Case No. 24-CV-0397

DISTRICT OF COLUMBIA
COURT OF APPEALS

Charles E. Wilson,
Appellant,

v.

Muriel E. Bowser, et al.,
Appellees.

Appeal of Superior Court Order in
Case No. 2023-CAB-005414

APPELLEE DISTRICT OF COLUMBIA BOARD OF ELECTIONS' INITIAL BRIEF AND MOTION FOR SUMMARY AFFIRMANCE

Respectfully submitted,

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STATEMENT OF JURISDICTION

This appeal is from final order of the D.C. Superior Court that disposed of all parties' claims in the matter of *Charles E. Wilson, et al., v. Muriel E. Bowser, et al.*, D.C. Superior Court Case No. 2023-CAB-005414.

PARTIES TO THE PROCEEDINGS BELOW AND ON APPEAL

The parties in the relevant proceedings are as follows:

Proceedings Before The Board Of Elections

Lisa Rice, a registered D.C. voter and the proposer of "Ranked Choice Voting And Open The Primary Elections To Independent Voters Act Of 2024" or Initiative Measure No. 83,

Proceedings Before The D.C. Superior Court

The District of Columbia Democratic Party, a political organization and official local branch of the National Democratic Party,

Charles E. Wilson, a registered D.C. voter and chair of the D.C. Democratic Party,

Keith Silver, a registered D.C. voter,

Proceedings Before The D.C. Court Of Appeals

Charles E. Wilson, a registered D.C. voter and chair of the D.C. Democratic Party,

Muriel E. Bowser, Mayor of the District of Columbia,

The District of Columbia, a capital city and federal district of the United States,

The D.C. Board of Elections, a three-member bi-partisan organization responsible, *inter alia*, for overseeing ballot access in District elections,

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DISTRICT OF COLUMBIA
COURT OF APPEALS

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	)	
v.	**)**	**Appeal from D.C.**
	)	**Superior Court**
Muriel E. Bowser, et al.,	**)**	**Case No. 2023-CAB-005414**
Appellees.	**)**	

APPELLEE D.C. BOARD OF ELECTIONS'
INITIAL BRIEF AND MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Rules 27(c) and 28 of the D.C. Court of Appeals and this Court's June 27, 2024 order, Co-Appellee, District of Columbia Board of Elections ("the Board") submits this initial brief and motion for summary affirmance. In this matter, Appellant seeks review of a D.C. Superior Court order ("Order") finding untimely his effort to challenge a Board determination with respect to a proposed ballot initiative (*i.e*., the "Ranked Choice Voting And Open The Primary Elections To Independent Voters Act Of 2024" or Initiative Measure No. 83 ("Measure")).[1] The Measure, *if* certified for ballot access by the Board, and *if* adopted by D.C. voters in an election, and *if* funded by the Council, would change the method of determining

[1] *See In Re: "Make All Votes Count Act of 2024"* BOE No. 23-007 (July 21, 2023) at pp. 269-280 of the Board's Supplemental Appendix ("SA").

the winners of District elections to a ranked choice voting approach and would allow "independent" voters to vote in primary elections.[2] Appellant requests that the Order below be overturned and that he be granted permanent injunctive relief barring the Measure from being placed on the ballot.

As explained herein, the Superior Court's Order should be affirmed because Appellant's complaint was not filed as required by the elections laws within the ten-day window for challenging the Board's threshold determination that the Measure met the "proper subject matter" requirements that apply to initiative matters. Further, as Appellant has forfeited his remedy at law for the same relief he seeks in equity, it would be improper to find that the Superior Court nevertheless has independent jurisdiction sitting in equity to circumvent the election laws. Thus, contrary to Appellant's claims, the Order was appropriately silent with respect to the merits of the Board's proper subject determination.

In the event that this Court concludes otherwise, this appeal should be denied because Appellant's position on the merits (*i.e.*, that the initiative does not meet proper subject requirements) fails. Accordingly, the Board's order should be

[2] Current law allows independent voters to change their party affiliation no later than the twenty-first day prior to the primary election. D.C. Official Code § 1-1001.07(g)(4) and 3 DCMR § 504.5.

summarily affirmed. In further support whereof, the following is respectfully submitted:

I. STATEMENT OF ISSUES

The complaint was untimely filed outside the statutory period that runs for ten days starting from the day of publication of initiative formulations in the D.C. Register and therefore the Superior Court's decision finding that that court lacked jurisdiction over the case below should be affirmed.

Because Appellant forfeited his right at law to Superior Court review of the Measure, it would have been improper for that court to entertain granting equitable relief and this case should not be remanded for such purpose.

This appeal should be denied because, assuming *arguendo* that the Superior Court has equitable jurisdiction over a matter that is otherwise untimely, Appellant cannot satisfy the standards for granting equitable relief.

This appeal should be denied and the Board's decision summarily affirmed because, assuming *arguendo* that Appellant timely filed his complaint below, the Board properly found that the Measure met proper subject requirements and Appellant's position to the contrary lacks merit.

II. COUNTERSTATEMENT OF THE CASE

The election laws and regulations establish a multi-step, time-sensitive process for placing initiatives on the ballot. Stated in general terms, the Board must, after an initiative is properly filed, determine whether it conforms to "proper subject matter" requirements. If a proposed initiative overcomes the proper subject hurdle, the Board must then formulate the initiative to meet title, word count, and legislative text requirements and publish these "formulations" of the initiative in the D.C.

Register. At that juncture, the law provides initiative opponents with a ten-day window within which to seek expedited Superior Court review of the Board's determinations with respect to the initiative. Meanwhile, the Board must issue a petition for the gathering of signatures in support of including the initiative on the ballot. The proposer then has up to 180 days to gather a statutorily required minimum number of valid signatures from D.C. voters before submitting the petition to the Board. The filing of the petition with the Board triggers a three-day preliminary review period when the petition is checked for facial numerical sufficiency. If the petition has on its face (*i.e.*, without investigating whether each signature is from an active D.C. voter and the address on the petition matches the address for that voter in the Board's files) enough signatures, the Board has thirty days to review the signatures to determine if the number of valid signatures is sufficient.[3] If the petition is found numerically sufficient, the Board must certify it

[3] The petition must contain valid signatures from five percent of District voters citywide and in at least five of the District's eight wards. *See* D.C. Official Code §1-1001.16(i)(1) (signature percent requirements). The Proposer in the instant case filed her petition on July 1, 2024. It contained roughly 35,000 signatures. Based on the statute's method for calculating the five percent signature requirement, that petition needs to have 22,538 valid signatures citywide. The Board's Registrar of Voters is currently conducting the Board's independent review of petition's signatures to determine if it has a sufficient number of valid signatures citywide in at least five wards. That review of the petition's signatures should be concluded the first week of August 2024. While the law provides for a concurrent process wherein voters may challenge the petition's signatures, no voter filed a numerically sufficient challenge and so Appellant has forfeited another opportunity to thwart ballot access

for inclusion on the ballot. The voters then, during an election, can adopt or reject it.

In addition, the pending Measure includes language making its implementation contingent upon Council funding. Therefore, assuming that the Measure is granted ballot access and is adopted by the voters, its ranked choice voting and relaxation of primary election participation provisions will not be implemented unless the Council approves a budget that funds them.

In the instant case, Appellant missed the statutory ten-day window for challenging the Board's proper subject determination. Accordingly, as a matter of law, the Superior Court lacked jurisdiction and properly dismissed the matter below. Contrary to Appellant's claim that the window for seeking judicial review opened when the Measure's formulations were posted on the Board's website, the elections laws are clear that the window opens when the formulations are published in the D.C. Register. He is also incorrect in asserting that the day on which he sought judicial review for purposes of meeting the ten-day filing restriction was not the day that he filed his complaint. Further, Appellant is mistaken to the extent he believes that the Superior Court otherwise had equity jurisdiction to consider the merits of his challenge to the Board's proper subject finding.

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for the Measure. No doubt he (or another opponent) will appeal the Board's review making the same non-justiciable policy arguments raised here.

Assuming that the complaint was timely filed or that the Superior Court had some independent jurisdiction to grant equitable relief with respect to the complaint over which it otherwise lacked jurisdiction at law, the complaint facially fails to satisfy the test for granting a permanent injunction where, as here, the supposed injury that Appellant fears is far from certain and he has other means at law to oppose the Measure. In any event, should this Court find that the merits are ripe for judicial review, the Court should summarily affirm the Board's underlying proper subject findings and deny the instant appeal as moot.[4]

III. COUNTERSTATEMENT OF FACTS

The ballot access process -- The term "initiative" refers to the process by which District of Columbia voters may propose laws and have such proposals placed on an election ballot for adoption directly by District of Columbia residents.[5] The District's Charter and statutes establish certain parameters on the scope of this right of initiative and a process that must be followed before an initiative will be placed

[4] In light of the discussion of the merits, we note that this Court, should it decline to affirm on other grounds, need not remand the case. *See Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 149-54 (2000) (reversing without remanding); *Haynes v. United States*, 390 U.S. 85 (1968) (reversing conviction rather than remanding where a remand would have resulted in reversal).

[5] D.C. Official Code § 1-204.101(a).

on the ballot.[6] One of the first steps in the process involves review by the Board of an initiative proposal to determine if the proposal meets certain "proper subject" requirements. Those requirements include that the proposed law cannot violate the District's Charter or the U.S. Constitution; cannot interfere with the Council's authority to appropriate funds; and cannot "have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977 or any subsequent amendments."[7]

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[6] The District of Columbia Self-Government and Governmental Reorganization Act, *as amended* (*i.e.*, the Home Rule Act) "originally contained no right of initiative, referendum or recall [but i]n 1978, the Charter Amendments Act [] granted the electorate these long-recognized instruments of direct control of legislative decisions and decision makers." *Convention Center Referendum Committee v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 896 (D.C. 1981) (*en banc*). The Charter Amendments Act granting District electors the right of initiative also directed the Council to enact laws necessary to the exercise of that right. *See* D.C. Code § 1-204.107. Those initiative-right implementing provisions are set forth in the Initiative Procedures Act (*see* D.C. Official Code § 1-1001.16).

[7] 3 DCMR §1000.5. As to the restrictions against initiatives that (1) require appropriations, *see also* D.C. Official Code §§ 1-204.101(a), 1-1001.02(10) and 1-1001.16(b)(1)(D) (prohibiting initiatives that appropriate funds or negate or limit Council budgetary actions); (2) are contrary to Home Rule, *see also* D.C. Official Code § 1-1001.16 (b)(1) ("[T]he Board shall refuse to accept the measure if … it is not a proper subject . . . under the … Home Rule Act[.]"); (3) conflict with the Constitution, *see also* Home Rule Act, Title IV, Sec. 404 (providing that legislative power be carried out in accordance with the Home Rule Act's terms) and Title III, Sec. 302 (codified at D.C. Official Code §1-203.02) (legislative power "shall extend to all rightful subjects of legislation . . . consistent with the Constitution []"); and (4) would authorize unlawful discrimination, *see also* D.C. Official Code §1-1001.16(b)(1)(C) (providing that the Board must reject a measure that "authorizes,

With respect to the proper subject review step, the Board is required by law to obtain advisory opinions from the Counsel to the D.C. Council and the Attorney General for D.C. as to whether the proposed measure meets the proper subject requirements.[8] The Board then has to make a decision in that regard.[9] Where the Board, at this juncture, rejects an initiative measure, the law provides that the proposer (and *only* the proposer) can, within ten days of the Board's decision rejecting the measure, seek review in the Superior Court.[10]

If the proposed measure clears the proper subject hurdle, then the Board must, within a prescribed time frame, draft a short title, a summary statement describing the measure that cannot exceed 100 words, and the legislative text of the measure (these elements are often referred to as the formulation(s) of the measure).[11] The elections laws provide:

> 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 …, that *person may seek review in the Superior Court of the District of Columbia within 10 calendar days*

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or would have the effect of authorizing, discrimination prohibited by [the Human Rights Act, D.C. Official Code § 2-1401.01 *et seq*.]").

[8] D.C. Official Code § 1-1001.16(b)(1A).

[9] D.C. Official Code § 1-1001.16(b)(2).

[10] D.C. Official Code § 1-1001.16(b)(3).

[11] D.C. Official Code § 1-1001.16(c)-(d).

> *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.[12]

The proceedings before the Board -- In the instant case, a D.C. registered elector, Lisa Rice ("Proposer"), filed, on June 16, 2023, a proposed initiative measure that was later designated as Initiative Measure No. 83.[13] That Measure, if adopted by the voters and funded by the Council, would result in two election administration changes.

First, the Measure would change the determination of the election winners for President of the United States and other "elected officials" from the current highest vote earner method to a type of ranked choice system.[14] Under the proposal, voters could (unless there are only two candidates on the ballot) rank their top candidate

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[12] D.C. Official Code § 1-1001.16(e) (emphasis added). In other words, where the Board accepts an initiative measure on proper subject grounds, no right of judicial review is provided to an opponent of an initiative measure to immediately challenge such acceptance and the opponent must wait until after the Board has accepted the measure as a proper subject *and* has published the formulations of the measure before going to court.

[13] SA at pp. 1-12.

[14] The Measure adopts the term "elected official" as defined at D.C. Official Code §1-1001.02(13) and the offices covered in that definition. Those officials are the Mayor, the Chairman and members of the Council, the Attorney General, members of the State Board of Education, the Delegate to Congress for the District, U.S. Senator and Representative, and Advisory Neighborhood Commissioners.

choices for each office up to a cap of five rankings. If no candidate received more than half of the first-choice votes, then the candidate with the fewest votes would be eliminated, and the voters who selected that candidate as their first choice would have their votes added to the total of the candidate who was their next highest-ranked choice. The process would continue until one candidate has more than half of the votes, and that person would be declared the winner.

Second, the Measure also, contrary to the existing restriction which bars an unaffiliated voter from changing that voter's party affiliation after the 21st day prior to a primary election,[15] opens party primaries that are overseen by the Board to all D.C. registered voters who have not yet specified on their voter registration record a party affiliation. In other words, "independent" voters could participate in a primary party even after the 21st day prior to such primary.[16]

[15] *See* 3 DCMR §504.3 ("All voter registration applications and voter registration update notifications that are received on or before the twenty-first (21st) day preceding an election shall be considered timely filed.").

[16] Candidates who are affiliated with a major party cannot be granted general election ballot access for the offices of Delegate, Chair and members of the Council, Mayor, Attorney General, U.S. Senator and U.S. Representative unless they are nominated through a Board-operated party primary. *See* D.C. Official Code §1-1001.08(j)(3). Other offices, such as was the case for D.C. Republican candidate presidential electors in the current election cycle, are not required to be nominated through Board-operated party primaries.

With regard to any funding that might be needed to implement ranked choice voting and the opening of primaries to independent voters, the legislative text of the Measure includes the following provision:

> Section 5. Applicability.
>
> (a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.
>
> (b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan and provide notice to the Budget Director of the Council of the certification.[17]

As the Proposer's filing met the ministerial requirements for acceptance, the Board's Office of General Counsel notified the Counsel to the D.C. Council and the Attorney General of the proposed initiative and of the need for their advisory opinions.[18] Notice was also provided to the Proposer and the public of a hearing date upon which the Board would consider whether the measure satisfied proper subject requirements.[19]

[17] SA at pp. 6-7.

[18] SA at pp. 13-28.

[19] SA at pp. 29-35.

Prior to the hearing, the Counsel to the Council and the Attorney General timely submitted their advisory opinions.[20] Several organizations and individuals provided written comments to the Board regarding the proposal.[21]

At a hearing held in the course of a regular Board meeting on July 18, 2023, the Proposer and her attorney appeared and addressed the Board.[22] Numerous organizations and individual members of the public were also present and provided comments. In their written submissions and comments made during the hearing, opponents of the measure argued that it (1) violated proper subject prohibitions on initiatives that interfered with the Council's spending power insofar as implementing ranked choice voting and allowing independent voters to vote in primaries would require funding; (2) violated the Home Rule Act because, according to the opponents, it meant that certain officials would not be elected as required in the Charter on a "partisan basis";[23] (3) violated the U.S. Constitution because, as opponents claimed, opening party primaries to independent voters violated political

[20] SA at pp. 36-51.

[21] SA at pp. 52-92.

[22] SA at pp. 107-125.

[23] *See* D.C. Official Code §§1-204.01(b)(1) ("The Council established . . . shall consist of 13 members elected on a partisan basis[.]"), 1-204.21(b) ("The Mayor . . . shall be elected, on a partisan basis [.]"), and 1-204.35(a) ("The Attorney General for the District of Columbia shall be elected on a partisan basis[.]").

party associational rights; and (4) to the extent that certain groups of voters would face greater challenges voting a ranked choice ballot, authorized illegal discrimination. Proponents of the Measure offered written statements and testimony countering the claims of opponents.

After hearing extensively from and questioning the July 18 hearing attendees regarding the Measure, the Board announced that its proper subject review would be continued until 2:00 p.m. on July 21, 2023 so that the Board members could meet in executive session and that the Board would announce at that time the members' decision as to the proper subject matter issue.[24] When the Board reconvened on the record on July 21, 2023, the Board Chair advised that the three-member Board had unanimously found that the Measure did not violate any proper subject restriction. Briefly, the Board members explained that they found: (1) the Measure did not interfere with the Council's discretion over spending and would not negate or limit any budgetary legislation in light of the fact that Measure's legislative text provided on its face that the implementation of its elections changes would be subject to the Council's budgetary process; (2) the Measure did not conflict with the Home Rule Act's requirement of electing officials on a partisan basis given that the Measure would not change the fact that separate primaries for nominating candidates would

[24] SA at pp. 237-239. The Board left the record open until noon on July 21 for the submission of written comments.

be held for each major party and that the party affiliation of those nominees would be identified on the general election ballot; (3) the Measure did not violate the constitutional associational rights of the parties for similar reasons and in light of the case law upholding comparable primary systems against the same constitutional challenge made by the opponents; and (4) the Measure did not improperly authorize discrimination because it was neutral on its face and the record was insufficient to establish that the Measure's particular proposed ranked choice voting structure would have a discriminatory impact.[25]

Following the announcement of the Board's decision, the Board's General Counsel described the next steps in the process, including that the Board would be holding a public meeting on the Measure's formulations "at some point after August 14th [2023]", and that the Board would then submit the formulations for publication.[26] With regard to publication, the Board's General Counsel noted on the record at the public hearing: *"And that's an important date because it does trigger a period during which the formulations can be challenged*."[27]

[25] SA at pp. 242-252.

[26] SA at p. 255.

[27] SA at p. 254 (emphasis added).

On July 24, 2023, the General Counsel requested a fiscal impact statement from the District's Chief Financial Officer ("CFO") as required by law.

On July 25, 2023, the Board posted on its website an 11-plus-page written opinion and order (*see* SA at pp. 269-280) that memorialized the proper subject determination that had been announced at the meeting on July 21, 2023.[28]

As the Measure had cleared the first proper subject hurdle, the Board moved onto the second formulation step and, *inter alia*, on August 23, 2023, convened a duly-noticed hearing on the formulations.[29] After listening to the comments of the Proposer and the public at the August 23, 2023 hearing, the Board adopted the Measure's formulations. In connection with that adoption, the General Counsel announced during the public proceeding and on the record that the Board-approved formulations would be submitted for publication in the D.C. Register and that "***[t]he publication in the D.C. Register, which will take place on Friday, September 1,***

[28] Appellant suggests in his initial brief ("IB") (at p. 14) that the Board's proper subject order should have been published in the D.C. Register. There is, however, no such requirement. On the contrary, the Board's long-standing practice has been to post its orders on its website. Indeed, a simple review of D.C. Register publications reveals that agency adjudications are not published there.

[29] Meanwhile, on August 1, 2023, Appellant filed an untimely complaint in the Superior. *District of Columbia Democratic Party, et al., v. Muriel E. Bowser, et al.*, 2023 CAB 004732. That case was later voluntarily withdrawn.

will launch a 10-day period during which any registered voter who objects to the formulations may seek review in the Superior Court[.]"[30]

On August 30, 2023, the CFO issued the fiscal impact statement.

The proceedings in the Superior Court -- On August 31, 2023, before the Measure's formulations were published in the D.C. Register, Appellant and others filed the complaint in the instant case in the D.C. Superior Court.[31] That complaint

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[30] SA at p. 299 (emphasis added). Given that the statute is clear that the ten-day window for seeking judicial review is triggered by publication in the D.C. Register and that the Board's General Counsel *repeatedly* on the public record warned opponents of that fact, holding Appellant to that statutory ten-day period for seeking judicial review hardly unfairly subjects him, as he alleges (IB at pp. 27 and 47), to "a game of skill" in which one misstep by counsel may be decisive.

[31] Count I of the complaint (SA p. 375, ¶ 18) claims that defendants ignored reasonable alternatives "to allowing 80,000 currently independent voters to effectively invade the three standing political parties in Washington, D.C." At Count II, apparently referring to the D.C. Charter requirement of partisan elections for certain offices, the complaint asserts that "[o]pen primaries would be a direct violation of the DC Home Rule Charter." Count III sets forth allegations concerning First Amendment rights to freedom of association and allowing "nonmembers" of a party to participate in selecting the party's nominee. *Id*. at p. 377. At Count IV, the complaint asserts a claim of a violation of the prohibition against initiatives that appropriate funds. *Id*. at p. 378; *see also* pp. 389-390. Count V claims that the Board's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law as required by the D.C. Administrative Procedure Act (D.C. Official Code §§ 2-501, *et seq*. ("APA")). *Id*. at pp. 378-379. Count VI asserts that the Board violated APA rulemaking requirements. *Id*. at pp. 379-380. While the complaint claims that ranked choice voting would introduce an additional layer of confusion for many of the voters in "predominantly Black wards (7 and 8)[.]" (SA at p. 391), no Count seems to press that claim and Appellant's initial brief does not appear to pursue it. Notably, in listing his merits issues (IB at pp. 13-22), that issue is omitted.

recognizes, insofar as it quotes D.C. Code § 1-1001.16(e)(1)(A) (which provision again authorizes challenges only *after* the formulations are published in the D.C.), that initiative challengers have no cause of action until the formulations appear in the D.C. Register. *Id*. at p. 2. The complaint appearing in the Superior Court's records has a date-stamp on the top right-hand corner of the first page of 8/31/2024. The Superior Court's docket includes the following entry:

> 08/31/2023
>
> 
> Complaint Filed
>
> *-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 (summons for defendant The District of Columbia not issued due to mispelling).*
> Docketed on:
>
> 09/01/2023
> Filed by:
>
> Plaintiff Wilson, Charles E.

On September 1, 2023, and after the complaint was filed, the Board's approved formulations of the Measure appeared in the D.C. Register as the Board's

General Counsel had forewarned.[32] The ten-day period for challenging the Measure therefore began on September 1, 2023 and expired on September 11, 2023.

On October 23, 2023, defendants filed in the Superior Court a motion to dismiss the complaint. In their motion, defendants relied upon *Super. Ct. Civ. R. 12(b)(1)* in support of their position that the Superior Court lacked subject matter jurisdiction. They also noted that Super. Ct. Civ. R. 12(h)(3) mandates that the Superior Court dismiss an action where it lacks subject matter jurisdiction. Defendants explained that the statutorily-mandated window for challenging the Measure in the Superior Court ran from September 1, 2023 to September 11, 2023 and that the plaintiffs had filed the complaint outside of that period. The motion to dismiss emphasized that the D.C. Court of Appeals has required strict compliance with election law time limits, even with respect to action taken prematurely.

On November 3, 2023, Appellant and the other plaintiffs below filed an opposition to the motion to dismiss. Defendants replied to the opposition on November 13, 2023.

On March 28, 2024, the Superior Court judge presiding over the case issued the Order which granted the motion to dismiss. The judge's Order quotes the

[32] SA at pp. 356-365. While Appellant's IB notes (at p. 35) that his counsel has not been able to locate the fiscal impact statement from the CFO that is required to be published in the D.C. Register (*see* D.C. Official Code §1-001.16(d)(2)(A)), that publication also includes the CFO's fiscal impact statement.

determinative language in D.C. Code §1-1001.16(e)(1)(A), which provides that a D.C. registered voter who objects to the Board's decisions with respect to an initiative "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[.]" The Order observes that the ten-day period started on September 1, 2023. The Order rejects the Appellant/plaintiff's argument that the ten-day period started when the Board posted the Measure's formulations on the Board's website. The Order also rejects a claim by Appellant/plaintiff that, even if the period was triggered by publication in the D.C. Register, the complaint was timely because the complaint was not docketed by the Superior Court until September 1, 2023. The Order states:

> Accepting Plaintiff's argument would require this Court to ignore the basic rules of statutory interpretation which necessitate a reading of the law as plainly written. . . .
>
> The applicable provision of the D.C. Code plainly reads that any registered qualified elector who wishes to challenge the Board's decision to adopt a short title, summary statement, and legislative form "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*." §1-1001.16(e)(1)(A) (emphasis added). Plaintiff filed the instant Complaint challenging the Board's decision to approve proposed Initiative 83's short title, summary statement, and legislative form on August 31, 2023. The Board's approved formulations were published in the D.C. Register on September 1, 2023. The statutory scheme under the D.C. Code contemplates a method for which registered electors can challenge the Board's decision *only after* the

> approved formulations have been *published in the D.C. Register*. §1-1001.16(e)(1)(A)[.]
> . . . .
>
> Reading §1-1001.16(e)(1)(A) to permit Plaintiff to raise a challenge to the Board's decision prior to its publication of the decision in the D.C. Register offends traditional notions of statutory interpretation and exceeds the bounds of this Court's jurisdiction. Likewise, the D.C. Code does not prescribe a challenge period that is triggered when the Board's formulations are posted on its website. Indeed, the D.C. Code is unambiguous in its pronounced method by when and how registered electors may challenge the short title, summary statement, and legislative form of a proposed Initiative[.]
> . . .
>
> Finally, the Court finds Plaintiff's argument that its Complaint is timely filed because the Complaint, which was filed on August 31, 2023, was not docketed until September 1, 2023, is without merit. This Court presumes that the date the Complaint is stamped by the Clerk's office is the date of filing. Plaintiff's Complaint was stamped as "eFiled" on "08/31/2023 [at] 5:29:46 PM". Thus, Plaintiff's Complaint is deemed filed and accepted by the Court on August 31, 2023. Because Plaintiff's Complaint fails to meet the requisite filing requirements specifically prescribed under D.C. Code, it must be dismissed.

SA at pp. 491-493.[33]

The case on appeal **--** Appellant timely filed for review of the Order. In his initial brief, he maintains that the Superior Court erred in not considering alternatives

[33] The court, in addition to D.C. Official Code §1-1001.16(e)(1)(A), cited the D.C. Administrative Procedure Act's (D.C. Official Code § 2-501 *et seq*. ("APA")) rulemaking notice and comment requirements. This Court has indicated, however, that the procedures applicable to initiative matters are governed by election laws and not the APA. *Davies v. D.C. Bd. of Elections & Ethics*, 596 A.2d 992, 996 (D.C. 1991).

to allowing the merits of the complaint to be heard and decided; and that that court had general equity jurisdiction to address the merits of his arguments without regard to the limitations of the election laws.[34] Relying on cases and statutes outside the election law context, Appellant argues that only late, and not early, filing should be treated as untimely or jurisdictional.[35] He repeats his trial court argument that the date that the complaint was docketed should control whether the case below was brought timely; his argument that "publish," for purposes of the commencement of the period for seeking judicial review, means posting on the Board's website; and his claims on the merits with respect to the Board's proper subject matter finding.[36] For the reasons discussed below, Appellant's arguments should be rejected and this Court should affirm the Superior Court's ultimate decision to dismiss.[37] In any event,

[34] *Id.* at pp. 10, 12, and 44-46.

[35] *Id.* at pp.10-11, 25-26, and 34.

[36] *Id.* at pp.10 and 24; pp. 23, and 33-35; and pp. 17-22, respectively.

[37] Appellant's IB also argues (at pp. 28-29) that the doctrine of exhaustion of administrative remedies should not apply to him. Exhaustion was not, however, a theory advanced by defendants below and that doctrine does not appear to be relevant to the Superior Court decision to dismiss the matter as untimely filed. In addition, Appellant claims that the trial court erred in dismissing under Super. Ct. Civ. R. 12(b)(6) for failure to state a claim. *Id*. at pp. 25 and 46. While the Order does cite to Rule 12(b)(6), the court's reasoning is based on a fatal jurisdictional defect, not the failure to state a claim. Consistent with defendants' motion to dismiss below, that analysis aligns with Super. Ct. Civ. R. 12(b)(1). Given that the Order explains that the court lacked jurisdiction over the case because it was untimely filed and it granted a motion that relied on Rule 12(b)(1), an error, if any, in the Order's

the underlying Board determination (*i.e.*, that the Measure satisfied proper subject requirements) is entitled to summary affirmance and this Court may deny the appeal for that alternative reason.

IV. SUMMARY OF ARGUMENT

As indicate above, Appellant filed his challenge to the Board's proper subject findings outside the mandatory statutory window. He did so despite ample warning of that filing requirement. Accordingly, the Superior Court's Order dismissing the complaint as untimely filed should be affirmed.

Because Appellant, without justification or cause, forfeited his remedy at law, the Superior Court lacked jurisdiction to consider his plea for equitable relief. Therefore, this appeal should not be remanded for consideration of the merits of Appellant's claims.

Assuming for the sake of argument that the Superior Court had jurisdiction to consider granting Appellant/plaintiff's request for permanent injunctive relief, Appellant simply cannot meet the heightened standard for such remedy.

Finally, should this Court find that the Superior Court erred in dismissing the complaint, the Board's decision finding that the Measure met proper subject

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references to Rule 12(b)(6) is harmless and Appellant's argument that the complaint stated a claim for Rule 12(b)(6) purposes is not relevant.

requirements is entitled to summary affirmance. Accordingly, for that independent reason, this appeal should be denied.

V. ARGUMENT

a. THE SUPERIOR COURT DECISION THAT THAT COURT LACKED JURISDICTION MUST, AS A MATER OF LAW, BE AFFIRMED ON APPEAL.

Standard of Review. At issue in this appeal is the Superior Court's determination with respect to the following statutory language:

> 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*.

D.C. Official Code § 1-1001.16(e)(1)(A) (emphasis added). In interpreting a statute,

> [This Court] first look[s] to its language; if the words are clear and unambiguous, [the Court] must give effect to its plain meaning. The intent of the legislature is to be found in the language used. The burden on a litigant who seeks to disregard the plain meaning of the statute is a heavy one, and this court will look beyond the ordinary meaning of the words of a statute only where there are persuasive reasons for doing so.

Kelly v. D.C. Dep't of Emp't Servs., 214 A.3d 996 (D.C. 2019) (citation omitted)). In addition, the Court is "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."[38]

This Court reviews the Superior Court's grant of a motion to dismiss under Rules 12(b)(1) and 12(b)(6) on a *de novo* basis. *Grayson v. AT&T Corp.*, 15 A.3d 219, 228 (D.C. 2011) (*en banc*). To survive a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, "the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence." *Moran v. U.S. Capitol Police Board*, 820 F.Supp.2d 48, 53 (D.D.C. 2011) (citation omitted).

Finally, in evaluating the failure of Appellant's counsel to timely file the complaint, it is noteworthy that this is not the case of a *pro se* litigant inexperienced in administrative practice. *Pliler v. Ford*, 542 U.S. 225, 231 (2004) (the forum has no obligation to act as counsel or paralegal to even *pro se* litigants); *Jones v. Morton*, 195 F.3d 153, 160 (3rd Cir.1999) (failure to understand does not excuse noncompliance with litigation requirements). Appellant's counsel should be charged with knowledge of the procedures that must be followed to avail his client of his legal remedies. *McKart v. United States*, 395 U.S. 185, 195 (1969) (courts will not "encourg[e] people to ignore [an agency's] procedures" by allowing litigants who "deliberate[ly] flout[]" administrative processes to seek those forfeited

[38] *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990) *remanded*, 615 A.2d 562 (D.C. 1994) and *Stevenson v. D.C. Bd. of Elections and Ethics*, 683 A.2d 1371, 1377 (D.C. 1986).

administrative remedies from the court later); *Topinka v. Kimme*, 78 N.E.3d 440, 443 and 445 (Ill. App. 2017) (plaintiff cannot defeat the elections law's review requirements "simply by refusing to trigger the 'condition precedent' of filing a complaint before [the State Elections Board] and instead filing his claims in the [trial] court").

1. *Contrary to Appellant's attempt to characterize the timing requirements of the election laws as non-binding, mere technicalities, the Superior Court properly found that those laws controlled the disposition of the complaint below and that, pursuant to such laws, the court lacked jurisdiction over the matter*.

Appellant suggests (at pp. 27 and 47) that appeal deadlines are "mere technicalities" which should not be relied upon to avoid a decision on the merits. Citing to cases outside the election law context and primarily in matters of review under the federal Administrative Procedures Act, he argues (at pp. 10-11, 25 and 34) that early filing does not constitute untimely filing and that, therefore, such filing does not raise a jurisdictional bar.

This Court has made clear, however, that the timelines for election law matters are not mere technicalities. As this Court has noted, the statutory procedures regarding initiatives provide the "only permitted means" by which an initiative may be challenged. *Davies v. D.C. Bd. of Elections & Ethics*, 596 A.2d at 994 ("Plaintiff can show no right to challenge the placement of an initiative on the ballot other than the right established by statute" (citation omitted)). The strict application of

elections laws' timing requirements is, *inter alia*, consistent with the mandate that initiative matters be construed liberally and only those limitations expressed in the law or clearly and compellingly implied may be imposed on initiatives.[39]

This Court has also instructed that compliance with the time limits imposed by the election laws is particularly important to maintain stability and continuity in the administration of government (*see White v. D.C. Bd. of Elections and Ethics*, 537 A.2d 1133, 1135 (D.C. 1988)) and to avoid piecemeal and possibly moot litigation (*see Lawrence v. D.C. Bd. of Elections & Ethics*, 611 A.2d 529, 531 (D.C. 1992)). The failure to mount a challenge within the statutory timeframe will preclude review by the court. *Davies, supra*. Moreover, the case law specifically instructs that this Court's jurisdiction is contingent upon seeking court review within statutory periods and that actions brought prior to the expiration of such periods must be dismissed as premature. *Lawrence,* 611 A.2d at 531; *U.S. ex rel. Langley v. Bowen*, 6 D.C. 196 (D.C. Sup. 1867) (where the statute fixes a time for the Board of Elections to act and that time has not expired, a petition for writ of mandamus to require the Board to act will be dismissed as premature).

[39] *Hessey, supra*, 584 A.2d at 3 (citations and quotations omitted); *see also, Stevenson,* 683 A.2d at 1377 (citing Superior Court order under review that stated: "As a franchise right, the initiative right should be liberally construed in both substantive and procedural contexts so as to advance and favor franchise.").

Appellant's reliance (at pp. 10-11 and 28-29) on cases involving review under the Administrative Procedure Act ("APA") for the proposition that only late filings can be viewed as untimely is unpersuasive. Indeed, consistent with its finding that the elections laws apply strictly to initiative matters, this Court has eschewed the notion that the D.C. APA provides a vehicle for challenging an initiative.[40]

As emphasized above, the Board's General Counsel announced on two occasions that the mandatory statutory time for seeking judicial review of the Board's action on an initiative matter would not commence until the publication of the formulations in the D.C. Register on September 1, 2023. Appellant ignored the law and her guidance. Instead, he chose to file in court before the final formulations of the Measure had been confirmed by publication.

The elections laws are crystal clear. On the one hand, the *proposer* can bring a direct challenge to the Board's rejection of an initiative on proper subject grounds within ten days of such rejection. On the other hand, the *opponents of the matter must wait until after the initiative's formulations are published in the D.C. Register* to challenge the measure in the Superior Court. The practical rationales for the timing restrictions on opponent litigation are self-evident: they avoid possible piecemeal litigation regarding issues that might be resolved by the formulation

[40] *Davies,* 596 A.2d at 996.

process and possible premature litigation by limiting Court review to the final version of the proposed legislation and a complete record.[41]

It is beyond dispute that Appellant was not the proposer of the Measure and that he falls into the category of an opponent. Accordingly, as a matter of law, he was barred from challenging the Measure until on or after September 1, 2023 when the Board had published the formulations for that Measure in the D.C. Register. Because Appellant filed the complaint before the Measure's formulations were so published, Appellant failed to seek review within the ten-day window for challenging an initiative matter. For these reasons, there was no jurisdiction in the Superior Court over this matter and, as provided in Rule 12(h)(3), the court below was required to dismiss.

Appellant has indisputably failed to carry his burden of showing that the plain meaning of the statute should be disregarded. Moreover, this Court's obligation to construe the right of initiative liberally and impose only those limitations on that right that are expressed in the law or clearly and compellingly implied would be rendered fairly meaningless if opponents of initiative matters are not held to the

[41] For example, if initiative opponents were not required to wait until the publication of the formulations and they sought judicial review immediately after the Board finds that a matter is a proper subject and the CFO was to then, as part of the formulation process, conclude that an initiative matter had no fiscal impact, the Court's time could be unnecessarily wasted on consideration of an otherwise moot issue as to whether the initiative improperly interferes with the Council's discretion over spending.

restrictions on challenging initiative proposals. Given Appellant's clear violation of the time restrictions imposed under the elections laws, this Court should affirm the Order that is on appeal.

2. This appeal should be denied given that the Superior Court correctly concluded in its Order that the period for seeking review of the Board's proper subject matter findings does not begin when the Board posts initiative formulations on its website.

As he did below, Appellant contends (at pp. 23 and 34-35) that publication of the Measure's formulation on the Board's website triggered the ten-day window for seeking judicial review. In this regard, the statute requires that the Board, within 24 hours of adoption of the formulations,

> (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.

D.C. Official Code § 1-1001.16(d)(2). Appellant vaguely suggests that the requirement that the Board publish the formulations on its website provides the meaning of publication for purposes of the time for seeking judicial review.

Appellant's position is directly contrary to the plain language of D.C. Official Code§ 1-1001.16(e)(1)(A) which requires that judicial review be sought "within 10 calendar days from the date the Board publishes . . . in the *District of Columbia Register*." Moreover, D.C. Official Code§ 1-1001.16(d)(2) refers to "publication"

in the D.C. Register as well as on the Board's website, and Appellant offers no rationale for treating the reference to publication on the Board's website as trumping the reference to publication in the D.C. Register in that same subsection. Further, the Board never adopted the position that time of publication for purposes of seeking judicial review was triggered by website posting of the formulations. Quite the contrary, the Board's General Counsel repeatedly stated on the public record that the period for seeking judicial review would start with publication in the D.C. Register and specifically on September 1, 2023. As Appellant's position (*i.e.*, that the statute's reference to publication for purposes of initiating the period for seeking judicial review started with posting of the formulations on the Board's website) is wholly without merit, this Court should deny his appeal.

3. This appeal should be denied given that the Superior Court correctly found that the date the complaint was filed and not the date that it was docketed is determinative of whether the case below was untimely filed.

Finally, Appellant claims (at pp. 10 and 24) that the date the complaint was docketed was the presumptive date of filing. There is, however, no legal or factual basis for his theory. The plain language of the statute requires the initiative opponent to seek review within the ten-day window. In this case, Appellant/plaintiff sought judicial review by filing his complaint a day before that window opened, regardless of when the court docketed the complaint. Appellant's suggestion that the Superior

Court clerk controlled the day that he sought review of the Measure confounds reason and his appeal should be denied as without merit.

b. BECAUSE THERE WAS AN ADEQUATE REMEDY AT LAW, APPELLANT INCORRECTLY CLAIMS THAT THE SUPERIOR COURT HAD INDEPENDENT JURISDICTION IN EQUITY TO CONSIDER THE MERTIS OF HIS CLAIMS AND THIS CASE SHOULD NOT BE REMANDED FOR SUCH PURPOSE.

Standard of review. As noted above, an appeal from the Superior Court's grant of a motion to dismiss for lack of jurisdiction is reviewed by this Court on a *de novo* basis. *Grayson, supra*, 15 A.3d at 228.

Appellant claims (at pp. 12, 25, and 44-46) that the Superior Court's finding that it lacked jurisdiction over the case for purposes of the election laws was not a basis for that court to decline to consider the complaint's requests for equitable relief. He asserts (at p. 13) that this Court should remand the case for consideration of his claims for equitable relief. In that regard, he relies (at pp. 45-46) on *Hessey v. Burden*, 615 A.2d 562 (D.C. 1992) to suggest that the Superior Court could have invoked equity jurisdiction to consider the merits of Appellant's challenges to the Board's proper subject findings. As explained below, Appellant's view is flawed.

The Superior Court has no independent jurisdiction in equity to consider a matter where there is a remedy at law. *Threatt v. Winston*, 907 A.2d 780, 785-86 (D.C. 2006) ("It is 'axiomatic' that equitable relief will not be granted where the plaintiff has a complete and adequate remedy at law." (citation omitted)); *Id.* at 786

(A party who has an adequate remedy at law cannot seek relief in equity (citation omitted)); *Capitol Hill Hospital v. D.C. State Health Planning and Development Agency*, 600 A.2d 793, 802 (D.C. 1991) (availability of administrative remedy forecloses the option of a case in equity). Along these lines, Appellant's reliance on *Hessey*, *supra*, is misplaced. That case recognized that the Superior Court had authority to grant equitable relief only because that court had jurisdiction over that case under the election laws:

> The case of *Hessey v. Burden* 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 §1320(b)(3) [now codified at§1-1001.16(b)(3)]. Once it was there, however, the court had jurisdiction, as a court of equity, to consider the opponents' remaining challenges to the proposed initiative.

Id. at 571.[42]

The logic of *Hessey* instructs that the Superior Court may grant an equitable remedy where a case was properly brought under the election laws. Here, Appellant/plaintiff had an adequate remedy at law. He should not be permitted to forfeit that remedy and then obtain the same relief on a theory of independent

[42] The Court was addressing a situation where the proposer had brought an action to challenge the Board's decision to reject an initiative matter, and opponents of the measure sought to intervene. The argument was made that, because the election law provided a right to only the proposer to challenge the Board's adverse proper subject ruling, the opponents had no standing. The Court, however, concluded that there was a basis in equity law to consider the claims of the opponents.

equitable jurisdiction. *McKart,* 395 U.S. at 195; *Topinka,* 78 N.E.2d 443 and 445. Accordingly, this Court should not remand for consideration of or consider on appeal Appellant/plaintiff's assertions of entitlement to such relief.

c. ASSUMING ARGUENDO THAT THE SUPERIOR COURT HAD JURISDICTION TO CONSIDER APPELLANT'S CLAIMS FOR EQUITABLE RELIEF, THE SUPERIOR COURT'S DISMISSAL OF THE CASE SHOULD BE AFFIRMED BECAUSE APPELLANT'S COMPLAINT DID NOT COME CLOSE TO ESTABLISHING THAT HE IS ENTITLED TO EXTRAORDINARY RELIEF.

Standard of review. Appellant/plaintiff sought orders from the Superior Court blocking the Measure's implementation, declaring the Board's actions unlawful, *etc*. To receive such a permanent injunction, a plaintiff must show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate[;] (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Caesar v. Westchester Corp., 280 A.3d 176, 192 (D.C. 2022) (citation omitted)). Extraordinary remedies are unavailable as a substitute for other relief. *Yeager v. Greene,* 502 A.2d 980, 983 (D.C. 1985) (discussing the standard for issuing writs); *see also, In re GTE Service Corp*., 762 F.2d 1024, 1026-27 (D.C. Cir. 1985) ("an extraordinary remedy, however, … will usually be denied when the petitioner *could have* invoked an adequate, ordinary remedy." (emphasis added)).

First, Appellant cannot plausibly show irreparable injury here where several significant steps must be accomplished before the Measure can be implemented, including but not limited to the fact that the voters would have to adopt it in an election and the Council would have to fund it. Second, Appellant cannot plausibly argue that his forfeited remedy at law of Superior Court review of the Board's proper subject determination was inadequate. Third, the balance of hardship arguably favors the Proposer who has collected 35,000 signatures on a petition in support of a Measure as compared to Appellant's supposed injuries. Fourth, the public interest would be served by sustaining the voters' right to initiative. Given that Appellant cannot satisfy the test for granting equitable relief, this Court should reject the claim that the trial court erred by failing to consider the merits on a theory of independent equitable jurisdiction and should deny the appeal.

d. ASSUMING ARGUNEDO, THAT THIS MATTER IS NOT DISMISSED AS UNTIMELY FILED, THIS COURT SHOULD DENY THE APPEAL BECAUSE THE UNDERLYING BOARD PROPER SUBJECT DECISION IS ENTITLED TO SUMMARY AFFIRMANCE.

Standard of Review. Summary disposition is appropriate where movant shows that the basic facts are both uncomplicated and undisputed, and that the Board's ruling rests on a narrow and clear-cut issue of law. *Bartel v. D.C. Bd. of Elections & Ethics*, 808 A.2d 1240, 1241 (D.C. 2002); *Jackson v. D.C. Bd. of*

Elections & Ethics, 770 A.2d 79, 80 (D.C. 2001). The Court "must accept the Board's findings of fact so long as they are supported by substantial evidence on the record as a whole." *Williams v. D.C. Bd. of Elections & Ethics*, 804 A.2d 316 (D.C. 2002). As to legal conclusions, the Court defers to the Board's interpretation of the statute which it administers so long as that interpretation is not plainly wrong or inconsistent with the legislative purpose. *Id*. The Court "must review the administrative record alone and not duplicate agency proceedings or hear additional evidence."[43] *Kegley v. District of Columbia*, 440 A.2d 1013, 1018 (D.C. 1982).[44]

[43] On appeal and below, Appellant sough to introduce evidence outside that considered by the Board. *See, e.g.*, SA at 467 (statement by Councilmember Mendelson). Such extra-record evidence must be disregarded. *Citizens Committee for the D.C. Video Lottery Terminal Initiative v. D.C. Board Of Elections & Ethics, et al.*, 860 A.2d 813, 819 (D.C. 2004) (declining to consider submissions that were not presented to the Board); *Styrene Info. & Research Center v. Sebelius*, 851 F.Supp. 57, 68 (D.D.C. 2012) ("'[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'") (citation omitted); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) ("[i]t is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made."). Given that the Superior Court cannot expand the record and can consider no more than this Court would (namely, the record that was before the Board), a remand will not develop the record on the merits and will not serve judicial economy.

[44] *Kegley* spoke directly to the standard of review to be applied by the Superior Court in agency review cases that *were not* brought under the D.C. APA. The Court found that the standard that applies to D.C. APA cases should also be applied to those non-APA cases. Thus, while, as in *Kegley*, the APA does not apply to the instant proceeding (*see Davies*, 596 A.2d at 996 (holding that the Initiative Procedures Act, not the APA, establishes the manner by which review of initiative matters may be sought in court)), the APA standard for judicial review should be adopted.

As long as the grounds upon which the Board acted were clearly disclosed and adequately sustained, it is not within the court's province to substitute its judgment for that of the Board. *Id.* (citing *Clark's Liquors, Inc. v. Alcoholic Beverage Control Board*, 274 A.2d 414, 418 (D.C. 1971)).

In addition, the substantive provisions of the initiative in this particular case concern election laws and therefore fall uniquely within the Board's expertise. Accordingly, this Court should defer to the Board's interpretation of the Measure's substantive provisions so long as that interpretation is not plainly wrong or inconsistent with the purpose of the elections laws. *Williams*, 804 A.2d at 318 (citations omitted).

Finally, as emphasized above, in determining whether the Board's actions were adequately sustained, we note again 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."[45] Accordingly, courts should presume that Board findings that support ballot access for an initiative are correct.

1. *As a matter of law, the Measure by its own terms fails to mandate any spending and is made contingent on the Council electing to provide*

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[45] *See supra* note 38.

funding and therefore the Board's finding that the Measure has no appropriations-related defect should be summarily affirmed.

A measure is deemed to appropriate funds if it "would intrude upon the discretion of the Council to allocate District government revenues in the budget process[.]"[46] On the one hand, an initiative measure cannot pass muster with respect to the prohibition on laws appropriating funds if it mandates unfunded activities or programs.[47] On the other, an initiative that "condition[ed] . . . compliance with its dictates upon funding by the Council" (*e.g.*, by including "subject-to-appropriations" type language) would qualify as a proper subject.[48]

Along these lines, the Measure's legislative text states that it "shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan" and that the Chief Financial Officer must certify such fiscal effect and provide notice of that certification to the Council's Budget Director.

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[46] *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 19 (D.C. 1991).

[47] *See D.C. Bd. of Elections and Ethics et al. v. D.C.*, 866 A.2d 788, 794 (D.C. 2005) ("*Campaign for Treatment*") (affirming a not-a-proper-subject finding where the initiative was silent as to the funding of its mandatory provisions, and declining to adopt a theory that initiatives can be read as implicitly "subject to" appropriated funding by the Council).

[48] Attorney General's June 11, 2023 Advisory Opinion at p. 5 (citing *Campaign for Treatment*, 866 A.2d at 799). There, the Attorney General stated: "At a minimum, then, we read *Campaign for Treatment* to allow an initiative to be a proper subject if it includes an express subject-to-appropriations clause."

In its Order, the Board rejected the argument that the Measure improperly interfered with legislative discretion over spending:

> [T]o addresses its funding needs, the Measure provides on its face that it will not be implemented unless and until its fiscal impact is addressed by an approved financial plan and budget. In other words, the Council would have to approve a budget that covers the costs needed to support the Measure before ranked choice voting and semi-closed primaries can be implemented. Should a budget encompassing the Measure not be adopted by the Council and approved by Congress, the Measure's ranked choice voting and semi-closed primary provisions cannot, as the Proposer's counsel acknowledged at the hearing, come to fruition. Some supporters of the Measure noted during the hearing that there have been instances where the Council has passed legislation with similar subject-to-appropriations language that was subsequently not funded by the Council.[]

SA at pp. 275-276 (footnote omitted). In light of its obligation to construe initiative measures liberally and the Measure's language that expressly subjects its implementation to the Council's budgetary process, the Board concluded: "[W]e cannot say that the Measure interferes with the discretion of the Council over appropriations. The Council will indeed retain that full discretion here as to whether or not to fund the Measure's proposals (assuming they are adopted by the voters)." *Id.*at 276.

The plaintiffs' complaint at Count IV purports to raise the issue of whether the Measure violates the prohibition on initiatives that appropriate funds. *See* SA at p. 378. The Complaint notes that there will be costs associated with implementing the initiative and that "[t]his could potentially negate or limit a budgetary act of the

DC Council and/or force a new budget line item." *Id*. On appeal, Appellant continues (at pp. 18-19) to maintain that the initiative will wrongfully appropriate funds.[49]

The Board's decision, however, clearly disclosed the grounds upon which the Board acted in finding that the Measure did not interfere with the Council's discretion over funding. Further, the Board's reasoning in finding that an initiative that by its own terms will not be implemented until funded by the Council is consistent with *Campaign Treatment*'s guidance indicating that initiatives which contain "subject to appropriations" language meet proper subject requirements with regard to Council budgetary authority. Accordingly, no court should substitute its judgment for that of the Board. *Kegley*, 440 A.2d at 1018. That is particularly true given that the Board's finding favors giving the Measure ballot access and allowing

[49] Appellant simply misses the mark by citing to *Convention Center*, 441 A.2d 889, for the proposition that an initiative cannot appropriate funds. That proposition is not in dispute. The point is that the Board concluded that the inclusion in the Measure of subject-to-appropriations type language cured any such possible appropriation defect. *Convention Center* is uninstructive on that point because that case did not consider a proposal that included subject-to-appropriations language. Along these lines, Appellant also suggests that Congressional oversight of the District's budget is somehow meaningful in this context. Appellant's IB at 19 (commenting that the Council requests funds whereas Congress appropriates). D.C. Official Code 1-1001.16(b)(1)(D) regarding the proper subject requirements, however, specifically refers to negating or limiting a budgetary act of the "Council". There is no authority to support the position that the proper subject matter requirement regarding appropriations concerns Congressional budgetary authority.

D.C. voters to pass on whether to present the Council with the option of funding ranked choice voting or opening primaries to independents. *See* n. 38, and cases cited therein. Accordingly, the Board's decision that the Measure does not present a matter that will interfere with budgetary authority should be summarily affirmed.[50]

2. Allowing independent voters greater access to the primary candidate nomination process does not change the Home Rule Act requirement that certain officials be elected on a partisan basis, and therefore the Board's decision finding that the Measure was not contrary to the Home Rule Act should be summarily affirmed.

As noted above, an initiative that is inconsistent with the Home Rule Act will not meet the proper subject requirement. In the proceedings before the Board, opponents of the Measure argued that this limitation was violated insofar as the initiative gave independent voters greater access to party primaries than they otherwise would have given the Home Rule Act requirement that certain officials be "elected on a partisan basis." The Board disagreed, noting that the Measure's provisions to ease primary participation concerned the *nomination* of candidates by the parties, not the *election* of officials. The Board emphasized:

> The Measure does not, as the AG noted, do away with partisan primaries. Rather, it essentially changes timing conditions that apply

[50] Regardless of the Court's disposition of this appeal, judicial guidance on the issue of whether including subject-to-appropriations language in proposed initiatives cures any appropriations-related proper subject defect with respect to a proposal could obviate future litigation and facilitate Board processing of measures. Accordingly, the Board is requesting that, should the Court not otherwise reach that question, the Court provide such guidance.

> to voter affiliation with a party and allows independent voters to affiliate with a party through the act of participating in a party primary election, rather than requiring voters to make that affiliation twenty-one days prior to that election. Therefore, we cannot conclude that the Measure means that government officials will not be elected on a "partisan" basis in violation of the D.C. Charter. There would still be a general election with only one nominee per political party, maintaining its essential "partisan" election nature.

SA at p. 278.

Undeterred by the obvious distinction between nomination and election and the application of the Measure to nomination versus the Home Rule Act's language's application to elections, Appellant/plaintiffs repeat in the complaint (SA at pp. 375-76) the argument disposed of by the Board and Appellant re-asserts (at 18) that claim before this Court.

Again, the Order clearly disclosed the grounds upon which the Board acted in finding that the Measure was not contrary to Home Rule. Likewise, the Board's reasoning is sustained by the plain language of the Home Rule Act and the Measure, and the Board's expertise in administering election laws. Accordingly, as indicated in *Kegley, supra,* the Board's judgment (particularly given that the Board's finding favors the voters' right to initiative) is entitled to deference and should be summarily affirmed.

3. In light of the case law regarding the expansion of primaries to independent voters, the Board's finding that the Measure does not conflict with U.S. Constitutional associational rights should be summarily affirmed.

The relaxation of restrictions on independent voter participation in primaries are not new inventions. It has been proposed and implemented in many other jurisdictions. In other cases, opponents have likewise attempted to preclude the measures by claiming that they conflicted with the U.S. Constitution. As explained in the Board's proper subject findings, where, as here, the organization of the primary by party is preserved, those challenges have failed:

> In support of this position, opponents cited *California Democratic Party v. Jones*, 530 U.S. 567 (2000).[] *Jones* considered California's switch from a closed primary where only a political party's declared members could vote on its nominees, to a blanket (or "jungle") primary, in which each voter's ballot lists every candidate regardless of party affiliation. The U.S. Supreme Court found that such a blanket party primary system interfered with political party constitutional associational interests. *Id*. at 570. However, the Court distinguished this system from a primary in which "even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'crossover,'" and vote in another party's primary, "at least he must formally become a member of the party; and once he does so, he is limited to voting for candidates of that party." *Id*. at 577.
>
> A Court plurality subsequently upheld a semi-closed primary system in which "[i]n general, 'anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time or (at most) registering within a state-defined reasonable period of time before an election." *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (a plurality of the Supreme Court found constitutional a similar semi-closed primary system in Oklahoma that allowed independent voters to participate in the party primaries); *see id*. at 600-01 (O'Connor, J., concurring in this respect).
>
> Here, the Measure does nothing to change the organization of primary ballots by party and does not allow nonparty members to vote

> for party officials. It simply allows voters who have not affiliated themselves with a party to vote on the ballot for one party's primary for government officials. Accordingly, this case is unlike *Jones* and more like *Clingman* and other open primaries approved by courts.

SA at pp. 278-79 (citing in a footnote *Democratic Party of Haw v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016) (rejecting a similar "freedom of association" challenge to Hawaii's open primary system) and *Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022) (rejecting a *Jones* challenge to the adoption of semi-open primaries where the organization of ballots by party was preserved)).

While Appellant/plaintiffs argue that their First and Fifth Amendment rights are violated by opening primaries to independent voters (*e.g.*, IB at pp. 21-22), they fail to address the *en point* case law that contradicts their position. The only case cited by Appellant where the court considered a primary election system is *Jones. See* IB at p. 22. As explained by the Board, *Jones* is inapposite and the structure of the primaries at issue here has been found by the courts to satisfy *Jones*' associational concerns. Again, the grounds upon which the Board acted were clearly disclosed and adequately sustained.

4. Assuming Appellant intends to pursue a claim with respect to whether the Measure will cause unlawful discrimination,[51] the Measure's ranked choice voting provision does not authorize or have the effect of authorizing

[51] As noted, the complaint vaguely alluded to the Measure causing an additional layer of confusion for "predominantly Black wards." Assuming that that issue was sufficiently raised below, Appellant does not seem to press it before this court.

unlawful discrimination and therefore the Board's decision should be summarily affirmed.

As discussed above, the Board cannot accept an initiative if the "measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2 [*i.e.*, the District's Human Rights Act]."[52] The District's Human Rights Act includes an "effects clause" that relieves those claiming discrimination from having to prove discriminatory intent as part of their *prima facie* case. Specifically, the Act prohibits "[a]ny practice which has *the effect or consequence* of violating any of the [Act's] provisions [against discrimination]."[53] The "effects clause" was modeled after the federal disparate impact doctrine recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).[54] In that regard, it is noteworthy that the proponent of a disparate impact claim must make a threshold showing of a "significant statistical disparity" caused by the practice at issue.[55] The burden on the party claiming a disparate impact is to produce "statistical evidence of a kind and degree sufficient to show that the practice in question ... caused" individuals to suffer the offending adverse impact "because of their membership in

[52] D.C. Official Code § 1-1001.16(b).

[53] D.C. Official Code §2-1402.68.

[54] *McCaskill v. Gallaudet Univ.*, 36 F.Supp.3d 145, 157 (D.D.C. 2014).

[55] *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (citation omitted).

a protected group."[56] For example, the proponent may meet the *prima facie* burden by showing that the odds of the disparity occurring by mere coincidence are less than five percent.[57] Causation will not be proved by "small or incomplete data sets and inadequate statistical techniques."[58]

The complaint suggests that voters in wards that have a higher number of Black residents will be disadvantaged by the more complicated ballot used in a ranked choice system. While under Rule 12(b)(6) that factual allegation must be accepted as true, that claim does not arise to a cognizable allegation of unlawful discrimination. Moreover, the Board's finding that opponents failed, through the omission of evidence of such discrimination, to carry their burden for denying the initiative ballot access is entitled to summary affirmance.

In the proceedings before the Board, some opponents broadly alleged that certain groups who were protected from discrimination by the Human Rights Act would disproportionately struggle with casting their ballots under a ranked choice

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[56] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

[57] *Palmer v. Shultz*, 815 F.2d 84, 92 (D.C. Cir. 1987). Courts have also considered evidence of a standard deviation rate of 1.96 or higher as a benchmark for finding a *prima facie* case of disparate impact. *Anderson v. Zubieta*, 180 F.3d 329, 339-340 (D.C. Cir. 1999).

[58] *Watson*, 487 U.S. at 996-97.

voting scenario.[59] Only two of the opponents making the claim that the Measure would have the effect of authorizing discrimination, however, even cited to a source of any data regarding this claim. Specifically, these commenters referenced a study on ranked choice voting in Maine elections and a study of a San Francisco election.[60] They asserted that the studies concluded that electorate populations that had a higher percent of protected classes, such as the elderly, also had a higher rate of spoiled ballots (spoiled ballots are not counted).

As indicated above, a party claiming a Human Rights Act violation on a discriminatory effect theory carries the initial burden of showing of a "significant statistical disparity" that was "caused" by the practice. That burden is consistent with the burden on opponents of initiative measures under the Board's regulations.[61]

The studies relied on by opponents (which appear from the record to concern elections held in 2018 or before) were not provided to the Board. Further, no

[59] *See* written comments of Charles Wilson (SA at pp. 68-69), Robert King (SA at pp. 70, 73-74, 76-77), Jeannette Mobley (SA at pp. 82-83), Hazel Bland Thomas (SA at pp. 85-87), and Deirdre Brown (SA at pp. 91-92). One proponent, however, submitted written comments that recent advances in ranked choice ballot design had "reduced" the level of confusion in voting. *See* written comments of Whitney Quesenbery (SA at pp. 58-59).

[60] *See* written comments of Mobley and Brown, cited *supra*.

[61] 3 DCMR § 424.1 ("The party who asserts the claim bears the affirmative duty of establishing the truth of the assertion.").

statistics comparing the levels of spoiled ballots across populations consisting of higher levels of protected classes versus non-protected classes was provided. No description of the structure of the ranked choice balloting practice employed in the jurisdictions studied (for example, were voters ranking more than the minimum five candidates allowed to be ranked under the Measure) was offered to verify that those ranked choice practices were even similar to that proposed in the Measure, or to verify that the practices for spoiling ballots in those other jurisdictions compared to that used by the Board. Opponents also cited no court case finding that ranked choice voting was illegally discriminatory.[62]

Based on this record, the Board found that the commenters who argued that the Measure's ranked choice voting provisions would have an illegal discriminatory effect failed to carry their burden. Specifically, the Board stated:

> . . . we cannot interfere with the right of initiative based on such speculative concerns, particularly given the lack of evidence of an incurable discriminatory impact and the fact that the Measure is neutral on its face.[]

[62] Two commenters who broadly alleged that ranked choice voting would disproportionately affect certain classes requested that the Board conduct a study of ranked choice voting on residents of the Lincoln Park area of D.C. *See* Comments of Robert King (SA at p. 76) and Hazel Bland Thomas (SA at p. 87). There is no precedent in the elections laws or the initiative review process for the Board to conduct studies in response to allegations of disparate impact. Funds are not and have never been appropriated to the Board for such purposes.

SA at pp. 277-278 (footnote omitted).[63]

As the Board properly found, the record is patently insufficient to establish that the particular type of ranked choice voting proposed by the Measure would authorize or have the effect of authorizing discrimination. Putting aside that opponents failed to show an apples-to-apples comparison between the Measure's ranked choice voting structure and that used in Maine and San Francisco in the studies they cited, there is nothing in the record before the Board to demonstrate that the alleged spoiled ballot disparity occurring between the electorate populations studied could not be attributed to mere coincidence.[64]

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[63] In the omitted footnote, the Board cited prior cases where it had rejected proper subject matter attacks by opponents whose claims were based on speculation or who offered no evidence to support their position.

[64] Moreover, even if opponents had connected the dots between the Measure's specific ranked choice voting system and an actual minimally statistically sufficient disparate impact, the Board would not have found that Initiative Measure No. 83 had the effect of authorizing unlawful discrimination. That is because, as a matter of law, a practice that has a discriminatory effect cannot be found unlawful where it is independently justified for some nondiscriminatory reason. D.C. Official Code §2-1401.03(a); *Gay Rights Coal. Of Georgetown Univ. Law Ctr. v. Georgetown Univ*., 536 A.2d 1, 29 (D.C. 1987); *Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 685 (D.C. Cir. 2006). The Proposer characterized the criticism that ranked choice voting is too complicated for Black voters and seniors (noting she was both) as "insulting and archaic." SA at p. 110. Her nondiscriminatory motivation for pursuing ranked choice voting is that, in her view, the current ballot counting practices result in the election of candidates supported by only a minority of voters; whereas (and, again in the Proposer's view), officials elected under ranked choice voting would have been placed in office by at least 50% of voters and would more accountable to the community as a whole. SA at p. 111. Thus, the Proposer

The judicial task is to determine whether the Board's finding that allegations of a discriminatory impact were too speculative was supported by substantive evidence derived from the administrative record alone and without considering additional evidence. *Kegley*, 440 A.2d at 1018. Opponents offered no statistical showing that the alleged higher incidence of spoiled ballots in voter populations that possessed a higher concentration of certain protected characteristics was not the result of mere chance. Despite the fact that the record was left open following the initial hearing proceedings, they did not even provide the Board with the studies underlying their claims. The agency record in this matter is indisputably insufficient to support a finding that ranked choice voting would have the effect of authorizing discrimination on a disparate impact theory. Accordingly, the Board's proper subject findings that, given the policy favoring the right of initiative, the Measure could not be said to be contrary to the Human Rights Act should be sustained.

VI. CONCLUSION

WHEREFORE, the Board prays that this Court affirm the Superior Court's dismissal of the case below or, in the alternative, summarily affirm the Board's

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sufficiently demonstrated that ranked choice voting would be independently justified for a nondiscriminatory reason and that demonstration would have rebutted any minimal showing of disparate effect.

decision finding that Initiative Measure No. 83 constitutes a proper subject for an initiative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 22, 2024, this initial brief and motion for summary affirmance was served through this Court's electronic filing system to:

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