No. 22-

In the District of Columbia Court of Appeals

KENYAN McDUFFIE,
Applicant,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS,
Respondent.

On Application for Expedited Review of an Order of the District of Columbia Board of Elections, No. 22-003 (Apr. 18, 2022)

APPLICATION FOR EXPEDITED REVIEW PURSUANT TO D.C. CODE § 1-1001.08(*o*)

Thorn L. Pozen
Kevin M. Hilgers
GOLDBLATT MARTIN POZEN LLP
1432 K Street, N.W., Suite 400
Washington, D.C. 20005

Joe Sandler
SANDLER REIFF LAMB
ROSENSTEIN & BIRKENSTOCK, P.C.
1090 Vermont Ave. N.W., Suite 750
Washington, DC 20005

Baruch Weiss
Stephen K. Wirth
Samuel F. Callahan
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
Tel.: +1 202.942.5000
Fax: +1 202.942.5999
baruch.weiss@arnoldporter.com

Attorneys for Applicant Kenyan McDuffie

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 28(a)(2), the following is a list of parties, intervenors, *amici curiae*, and counsel in the Board of Elections and appellate proceedings:

Challenger
Bruce V. Spiva

Challenger's Counsel
Theodore A. Howard
WILEY REIN, LLP
2050 M St., NW
Washington, D.C. 20036

Agency Respondent
District of Columbia Board of Elections

Agency's Counsel
Christine Pembroke
Senior Staff Attorney
DISTRICT OF COLUMBIA BOARD OF ELECTIONS
1015 Half Street, S.E.
Washington, D.C. 20003

Challenged Candidate
Kenyan McDuffie

Challenged Candidate's Counsel
Thorn L. Pozen
Kevin M. Hilgers
GOLDBLATT MARTIN POZEN LLP
1432 K Street, N.W., Suite 400
Washington, D.C. 20005

Joe Sandler
SANDLER REIFF LAMB ROSENSTEIN & BIRKENSTOCK, P.C.
1090 Vermont Ave. N.W., Suite 750
Washington, DC 20005

Baruch Weiss
Stephen K. Wirth
Samuel F. Callahan
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, D.C. 20001

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases Page(s)

Cases—Continued Page(s)

Statutes and Rules Page(s)

Legislative Materials

Other Authorities

Other Authorities—Continued Page(s)

STATEMENT CONCERNING EXPEDITED REVIEW AND, IN THE ALTERNATIVE, REQUEST FOR A STAY

Applicant Kenyan McDuffie files this application under D.C. Code § 1-1001.08(*o*) seeking expedited review of a final order of the Board of Elections, issued April 18, 2022, declaring him unqualified as a candidate for the position of Attorney General of the District of Columbia. Mr. McDuffie has filed this application "[w]ithin 3 days after announcement of the determination of the Board with respect to the validity of the nominating petition," and it therefore is timely. D.C. Code § 1-1001.08(*o*)(2).

Section 1-1001.08(*o*)(2) provides that, upon the timely filing of an application, this Court "shall expedite consideration of the matter." Expedited consideration is necessary here because this matter must be resolved in time for ballots to be printed for the upcoming June primary election.

In particular, although the primary is not until June 21, the Board of Elections has insisted that Councilmember McDuffie will not be included on the ballot unless this Court makes its determination by Thursday, April 28, because it must provide final ballot information to a printer on or before Monday, May 2. Mr. McDuffie accordingly requests that this Court issue a schedule for response and reply briefing and oral argument that will allow resolution of this case by April 28.

In the event that this Court is unable to reach a decision by April 28, Mr. McDuffie requests that the Court issue a temporary stay of the Board's decision and, if necessary, of the upcoming primary election in order to prevent irreparable harm to Mr. McDuffie and to the District's voters. A stay is warranted because, for the reasons stated below, Mr. McDuffie is likely to prevail on the merits; allowing the primary to proceed without his name on the ballot would irreparably harm him; and given the broad significance of the issue in this election and future ones, and voters' strong interest in being able to vote for their chosen candidate, the public interest and the equities strongly favor a short stay to allow this Court to fully consider and resolve the case before an election is held. *District of Columbia v. Towers*, 250 A.3d 1048, 1053 (D.C. 2021); *see also, e.g.*, *Zukerberg v. D.C. Bd. of Elections & Ethics*, 92 A.3d 288, 290 (D.C. 2014) (recognizing Court's power to order changes to the timing of elections if election on original schedule "is not practically possible").

INTRODUCTION

For his entire career, Kenyan McDuffie has used his legal training, judgment, and experience as an attorney for the public good—first as a law clerk, then as an assistant state's attorney and trial attorney in the U.S. Department of Justice's Civil Rights Division, and, for the past decade, as an elected member of the Council of the District of Columbia, representing Ward 5. He is now a candidate for the office of Attorney General of the District of Columbia.

Attorney General elections are a relatively recent development in the District. The District Charter was amended in 2010 to provide, for the first time, that the position of Attorney General would be elected by the people, rather than appointed by the Mayor. The Council also adopted legislation supplying the "[m]inimum qualifications and requirements" for holding the position of Attorney General, D.C. Code § 1-301.83(a), which, per the law's drafters, were designed to "ensure[] experience, connection and commitment to the District"—necessary because the District is "a unique city with a complicated legal system."[1]

[1] Committee on Public Safety and the Judiciary, Report on Bill 18-65, at 8 (Dec. 16, 2009), https://bit.ly/3rJUB3P.

If anyone has the "experience, connection and commitment to the District" and its "complicated legal system" necessary to serve as Attorney General, it's Mr. McDuffie. He is not only an active member of the D.C. Bar and a veteran attorney who practiced law for years in the District; he has spent the last decade *writing* the District's laws, *analyzing* proposed legislation's lawfulness and effect, and *advising* his constituents and fellow councilmembers on the constitutionality, legality, and substance of the law. Simply put, he is precisely the sort of candidate District voters and councilmembers had in mind when they made the office of Attorney General an elected position and established the office's minimum qualifications. And surely none of the attorney-councilmembers who voted for those qualifications would have intended to exclude *themselves* from serving.

All that notwithstanding, the D.C. Board of Elections ruled on April 18, 2022, that although Mr. McDuffie is undisputedly an attorney in good standing with the D.C. Bar and has been employed by the District for ten years as a Councilmember, he is *unqualified* to serve as Attorney General on the ground that he has not "been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as … [a]n attorney employed in the District of Columbia by … the District of

Columbia." D.C. Code § 1-301.83(a)(5)(D). The Board came to that decision based on its determination that being "actively engaged … as … [a]n attorney" means being "*employed 'as an attorney'*"—*i.e.*, the candidate must "have served or be serving *in the position of attorney*." A10 (emphasis added). Only if one's status as an attorney is a job requirement, the argument runs, can one be "engaged … as … [a]n attorney." Under the Board's reading, a sixth-year associate at a white shoe law firm exclusively practicing international law can be Attorney General; an attorney-councilmember who has spent a decade drafting, analyzing, and advising on the District's unique and complex system of laws cannot.

The Board was wrong. To begin, this Court, like courts across the Nation, holds that qualifications for elected office must be construed in favor of the candidate, that there is a presumption that candidates for office are qualified to serve, and that any doubt or ambiguity must be resolved in favor of eligibility. That presumption reflects the fact that voters, not bureaucrats, are best suited to decide whether a candidate is qualified, and it serves the fundamental right of voters to cast their votes for the person of their choice.

Applying that generous standard here requires reversal—and indeed the Board's interpretation fails under any standard. The Board's additional

requirement that candidates be "employed 'as an attorney'" or "in the position of attorney" finds no support in the statute's text. The statute does not require candidates to be "employed" as an attorney but to be "actively engaged … as … [a]n attorney employed … by … the District." That is a meaningful distinction because it is based not on an employee's *job title* or *qualifications*, but on what they *do*. And there is no dispute that Mr. McDuffie does the work of an attorney—that he exercises "legal skills and judgment," A8—every day in his role as Councilmember. The legislative history, moreover, shows that the Council chose a candidate pool that would allow attorneys from a broad spectrum of the D.C. Bar to run, and that, if they had intended to limit that pool to attorneys who are "employed" in "the position of attorney," they knew how to craft such a requirement but chose not to.

Beyond that, the Board's reading of the statute renders an entire class of candidates identified in the statute superfluous. It makes the candidates described in subsection (D)—those who are "actively engaged … as … [a]n attorney employed … by … the District"—entirely redundant with candidates who are "actively engaged … as … [a]n attorney in the practice of law" under subsection (A) because there is no category of person who is "employed as [an] attorney[]" who is not also "engaged … in the practice of law." D.C. Code § 1-

301.83(a)(5). Mr. McDuffie's construction of the statute gives full and independent effect to each of its provisions; the Board's does not.

The best reading of the statute's text, structure, and legislative history is that Mr. McDuffie has demonstrated that he is qualified to serve as the District's Attorney General. That is especially so under a presumption of eligibility that gives candidates every benefit of the doubt. The Court should reverse the decision of the Board of Elections and give District voters the full opportunity to vote for the candidate of their choice.

STATEMENT OF JURISDICTION

On April 18, 2022, the Board of Elections issued a final order determining that Mr. McDuffie is ineligible for the position of Attorney General of the District of Columbia. Mr. McDuffie filed this application "[w]ithin 3 days after announcement of the determination of the Board with respect to the validity of the nominating petition," and it therefore is timely. D.C. Code § 1-1001.08(*o*)(2). This Court has jurisdiction pursuant to D.C. Code § 1-1001.08(*o*)(2).

STATEMENT OF THE ISSUES

Whether an attorney who is a sitting member of the Council of the District of Columbia is "actively engaged" as "[a]n attorney employed in the

District of Columbia by … the District of Columbia" and therefore is qualified to serve as Attorney General.

RELEVANT STATUTORY PROVISIONS

Section 1-301.83 of the D.C. Code, titled "Minimum qualifications and requirements for Attorney General," provides:

> (a) No person shall hold the position of Attorney General for the District of Columbia unless that person:
>
> (1) Is a registered qualified elector as defined in § 1-1001.02(20);
>
> (2) Is a bona fide resident of the District of Columbia;
>
> (3) Is a member in good standing of the bar of the District of Columbia;
>
> (4) Has been a member in good standing of the bar of the District of Columbia for at least 5 years prior to assuming the position of Attorney General; and
>
> (5) Has been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as:
>
> (A) An attorney in the practice of law in the District of Columbia;
>
> (B) A judge of a court in the District of Columbia;
>
> (C) A professor of law in a law school in the District of Columbia; or
>
> (D) An attorney employed in the District of Columbia by the United States or the District of Columbia.

(b) The Attorney General shall devote full-time to the duties of the office and shall not engage in the private practice of law and shall not perform any other duties while in office that are inconsistent with the duties and responsibilities of Attorney General.

STATEMENT OF THE CASE

This application seeks expedited review of a final decision of the Board of Elections declaring Councilmember Kenyan McDuffie unqualified for the office of Attorney General of the District of Columbia under D.C. Code § 1-301.83(a)(5). A1-12. The Board's decision, issued April 18, 2022, concluded that although Mr. McDuffie is undisputedly an active attorney in good standing with the D.C. Bar and has been employed by the District for ten years as a Councilmember, he is unqualified on the ground that he has not "been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as … [a]n attorney employed in the District of Columbia by … the District of Columbia." D.C. Code § 1-301.83(a)(5). Mr. McDuffie timely filed this application for expedited review pursuant to D.C. Code § 1-1001.8(*o*)(2) and seeks reversal of the Board's order.

STATEMENT OF FACTS

A. Factual Background

Kenyan McDuffie has served as a District Councilmember representing Ward 5 since 2012, and for that entire period has been an active attorney in

good standing with the D.C. Bar. A23-24, A33.[2] He was Chair of the Committee on the Judiciary from 2015 to 2017, where among other major legislative efforts he oversaw criminal justice reforms that ended the use of solitary confinement and life sentences in the District. A38. He is now Chair of the Committee on Business and Economic Development. A38. Before his election to the Council, from 2008 to 2010 Mr. McDuffie was a trial attorney with the Civil Rights Division of the U.S. Department of Justice, where among other responsibilities he worked on cases to reform the policies and procedures of police departments. A23-24, A33, A37. Before that, he was an Assistant State's Attorney in Maryland and a law clerk on the Seventh Judicial Circuit of Maryland. A23-24, A33.

In addition to his D.C. Bar membership, Mr. McDuffie also has been the member of multiple voluntary bar associations, including the Washington Bar Association and the National Bar Association. A59. Through these memberships, he has participated in legal conferences, panels, and similar

[2] In the District, only an attorney with "active" membership is eligible to practice or hold himself out as licensed to practice law. Attorneys can also be "inactive," meaning that they have "been admitted to the D.C. Bar and are eligible for active membership but do not practice, or in any way hold themselves out as licensed to practice, in the District of Columbia." *Classes of Membership*, D.C. Bar, https://bit.ly/38bJxW5. Mr. McDuffie has been an active member of the D.C. Bar since his admission in 2008. *See* A48.

events, as well as received awards, including the National Bar Association's "Top 40 Trailblazers Under 40." *Id.*

B. Legislative History

In 2010, District voters overwhelmingly ratified an amendment to the District Charter making the position of Attorney General elected by the people, rather than appointed by the Mayor. This amendment was proposed in a 2007 bill, ultimately enacted in 2010 as the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act, A. 18-351, § 103(a), 57 D.C. Reg. 3,012, 3,014 (Apr. 9, 2010). The Act's purpose was to "codif[y] the institutional independence and make[] modifications to strengthen the position of Attorney General through the establishment of minimum qualifications and a term of services." Committee on Public Safety and the Judiciary, Report on Bill 18-65, at 1-2 (Dec. 16, 2009) (hereinafter "Committee Report"), https://bit.ly/3rJUB3P.

The Act imposed a set of "[m]inimum qualifications and requirements" for holding the position of Attorney General. D.C. Code § 1-301.83(a). The Council's report on the legislation explained that these qualifications were designed to "ensure[] experience, connection and commitment to the District"—necessary because the District is "a unique city with a complicated

legal system." Committee Report at 8. Under the relevant terms of the Act, a candidate qualifies if the candidate

> [h]as been actively engaged, for at least five of the 10 years immediately preceding years, as:
>
> (A) An attorney in the practice of law in the District of Columbia,
>
> (B) A judge of a court in the District of Columbia,
>
> (C) A professor of law in a law school in the District of Columbia, or
>
> (D) An attorney employed in the District of Columbia by the United States or the District of Columbia.

D.C. Code § 1-301.83(a)(5). The statute also requires that the candidate be a District resident, and be "a member in good standing of the bar of the District of Columbia" for at least five years. *Id.* § 1-301.83(a).

The enacted language of § 1-301.83(a)(5) differs from the language of the bill as it was first introduced. Originally, the provision that ultimately became § 1-301.83(a) stated that, "[i]n the case of a professor of law in a law school in the District of Columbia or of an attorney employed in the District of Columbia by the United States or the District of Columbia," a candidate would be qualified if he "has been *employed in such capacity* for at least five years and has been eligible for membership in the bar of the District of Columbia for at

least seven years prior to appointment." Bill 18-65, § 102(a)(3)(B) (introduced Jan. 6, 2009) (emphasis added). But this language was eliminated prior to the bill's enactment. At the bill's first reading on January 5, 2010, Councilmember Mary Cheh, a George Washington University law professor, stated that she wanted to work with Councilmember Phil Mendelson, the Act's lead author, on refining the qualifications requirements before final reading.[3] This discussion prompted changes to the qualifications provision. At second reading on February 2, the Act's sponsor, Councilmember Mendelson, moved an amendment in the nature of a substitute making various changes, including to the qualifications requirements.[4] The amended text no longer required a candidate "to be employed in such capacity" as an attorney "in the District Columbia by the United States or the District of Columbia." Rather, under the final language as enacted, it sufficed if the candidate was "actively engaged" as "[a]n attorney employed in the District of Columbia by the United States or the District of Columbia." D.C. Code § 1-301.83(a)(5)(D).

---

[3] An audio recording of Councilmember Cheh's remarks is available at https://bit.ly/3OuMm5m (beginning at 3:10:20).

[4] An audio recording of Councilmember Mendelson's remarks is available at https://bit.ly/3rKbDyW (beginning at 2:27:00).

C. Procedural History

On March 21, 2022, Mr. McDuffie filed a Declaration of Candidacy for Attorney General with the Board of Elections. A1. On March 28, the Board's Executive Director issued a preliminary determination that Mr. McDuffie met the qualifications for the office and could be placed on the primary ballot. A1-2.

The next day, Bruce Spiva, another candidate for Attorney General who until recently was a partner at the law firm Perkins Coie, filed a challenge to Mr. McDuffie's qualifications. A13-17. While acknowledging that Mr. McDuffie was both an active attorney in good standing and a D.C. Councilmember, Mr. Spiva asserted that McDuffie was unqualified for the position of Attorney General under D.C. Code § 1-301.83(a)(5)(D) because he was not "employed '*as an attorney*'"—in other words, that § 1-301.83(a)(5)(D) required that the candidate be hired specifically to "provid[e] legal services to the District of Columbia." A28-29 (emphasis in original).

Mr. McDuffie moved to dismiss the challenge for failure to state a claim. A51-63. He contended that, as "both an attorney and a Councilmember," he fell within the plain language of subsection (D). As Mr. McDuffie explained, Mr. Spiva's interpretation would render subsection (D) surplusage: Any

candidate hired by the District specifically to serve as an attorney would necessarily qualify under subsection (A), which covers candidates engaged as "[a]n attorney in the practice of law in the District of Columbia." A56-57. Mr. McDuffie further contended that, even if subsection (D) required active service in an attorney role, he satisfied that requirement because, among other things, he "applies his knowledge and skills as an attorney" in working as a Councilmember and indeed "has dedicated his career as an attorney and public servant to use the law to 'uphold[] the public interest'"—a "core obligation of the Attorney General." A59-60 (quoting D.C. Code § 1-301.81(a)(1)). Limiting the Attorney General position to only those actively practicing as attorneys, Mr. McDuffie explained, "would disqualify attorneys who have dedicated their careers to public service," contrary to "what the Council intended." A60.

On April 18, the Board held oral argument and announced its decision on the record, and it issued a memorandum opinion and order that evening. A4. The Board upheld Mr. Spiva's challenge, concluding that Mr. McDuffie had not "for the requisite time period, been 'actively engaged … as … [a]n attorney employed in the District of Columbia by the United States or the District of Columbia." A11. The Board adopted Mr. Spiva's interpretation of subsection (D) as requiring that a candidate not only be an attorney employed

by the District, but also be "*employed 'as an attorney'*"—*i.e.*, the candidate must "have served or be serving *in the position of attorney*." A10 (emphasis added); *see* A11 (candidates must be "*hired* and act 'as attorneys'" (emphasis added)). The Board concluded that Mr. McDuffie did not satisfy this requirement because, although his role involves the execution of "legal skills and judgment," "a D.C. Councilmember need not be an attorney, as indeed, many Councilmembers are not attorneys." A8.

STANDARD OF REVIEW

This Court generally reviews decisions of the Board of Elections for reasonableness, but pure "question[s] of law, including statutory interpretation," are reviewed *de novo*. *In re Haworth*, 258 A.2d 447, 449 (D.C. 1969); *see, e.g.*, *Harvey v. D.C. Bd. of Elections & Ethics*, 581 A.2d 757, 759 (D.C. 1990) (reversing Board's interpretation as "inconsistent with the statutory scheme"). "[I]f the language of the statute involved is clear," this Court does "not defer to the agency's interpretation." *Bates v. D.C. Bd. of Elections & Ethics*, 625 A.2d 891, 893 (D.C. 1993). And when "traditional tools of statutory construction," including "canons" of interpretation, resolve ambiguity in a statute, "*Chevron* leaves the stage"—the agency cannot obtain deference. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

SUMMARY OF ARGUMENT

This Court holds that qualifications for elected office must be construed in favor of the candidate and that there is a presumption that candidates for office are qualified to serve. This presumption serves to protect the most precious freedoms enshrined in the Constitution: the right to associate for the advancement of political beliefs, and the right of qualified voters to cast their votes for the candidate of their choice. The statutory qualifications to serve as Attorney General must be interpreted to effectuate and protect these fundamental rights.

Mr. McDuffie is qualified to serve as Attorney General under any standard—and especially under a presumption that gives candidates every benefit of the doubt. He has served on the D.C. Council for 10 years, has been a D.C. attorney during that entire period, and routinely uses his legal skills and expertise in his capacity as a legislator. He is thus qualified for the position of Attorney General under the plain language of § 1-301.83(a)(5)(D), which covers candidates who have "been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as … [a]n attorney employed in the District of Columbia by the United States or the District of Columbia." The Board interpreted the words

"actively engaged … as" to impose an additional restriction not found in the text—namely, that § 1-301.83(a)(5)(D) "appl[ies] only to attorneys *employed as attorneys*, in roles where D.C. [Bar] membership is a *prerequisite*." A10 (emphasis added). But that interpretation does not accord with ordinary usage: One can be "actively engaged" in a role without formally being "employed" to perform that role. The drafting history of § 301.83(a) confirms that the Council knew how to use language that would have imposed the Board's formulation but instead opted for a broader formulation. And under the well-established presumption of eligibility—which this Court must apply prior to granting any deference to the Board—any ambiguity must be resolved in Mr. McDuffie's favor.

The Board's atextual reading of the statute creates more problems than it solves. It renders the candidates described in subsection (D)—those who are "actively engaged … as … [a]n attorney employed … by … the District"—entirely redundant with candidates who are "actively engaged … as … [a]n attorney in the practice of law" under subsection (A). That is because there is no category of person who is "employed as [an] attorney[]" who is not also "engaged … in the practice of law." D.C. Code § 1-301.83(a)(5). Instead, this Court should give the statute its plain meaning—consistent with the statute's

structure and legislative history and the presumption of eligibility—and reject any construction of the statute that renders an entire class of candidates superfluous.

The Court should reverse the Board of Elections and vindicate the fundamental right of voters to select the candidate of their choice.

ARGUMENT

I. This Court Applies a Presumption that Candidates for Elected Office Are Qualified to Serve

This Court has long held "that qualifications for candidacy be interpreted in an inclusive spirit" with a presumption that candidates for elected office are qualified to serve. *Lawrence v. D.C. Bd. of Elections & Ethics*, 611 A.2d 529, 532 (D.C. 1992). This presumption reflects "the fact that any decision in this area affects not only the prospective candidate but also the voters as a whole, since a meaningful part of the right to vote is to vote for a candidate of one's choice." *Id.* Excluding a candidate from running for elected office thus "implicates basic constitutional rights," including "'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'" *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). And "a critical ingredient of

the electorate's ability to vote effectively is choice among the candidates with demonstrated support." *Lawrence*, 611 A.2d at 532 (quoting *Williams-Godfrey v. D.C. Bd. of Elections & Ethics*, 570 A.2d 737, 739 n.4 (D.C. 1990)). The Supreme Court has explained that these "interwoven strands of 'liberty,'" protected by the Constitution, "rank among our most precious freedoms." *Anderson*, 460 U.S. at 787 (quoting *Williams*, 393 U.S. at 31).

This Court has also held that the presumption in favor of candidate eligibility is consistent with the broader principle that laws affecting the right to vote should be broadly construed to expand the franchise. *See Lawrence*, 611 A.2d at 532. This Court has consistently held "that a prime purpose of Congress in formulating the District of Columbia Elections law was to keep the franchise open to as many people as possible." *Id.* (quoting *Gollin v. D.C. Bd. of Elections & Ethics*, 359 A.2d 590, 595 (D.C. 1976)). In particular, this Court "construe[s] our election law and regulations whenever possible so as to effectuate the basic goal, enshrined in the statute itself, of enabling the voters to 'express their preference.'" *Best v. D.C. Bd. of Elections & Ethics*, 852 A.2d 915, 919 (D.C. 2004) (quoting D.C. Code § 1-1001.05(b)(1)). And, in light of "[t]he fundamental nature of the right involved," this Court has held "that construction of the statute in favor of the franchise is the course that we must

follow." *Id.* (quoting *Kamins v. Bd. of Elections for D.C.*, 324 A.2d 187, 192 (D.C. 1974). The presumption of eligibility serves these interests by enabling more voters to cast their votes for their chosen candidates.

This Court is not alone in construing election laws broadly to permit candidates to run for office. These principles have been universally applied by state courts across the Nation.[5] Thus, American Jurisprudence (Second) has summarized an unbroken line of precedent establishing that "the imposition

---

[5] *See, e.g.*, *Municipality of Anchorage v. Mjos*, 179 P.3d 941, 943 (Alaska 2008) ("[T]here is a presumption in favor of candidate eligibility"); *Escamilla v. Cuello*, 230 Ariz. 202, 205 (2012) ("[D]isqualifications provided by the legislature are construed strictly[,] and there is a presumption in favor of' … candidates' eligibility to run for office." (citation omitted)); *Carter v. Commission on Qualifications of Judicial Appointments*, 93 P.2d 140, 142 (Cal. 1939) ("Ambiguities are to be resolved in favor of eligibility to office."); *Bysiewicz v. Dinardo*, 6 A.3d 726, 738 (Conn. 2010) ("[S]tatutory limitations on eligibility to run for public office should be liberally construed, and any ambiguities should be resolved in favor of a candidate's eligibility."); *Scharn v. Ecker*, 218 N.W.2d 478 (S.D. 1974) ("There is a presumption in favor of eligibility of one who has been elected or appointed to public office, and any doubt as to the eligibility of any person to hold an office must be resolved against the doubt." (citation omitted)); *Cannon v. Gardner*, 611 P.2d 1207, 1211 (Utah 2010) ("[S]tatutes [addressing right to hold public office] should receive a liberal construction in favor of assuring … the right to aspire to and hold public office."); *Gerberding v. Munro*, 949 P.2d 1366, 1373 (Wash. 1998) ("[E]ligibility to an office … is to be presumed rather than to be denied, and … any doubt as to the eligibility of any person to hold an office must be resolved against the doubt." (citation omitted)); *Cathcart v. Meyer*, 88 P.3d 1050, 1070 (Wyo. 2004) ("[T]here is a strong presumption in favor of eligibility for office.").

of restrictions upon the right of a person to hold a public office should receive a liberal construction in favor of the people exercising freedom of choice in the selection of their public officers," and that "statutes declaring qualifications are to receive a liberal construction" in favor of eligibility. 63C Am. Jur. 2d § 53 (Feb. 2022) (footnotes omitted). "If there is any doubt or ambiguity in the applicable restrictions, such doubt or ambiguity must be resolved in favor of eligibility … ." *Id.* (footnotes omitted).

II. Mr. McDuffie Is Qualified to Serve As Attorney General

The plain language, structure, and history of § 1-301.83(a) make clear that Mr. McDuffie—a veteran attorney, sitting Councilmember, and life-long public servant—is qualified to serve as Attorney General. Any doubt must be resolved in his favor under the longstanding presumption of eligibility.

A. Mr. McDuffie is qualified under the plain language of § 1-301.83(a)(5)(D)

Section 1-301.83(a)(5) provides that a candidate for Attorney General is qualified if—in addition to other requirements not disputed here—the candidate "[h]as been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as … [a]n attorney employed in the District of Columbia by the United States or the District of Columbia." Mr. McDuffie is qualified under this provision. He

undisputedly has been employed for ten years by the District of Columbia as a Councilmember, and during this entire period has been an active attorney in good standing with the D.C. Bar.

The Board nonetheless found Mr. McDuffie unqualified because D.C. Councilmembers are not strictly *required* to be attorneys. The Board adopted Mr. Spiva's argument that § 1-301.83(a)(5)(D) "appl[ies] only to attorneys *employed as attorneys*, in roles where D.C. [Bar] membership is a *prerequisite*." A10 (emphasis added) (quoting A70). In other words, the Board concluded that a candidate cannot be actively engaged as an attorney employed by the District of Columbia under subsection (D) unless he is specifically is "serving *in the position of attorney*." A10-11 (emphasis added); *see* A11 (candidates must be "*hired* and act 'as attorneys'" (emphasis added)). The result, implausibly, is that the attorney-councilmembers who adopted the law—those perhaps most knowledgeable about the very laws the Attorney General is responsible for enforcing—disqualified *themselves* from serving as Attorney General.

The problem with the Board's analysis is that the text of subsection (D) does not impose any requirement that a candidate be "employed as [an] attorney[]" or "serv[e] in the position of attorney." Rather, it requires that the

candidate be "actively engaged" as "[a]n attorney" employed by the District. And contrary to the Board's suggestion, the phrase "actively engaged as" cannot reasonably be interpreted to restrict the category of qualified individuals to those with jobs *requiring* attorney status.

As a matter of plain English, being "engaged as" something does not strictly depend on one's title or formal job requirements. Rather, it depends on what the person actually does. *See, e.g.*, *Engaged*, Merriam-Webster Online Dictionary ("involved in activity"); *Engage*, Black's Law Dictionary (11th ed. 2019) ("To employ or involve oneself; to take part in; to embark on."). As another high court recently explained in rejecting a narrow interpretation of a qualifications provision for county attorney: "One can be engaged in the practice of law in a multitude of different ways," and what matters are candidates' "day-to-day activities," not their "title." *Nebraska Republican Party v. Shively*, 971 N.W.2d 128, 144 (2022). And being "actively engaged" in a certain enterprise does not mean the person does it to the exclusion of all other enterprises. *See id.* ("'practiced law actively' means engaged in giving advice or rendering such service as requires the use of any degree of legal knowledge or skill and doing so on a daily or routine basis"). For instance, someone employed as an attorney at a law firm can be "actively engaged as"

the head of a practice group, as a firm ombudsman, as a mentor to a junior attorney, or as a member of the firm's hiring committee.

So too, while Councilmembers are not strictly required to be attorneys, Mr. McDuffie himself is "actively engaged as" an attorney employed by the District. He is a licensed attorney in active status with the D.C. Bar, meaning that he is governed by the Rules of Professional Conduct that apply to attorneys.[6] And his role as Councilmember undisputedly involves exercising legal judgment and expertise. Mr. McDuffie, for example, has authored numerous laws, exercised oversight over multiple District agencies—including *the Office of the Attorney General*[7]—to evaluate their compliance with legal obligations, and supervised the attorneys employed on his staff. He frequently must investigate the real-world impact of existing District laws on

---

[6] The D.C. Bar has recognized that a number of provisions of the Rules of Professional Conduct apply "to attorneys in whatever capacity they are acting—it is not limited to conduct occurring during the representation of a client." D.C. Bar Ethics Opinion No. 323 (2004) (Rule 8.4 applicable to federal officials with national security or intelligence positions who are members of the bar even though they are not employed as attorneys); *see also* D.C. Bar Ethics Opinion No. 336 (2006) (court-appointed guardian who is a member of the Bar is bound by Rules 3.3 and 8.4 even though not acting as the incapacitated individual's counsel, because all members of the Bar are bound by those rules regardless of the capacity in which they are acting).

[7] *Committee on the Judiciary and Public Safety*, Council of the Dist. of Columbia, https://bit.ly/3Ov8Hjt.

residents, and drafts and reviews legislation with the goal of advancing the public interest. These activities are indistinguishable from activities conducted by the attorneys in the Council's Office of the General Counsel. *See* Council of the Dist. of Columbia, *Legislative Drafting Manual* (2019), https://bit.ly/3v5hWPH.

While Mr. McDuffie undertakes this legislative work for the public rather than for a particular client, these legislative activities are quintessentially legal in nature, and draw extensively upon McDuffie's legal training, judgment, and experience. Leading law schools teach courses and offer clinics focused on legislative drafting.[8] And indeed, "drafting legislation and court rules" falls within the "practice of law" as that phrase is defined in the leading legal dictionary. *See Practice of Law,* Black's Law Dictionary (11th ed. 2019).

If ordinary meaning left any doubt, the Board's contrary understanding is repudiated by the provision's drafting history—which makes clear that the Council knew how to limit the category of qualified individuals to those

[8] *See, e.g.*, *Legal Drafting: Legislation*, Am. Univ. Wash. Coll. of L., https://bit.ly/3k5e4ri; *Legislative Drafting Research Fund*, Colum. L. Sch., https://bit.ly/3vBgCmp; *Legislative Policy & Drafting Clinic*, Bost. Univ. Sch. of L., https://bit.ly/3vzqmxN.

"employed as" attorneys but rejected that formulation. When first introduced in the D.C. Council, the provision that ultimately became § 1-301.83(a) stated that, "[i]n the case of … an attorney employed in the District of Columbia by the United States or the District of Columbia," a candidate would be qualified if, among other things, he "*has been employed in such capacity* for at least five years and has been eligible for membership in the bar of the District of Columbia for at least seven years prior to appointment." Bill 18-65, § 102(a)(3)(B) (introduced Jan. 6, 2009) (emphasis added). But that language—focused on whether the candidate is "employed" in an attorney "capacity"—was not ultimately enacted. Instead, in the final version of the bill, it sufficed if the candidate was "actively engaged" as "[a]n attorney employed in the District of Columbia by the United States or the District of Columbia." Had the Council intended to limit candidates for Attorney General to those employed *as attorneys*, it could readily have done so by using the very formulation contained in the original bill, by requiring candidates "to be employed in such capacity" as an attorney for the District. But the Council did not adopt that formulation; it used broad language covering those individuals who were attorneys and were employed by the District but who were not

specifically employed by the District in that capacity. That describes Mr. McDuffie.

Finally, to the extent that text and history leave any ambiguity, the longstanding presumption of candidate eligibility requires the Court to resolve that ambiguity in Mr. McDuffie's favor. "[Q]ualifications for candidacy" must "be interpreted in an inclusive spirit"—in part because "a critical ingredient of the electorate's ability to vote effectively is choice among the candidates with demonstrated support." *Lawrence*, 611 A.2d at 532. As an established canon of statutory construction, the presumption in favor of eligibility "trumps [agency] deference," particularly because the presumption has constitutional footing. *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008); *see also, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'"). Mr. McDuffie is a devoted public servant who uses his legal skills and training every day to legislate for the public good. The District's voters should be permitted to vote for him.

B. The Board's reading of the statute renders § 1-301.83(a)(5)(D) superfluous

Even putting aside the plain text and legislative history of § 1-301.83(a), the Board of Election's reading of the statute to require candidates who are

employed by the District to be "serving in the position of attorney" or "employed as attorneys," A10, creates an intractable structural problem. It renders the class of candidates described in subsection (D) entirely redundant with candidates who are "actively engaged … as … [a]n attorney in the practice of law" under subsection (A) because there is no category of person who is "employed as [an] attorney[]" who is not also "engaged … in the practice of law." That superfluity can be avoided, however, by adopting Mr. McDuffie's construction of the statute, which gives separate meaning to each of the statute's provisions.

"A basic principle [of statutory construction] is that each provision of [a] statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous." *D.C. Bd. of Elections & Ethics v. District of Columbia*, 866 A.2d 788, 795 (D.C. 2005) (internal citations omitted). "[T]he courts must … lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 58 (1868)). This principle, known as the surplusage canon or

the rule against superfluity, is a "cardinal rule of statutory interpretation," which ensures that "no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality op.).

The Board of Elections violated this cardinal rule. It adopted Mr. Spiva's argument that § 1-301.83(a)(5)(D) "appl[ies] only to attorneys employed as attorneys, in roles where D.C. [Bar] membership is a prerequisite." A10 (quoting A70). The Board reasoned that any other reading would render the phrase "actively engaged … as … an attorney" superfluous. *See id.* But the opposite is true: The Board's reading renders *all* of § 1-301.83(a)(5)(D) inoperative, for in every case where an attorney is "employed as [an] attorney[]," he or she will also qualify under § 1-301.83(a)(5)(A) as "[a]n attorney in the practice of law."

Take, for example, the "attorneys employed as attorneys" that the Board identified in its decision: "Assistant Attorneys within the Office of Attorney General, Counsel for Agencies, or Counsel to the Councilmembers." A8. Each of these positions entails "the practice of law" under any definition of that term. Each would therefore qualify to serve as Attorney General under

subsection (A).[9] By contrast, the Board did not identify a *single* example of an individual falling within its understanding of subsection (D)—*i.e.*, an "attorney[] employed as [an] attorney[], in [a] role[] where D.C. [Bar] membership is a prerequisite," A10—who would *not* also qualify under subsection (A) as "[a]n attorney in the practice of law." In other words, under the Board's reading, subsection (D) is entirely subsumed, and rendered superfluous, by subsection (A).

For his part, Mr. Spiva asserted before the Board that some "hearing examiners and administrative judges at the D.C. Office of Employee Appeals and many other agencies are required to be admitted to the D.C. Bar and thus employed as attorneys." A66. From this, he suggests, "[o]ne might therefore argue that these attorneys are not 'actively engaged … as … an attorney in the practice of law' as contemplated by section 1-301.83(a)(5)(A)" but

[9] *See, e.g.*, D.C. Ct. App. R. 49 ("'Practice of Law' means the provision of professional legal advice or services where there is a client relationship of trust or reliance."); *Practice of Law*, Black's Law Dictionary (11th ed. 2019) ("The professional work of a lawyer, encompassing a broad range of services such as conducting cases in court, preparing papers necessary to bring about various transactions from conveying land to effecting corporate mergers, preparing legal opinions on various points of law, drafting wills and other estate-planning documents, and advising clients on legal questions.").

nonetheless qualify under § 1-301.83(a)(5)(D). *Id.* These examples in fact prove the opposite point.

To begin, as a factual matter, many of these individuals are not actually required to be members of the D.C. Bar. *See, e.g.*, D.C. Code §§ 8-808, 50-2301.04. And, of course, if the District Council were concerned solely with the narrow class of hearing examiners and administrative law judges *who are required to be D.C. Bar members*, they could have simply included these quasi-judicial officers in the statute, much like they expressly identified judges in subsection (B).

More fundamentally, the District employees Mr. Spiva identified are simply not "employed as attorneys," A66, or "serving in the position of attorney." A10. They are employed as, and serving in the position of, hearing examiners and administrative judges.[10] The mere fact that D.C. Bar membership may be a hiring qualification for *some* of these roles does *not*

[10] Indeed, most of these employees are expressly *not* considered to be acting as "attorneys" under District law for the purposes of the Merit Personnel System. *See* D.C. Code § 1-608.51(2) ("'Attorney' means: (A) Any position which is classified as part of Series 905, *except* for any position that is occupied by a person whose duties, in whole or in substantial part, consist of hearing cases as an *administrative law judge* or as an *administrative hearing officer*"). District law does consider a "hearing examiner employed by the Office of Employee Appeals" to be serving as an "attorney," D.C. Code § 1-608.51(2)(B), but this narrow carve-out proves the rule.

mean that the individual has been "*employed* 'as an attorney'" or is "serving in the *position* of attorney." A10 (emphasis added). Instead, these roles, like the role of Councilmember, require the application of legal judgment, reasoning, and skill in the rendering of legal decisions and opinions.

Put differently, in light of the fact that some hearing examiners need not be attorneys, they cannot be said to be "*employed* as attorneys." A10 (emphasis added). But those among them who are attorneys and use their skills as attorneys in the course of their work are clearly "actively *engaged* … as … attorney[s] employed … by … the District of Columbia," D.C. Code § 1-301.83(a)(5)(D) (emphasis added), in the sense that they are actively doing the work of an attorney as part of their employment. *See supra* Section II.A. These individuals therefore would qualify to run for Attorney General under the plain reading of § 1-301.83(a)(5)(D) that Mr. McDuffie advocates. But they would *not* qualify under Board's additional requirement that they be "employed as attorneys" or "serving in the position of attorney." A10.

The upshot of all this is that the construction of the statute advocated by Mr. Spiva and adopted by the Board fails to give full effect to *all* of § 1-301.83(a)'s text. But that is not the only reading, and the alternatives would permit Mr. McDuffie to run for office, consistent with the presumption of

eligibility. For one, the Court could adopt a very broad reading of § 1-301.83(a)(5) to permit *any* attorney employed by the District to run for Attorney General, regardless of whether he or she uses his legal skills on the job. But it need not go so far. Mr. McDuffie's narrower reading of "engaged as … [a]n attorney" to mean actively doing the work of an attorney—like he does in his role as Councilmember—is also consistent with the plain text of the statute and with the presumption of eligibility.

To be sure, the Board based its "employed as attorneys" requirement at least in part on its "concern[]" about "the implications of … considering, on a case-by-case basis," arguments made by individuals who are not "employed as attorneys" or "serving in the position of attorney" that they are nonetheless the "'functional equivalent' because their job entails reading laws, interpreting laws, and the like." A10-11. According to the Board, there is no logical stopping point between District employees like Mr. McDuffie, who indisputably bring their legal training, judgment, and experience as an attorney to bear in the course of their employment by the District, and others who, despite being an active member of the D.C. Bar, do not use any legal training on the job. *See* A8, A11.

But Mr. McDuffie is *not* arguing that he is the "functional equivalent" of someone actively engaged as an attorney employed in that capacity by the District; he is arguing that he *is* actively engaged as an attorney employed by the District. As described above, every day Mr. McDuffie uses his legal training, judgment, and experience in the execution of his duties as Councilmember. *See supra* Section II.A. That is all that is required for him to be "actively *engaged* … as … [a]n attorney" under § 1-301.83(a)(5)(D)'s plain text. And that fact also readily distinguishes this case from that of the "school teacher" "who happens to be an attorney in good standing with the D.C. Bar." A8. School teachers, unlike Councilmembers, do not routinely use their legal expertise as part of their employment and thus are not "actively engaged" as attorneys.

In any event, this Court need not conclusively resolve every possible hypothetical now. It need only decide that Mr. McDuffie—a veteran attorney and sitting Councilmember who actively uses his legal training and skills to do legal work on the public's behalf—is qualified to serve as Attorney General of the District. The plain text, structure, and legislative history of § 1-301.83(a) confirm that fact. And this Court's longstanding and universally accepted

presumption that candidates for elected office are qualified to serve removes any doubt. *See Lawrence*, 611 A.2d at 532.

CONCLUSION

The Court should reverse the decision of the Board of Elections.

Dated: April 21, 2022

By: */s/ Baruch Weiss*

Baruch Weiss
Stephen K. Wirth
Samuel F. Callahan
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001-3743
Tel.: +1 202.942.5000
Fax: +1 202.942.5999
baruch.weiss@arnoldporter.com

Thorn L. Pozen
Kevin M. Hilgers
GOLDBLATT MARTIN POZEN LLP
1432 K Street, N.W., Suite 400
Washington, D.C. 20005

Joe Sandler
SANDLER REIFF LAMB
ROSENSTEIN & BIRKENSTOCK, P.C.
1090 Vermont Ave. N.W., Suite 750
Washington, DC 20005

Attorneys for Applicant
Kenyan McDuffie

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, consistent with guidance from the Clerk of the Court, I filed this application with the Court by email. I obtained consent to serve this application by email on the respondent and the parties in the Board of Elections, and accordingly have served the following individuals by email:

Christine Pembroke
Senior Staff Attorney
DISTRICT OF COLUMBIA BOARD OF ELECTIONS
1015 Half Street, S.E.
Washington, D.C. 20003
cpembroke@dcboe.org

Counsel for Respondent District of Columbia Board of Elections

Theodore A. Howard
WILEY REIN, LLP
2050 M St., NW
Washington, D.C. 20036
thoward@wiley.law

Counsel for Bruce V. Spiva

Dated: April 21, 2022

/s/ Stephen K. Wirth
Stephen K. Wirth

APPENDIX

APPENDIX TABLE OF CONTENTS

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

Bruce V. Spiva, Challenger	)	Administrative Order #22-003
v.	)	Re: Challenge to Qualification for the Office of Attorney General for the District of Columbia
Kenyan McDuffie, Candidate.	)	

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the District of Columbia Board of Elections ("the Board") on April 18, 2022. It is a challenge to the candidacy of Kenyan McDuffie ("Candidate McDuffie") for the office of Attorney General for the District of Columbia ("Attorney General") filed by Bruce V. Spiva ("Mr. Spiva" or "the Challenger"). Chairman Gary Thompson and Board Members Michael Gill and Karyn Greenfield presided over the hearing. Mr. Spiva was represented by Theodore A. Howard, and Candidate McDuffie was represented by attorneys Thorn Pozen, Kevin Hilgers, and Joseph Sandler.

This Memorandum Opinion, which constitutes the Board's conclusions of law, memorializes the oral ruling the Board rendered during the hearing on April 18, 2022.

Background

On March 21, 2022, Candidate McDuffie filed with the Board a Declaration of Candidacy for the office of Attorney General (in which document he attested to meeting the qualifications for that office), as well as a nominating petition and other documents. On March 28, 2022, the Executive Director (taking the attestations as correct) issued a preliminary determination that

Candidate McDuffie met the qualifications necessary to place his name on the primary ballot as a candidate for the office of Attorney General. The notice of the preliminary determination advised that the nominating petition challenge period for the June 21, 2022 Primary Election ("the Primary Election") would begin on March 26, 2022 and end on April 4, 2022.

On March 29, 2022, Mr. Spiva filed with the Board a written "Challenge to a Nominating Petition" ("the Challenge"). The Challenge is signed and witnessed by a Board employee, and there is no dispute as to its authenticity or genuineness on the part of Mr. Spiva. The Challenge, relies on D.C. Official Code § 1-1001.08(o)(1) as a jurisdictional basis, correctly so as noted below.[1] In the Challenge, Mr. Spiva argues that Candidate McDuffie is not qualified to be on the ballot for the office of Attorney General because he does not meet the requirements of D.C. Official Code §1-301.83(a), which is incorporated by reference into the D.C. Charter.[2]

The controlling statute, D.C. Code §1-301.83(a), provides in full:

> (a) No person can hold the position of Attorney General for the District of Columbia unless that person:
>
> (1) Is a registered qualified elector of the District of Columbia;
> (2) Is a bona fide resident of the District of Columbia;
> (3) Is a member in good standing of the bar of the District of Columbia;
> (4) Has been a member in good standing of the bar of the District of Columbia for least 5 years prior to assuming the position of Attorney General; and
> (5) Has been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as:
>
> (A) An attorney in the practice of law in the District of Columbia;

[1] That provision states in pertinent part:

> The Board is authorized to accept any nominating petition for a candidate for any office as *bona fide* with respect to the qualifications of the signatures thereto if the original or facsimile thereof has been posted in a suitable public place for a 10-day period beginning on the third day after the filing deadline for nominating petitions for the office. Any registered qualified elector may within the 10-day period challenge the validity of any petition by written statement signed by the challenger and filed with the Board and specifying concisely the alleged defects in the petition.

[2] *See* D.C. Charter, Sec. 435(d); D.C. Code §1-204.35(d) ("Any candidate for the position of Attorney General shall meet the qualifications of [D.C. Official Code §1-301.83], prior to the day on which the election for Attorney General is to be held").

(B) A judge of a court in the District of Columbia;
(C) A professor of law in a law school in the District of Columbia; or
(D) An attorney employed in the District of Columbia by the United States or the District of Columbia.[3]

The Parties do not dispute that Candidate McDuffie satisfies the requirements of (a)(1), (2), (3), and (4), and further, that Candidate McDuffie does *not* satisfy the requirements of (a)(5)(A), (B), or (C). The Parties also do not dispute that he is employed by the District of Columbia. The issue thus comes down to the interpretation and application of §1-301.83 (a)(5)(D) ("Section "(a)(5)(D)"), namely, has Candidate McDuffie, as a D.C. Councilmember, been "actively engaged…as an attorney employed…by…the District of Columbia." This issue depends on what it means to be "actively engaged" specifically *"as an attorney*."

On March 30, 2022, the Board scheduled a prehearing conference between the parties to be held on April 13, 2022. Subsequently, the Board established a briefing schedule for the parties. Pursuant to this schedule, Candidate McDuffie filed a Motion to Dismiss ("Motion to Dismiss") the Challenge on April 6, 2022, and Mr. Spiva filed a Reply & Opposition to the Motion to Dismiss on April 11, 2022 ("Reply"). On April 12, 2022, Candidate McDuffie filed a Motion for Leave to File a Sur-Reply/Reply and Sur-Reply/Reply to the Reply/Opposition to the Motion to Dismiss ("Sur-Reply"). Each of the pleadings in this matter are incorporated by reference into this Order.

In the Sur-Reply (the filing of which is not expressly allowed by Board rules), Candidate McDuffie raised new procedural arguments against the Challenge. Specifically, he asserts that Mr. Spiva "failed to follow the governing procedural requirements for an action before the Board to

[3] Similar language is found with respect to the qualifications to be a D.C. Judge at D.C. Code §11-1501.

challenge candidate qualifications, such as not filing a complaint that was signed and sworn … and notarized, and not serving [Candidate McDuffie] with the complaint."[4]

On April 13, 2022, the Board's Office of the General Counsel ("OGC") convened a prehearing conference in the matter as allowed by 3 DCMR §415.1. During the prehearing conference, the Parties agreed to stipulate that there were no facts that are in dispute, and that an evidentiary hearing was thus unnecessary. The OGC issued a prehearing conference order indicating that the Board hearing scheduled for April 18, 2022 would be converted to oral argument on the Motion to Dismiss, the outcome of which would resolve the issue as a matter of law. The prehearing conference also established that the Board would entertain the Sur-Reply at the hearing.

On April 18, 2022, the Board heard oral argument in the matter, during which the parties in the matter reiterated and expanded upon the contentions made in their respective pleadings. After the argument, the Board entered into executive session to deliberate (as per D.C. Code §2-575(b)), and thereafter announced its determination on the record.

Discussion

The Sur-Reply

In his Motion to Dismiss, Candidate McDuffie does not question Mr. Spiva's assertion that the Board has jurisdiction to determine the issue of Candidate McDuffie's qualifications to serve as Attorney General. Rather, he casts Mr. Spiva's challenge as a "Complaint," and seeks to have it dismissed for failure to state a claim for which relief may be granted. It is not until the submission of the Sur-Reply that Candidate McDuffie asserts, in the alternative, that the "Challenge" approach

[4] Sur-Reply at 3.

is improper and that the failure to file and properly serve a captioned "Complaint" warrants rejecting the improperly styled "Challenge."

As underscored at argument, the Board has the authority under its regulations to waive any of its pleading or technical requirements.[5] In this instance, Candidate McDuffie was not prejudiced by the manner in which Mr. Spiva challenged his qualification, captioned as a "Challenge" instead of a "Complaint." Even prior to the filing of the Challenge, the media disclosed that Mr. Spiva would be raising the instant issue of Mr. McDuffie's qualifications, and there is no dispute that Candidate McDuffie and his counsel received a copy of the Challenge shortly after it was filed on March 29, 2022. Mr. McDuffie did not allege that the timing of actual notice of the Challenge impeded his ability to respond to the Challenge, which he did by April 6, 2022. Since the Parties agreed that no material facts were in dispute, the absence of a complaint's technical averments was of no consequence. Finally, given the authority (discussed below) indicating that a challenge is, in fact, the appropriate vehicle for raising an issue of candidate qualification, Mr. Spiva has good cause for proceeding in this manner. Accordingly, and assuming for the sake of argument that Mr. Spiva should have proceeded by filing a "Complaint," we hereby waive the Board's rules concerning the filing of complaints and allow the Challenge to proceed. In substance, Mr. Spiva timely raised the issue in hand, and the manner in which he did so is of no consequence, let alone prejudice, to the candidate.

In any event, the statutory challenge process and case law indicates that candidate qualifications are properly presented under petition challenge procedures. The Board is statutorily charged with conducting elections, delegating to Board officials the authority to carry out the

[5] 3 DCMR §400.5 ("The Board may, for good cause shown, waive any of the provision of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law."

purposes of the elections laws, and issuing regulations, including those necessary to determine that candidates meet the statutory qualifications for office.[6] D.C. Official Code § 1-1001.08(b)(1)(D) provides that "[a]ny candidate for the position of Attorney General shall also meet the qualifications required by § 1-301.83 before the day on which the election for Attorney General is to be held."[7] 3 D.C.M.R. § 601.9. requires the Board's Executive Director to make a preliminary determination as to a candidate's qualifications for the office sought. This preliminary determination does not "preclude further inquiry into or challenge to the eligibility of an individual for candidacy or office made prior to the certification of the election results." 3 D.C.M.R. § 601.9. These and other authorities grant the Board responsibility to determine a candidate's qualifications at any time during the electoral process.[8]

Accordingly, to the extent that Candidate McDuffie's Motion to Dismiss suggests that the correct procedure for addressing the qualification issue is a complaint as opposed to a challenge, *Lawrence* precludes such a strict reading of section 1-1001.08(o)(1).[9] We conclude that the 10-

[6] D.C. Official Code § 1-1001.05(a)(3), (14).

[7] D.C. Official Code § 1-1001.08(b)(1)(D).

[8] *See Kabel v. D.C. Bd. of Elections and Ethics,* 962 A.2d 919, 921 (D.C. 2008) ("we have no doubt the Board could have . . . refused to certify [a candidate] as 'eligible' to take office."); *Best v. Bd. of Elections and Ethics*, 852 A.2d 815, 919 (D.C. 2004) (recognizing the importance of Board's regulation which ensures candidate eligibility) (citation omitted)); *Lawrence, supra, v. D.C. Bd. of Elections & Ethics*, 611 A.2d at 531; *McFarland v. Pemberton*, 530 S.W.3d 76 (Tenn. 2017) (by necessary implication, county election commission had authority to resolve candidate qualification (residency); commission's authority was not merely ministerial and did not violate separation of powers). Having concluded that we have authority to determine whether a candidate is qualified, we do not intend to reach the question of whether the Board has an affirmative duty to investigate candidate qualifications. *McInnish v. Bennett*, 150 So.3d 1045 (Ala.), *cert. denied*, 135 S.Ct. 232 (2014) (dissenting and concurring opinions discussing whether Secretary of State had an affirmative duty to investigate whether Barack Obama qualified as a natural-born-citizen under U.S. Const. Art. II, § 1, cl. 4).

[9] In that case, the D.C. Court of Appeals addressed a residency challenge to the qualifications of a candidate for the D.C. Council. In concluding that that qualifications challenge should be made as part of the petition challenge process, the Court stated:

> [t]hus, we read broadly the provision of § 1-1312(o) [now §1-1001.08(o)] allowing challenges to "the validity" of any petition as establishing a mechanism for review of challenges to the placing of

day period provided under D.C. Official Code § 1-1001.08(o)(1) for bringing challenges to nominating petitions covers challenges based on candidate qualifications as well as on nominating petition insufficiency.

This conclusion obviates the need to address the claims in the sur-reply that Mr. Spiva followed improper procedures in raising his qualification challenge. Insofar as the procedural issues raised for the first time in the Sur-Reply have been effectively rendered moot by our conclusion, and the Sur-Reply's arguments on the merits do not add materially to the discussion, we hereby deny the Sur-Reply.[10]

The Motion to Dismiss

Candidate McDuffie does not claim to have been actively engaged for the requisite time period as either an attorney in "the practice of law" in the District, a judge of a court in the District, or a professor of law in a law school in the District. Mr. Spiva does not contest that Candidate McDuffie is both an attorney and a District government employee. Thus, the precise question before the Board is whether Section (a)(5)(D) requires that a person seeking to qualify under this provision must have been "actively engaged" for the requisite time period "as an attorney employed in the District of Columbia by the District of Columbia."

Mr. Spiva asserts that in addition to being an attorney (*i.e.*, a member of the D.C. Bar in good standing) and a District employee, the candidate must also be actively engaged "*as an*

> a proposed nominee on the ballot both as to qualifications and to procedural formalities. In this manner, all challenges then formulated can be considered contemporaneously by this court.

Lawrence, supra, 611 A.2d at 531 (footnote omitted).

[10] In any event, we note that the arguments as to service of process were withdrawn during oral argument (although the Challenge was served upon Candidate McDuffie's counsel, as permitted). Moreover, the absence of a formal notarization to the signature on the Challenge (which was witnessed by a BOE employee) is non-prejudicial and waived, especially due to the absence of any question as to its authenticity and the genuineness of the challenge made.

attorney," and since Candidate McDuffie is not, in his capacity as a D.C. Councilmember, engaged "as an attorney," he is ineligible to hold the office of Attorney General. There is no dispute that a D.C. Councilmember need not be an attorney, as indeed, many Councilmembers are not attorneys.

Candidate McDuffie claims that an individual who is an attorney employed by the District need not also be engaged "as an attorney" in his or her position. He contends that qualification under Section (a)(5)(D) requires only that an individual have been a member of the D.C. Bar (in good standing) for the requisite time period, and that they have been employed in the District during that period of time by either the federal or District government, but not necessarily "as an attorney." Candidate McDuffie maintains that as a D.C. Councilmember he utilizes his legal skills and judgment, applying them to the job at hand, such as his time as Chair of the Committee on the Judiciary. Candidate McDuffie maintains that this interpretation would likewise allow any District employee (such as a school teacher) who happens to be an attorney in good standing with the D.C. Bar to likewise run for the office by virtue of being employed by the District, even if not in a capacity "as an attorney."

The Parties do not doubt that District employees who are hired as attorneys and carry the title of attorneys obviously qualify, such as the many Assistant Attorneys within the Office of Attorney General, Counsel for Agencies, or Counsel to the Councilmembers. The "fuzzy" area (as alluded to in oral argument) comes when one steps outside those obvious attorney roles and examines District employees who are neither hired nor function "as attorneys," but nevertheless work in roles where "legal issues" are considered by the District employee.

The Board's task at hand is to interpret the phrase "as an attorney" in the context of Section 1-301.83 as a whole. A basic principle of statutory interpretation is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or

superfluous, void or insignificant[.]" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal citations omitted). When engaging in statutory interpretation,

> "[w]e start, as we must, with the language of the statute." *Bailey v. United States*, 516U.S. 137, 144, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (*en banc*) (internal quotation marks and citation omitted). "Moreover, in examining the statutory language, it is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'" *Id.* (quoting *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979) (additional citation omitted)).

Tippett v. Daly, 10 A.3d 1123, 1126-27 (D.C. 2010).

It is also true that

> [a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. United States Postal Service*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006). "The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context." *FDA v. Brown Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Therefore, "we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them." *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 652 (D.C. 2005) (*en banc*). "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey*, 516 U.S. at 145, 116 S.Ct. 501. "Statutory interpretation is a holistic endeavor[.]" *Washington Gas Light Co. v. Public Service Comm'n*, 982 A.2d 691, 716 (D.C. 2009) (internal quotation marks and citations omitted).

Id. at 1127.

In examining the meaning of the language in Section (a)(5)(D), we start by stating what we believe it does *not* mean. In light of D.C. Official Code § 1–301.83(a)(5)(A), which establishes "[a]n attorney in the practice of law in the District of Columbia" as an alternative requirement for Attorney General, we do not believe that Section (a)(5)(D) requires an attorney who claims eligibility under that provision to be engaged in the "practice of law" (*i.e.* an attorney engaged by a client to perform legal services for consideration). Interpreting Section (a)(5)(D) to require

attorneys who are government employees to engage in the "practice of law" would render Section (a)(5)(A) superfluous and deprive it of adequate meaning. That said, Section (a)(5)(D) still requires an individual who claims to be eligible to serve as Attorney General pursuant to that provision to be employed "as an attorney" by either the federal or District government. The plain language of that provision, which requires one to have been, for the requisite time period, "actively engaged … as … an attorney employed in the District of Columbia by the … District of Columbia[,]" necessitates this result.

We acknowledge, as does Mr. Spiva, that Candidate McDuffie is an attorney and that he is employed in the District of Columbia by the District government. However, we find that more is required to be eligible to serve as the Attorney General under Section (a)(5)(D). We observe that the phrase "actively engaged" in the context of the statute refers to individuals serving or having served in specific positions: attorneys, judges, and law professors. We see no basis upon which to interpret Section 5(A)(D) such that it does not require individuals in this category to have served or be serving in the position of attorney. That is exactly what the provision states: "as an attorney"

Ultimately, we are persuaded by Mr. Spiva's argument, articulated in his Reply, that:

> [r]eading the [statute] to cover all D.C. Bar members who are employed by the District of Columbia government in any role whatsoever renders the phrase actively engaged … as … an attorney' superfluous. … While an attorney in practice, a judge, or a professor of law all must hold law degrees and apply their legal skills and experience to perform their daily work out of necessity, the same is not true for all District of Columbia government employees – unless of course they are employed as attorneys in positions where active D.C. Bar membership is a prerequisite. The only interpretation that gives meaning to all of the words of the statute and reads them as a cohesive whole is to read [Section (a)(5)(D)] as applying only to attorneys employed as attorneys, in roles where D.C. membership is a prerequisite.

We are also concerned by the implications of venturing outside the box of those District employees who are hired and act "as attorneys" and considering, on a case-by-case basis, arguments by those who are not actively engaged "as attorneys" that they are nevertheless the "functional equivalent" because their job entails reading laws, interpreting laws, and the like. If the door is opened for a D.C. Councilmember, who clearly need not be an attorney and does not hold a position "as an attorney," then why not open the door to all Council staff members who happen to be attorneys although are not acting as such, or any District agency employee so long as they happen to be a member of the D.C. Bar in good standing. During oral argument, no counsel could articulate how to "draw the line" on this slippery slope such that the Section (a)(5)(D) provision would essentially be reduced to adding one new requirement only (in addition to being a member of the D.C. Bar): a government employee, regardless of whether or not the person is "actively engaged…*as an attorney*."

The sounder approach, and one that gives effect to the plain language of Section (a)(5)(D) and the statute as a whole, is to interpret it exactly as it reads: that in addition to being a member of the D.C. Bar in good standing and employed by the government, the candidate must also be "actively engaged…*as an attorney*." Much as a Councilmember might benefit from being an attorney (like many government jobs), many Councilmembers are not attorneys, and it cannot be concluded, at least in this case, that being a Councilmember is enough to take the place of the express language of the provision that one must be "actively engaged…as an attorney."

Conclusion

Given our requirement to honor the plain and ordinary wording of the statute, we find that Candidate McDuffie has not, for the requisite time period, been "actively engaged . . . as . . . [a]n attorney employed in the District of Columbia by the United States or the District of Columbia."

For these reasons, he does not meet the qualification requirements to serve as Attorney General. Accordingly, it is hereby

ORDERED that Motion to Dismiss is denied, and it is further

ORDERED that the Challenge is upheld, and Candidate McDuffie is denied ballot access as a candidate for the office of Attorney General in the Primary Election.

Dated: April 18, 2022

Gary Thompson
Chair, Board of Elections

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS
WASHINGTON, DC 20003-4733

RECEIVED
MAR 29 2022
BY:

NOMINATING PETITION CHALLENGE RECEIPT

Date: March 29, 2022 **Time:** 11:51 AM

Challenged Candidate: Kenyan McDuffie
(print name)

Office Sought: Attorney General
(print office)

Challenger Name: Bruce V. Spiva
(print name)

Challenger's Full Address (*including Zip Code*): 1718 Crestwood Drive NW, Washington, DC 20011

I acknowledge receipt of the items indicated below:

☑ Challenge to a Nominating Petition Form

☑ A Challenge Containing 36 pages

Signature of Board Employee

Signature of Person Filing the Challenge

Name of Person Filing the Challenge: Heather A. Leins
(print name)

Full Address: 5425 39th Street NW, Washington, DC Zip Code: 20015

Daytime Phone Number: 202-719-4268 E-mail Address: hleins@wiley.law

RECEIVED
MAR 29 2022
BY:

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS
WASHINGTON, DC 20003-4733

NOMINATING PETITION CHALLENGE

In order for your challenge to be accepted, you must:

- allege the minimum number of signature defects that would, if valid, render the prospective candidate ineligible for ballot access
- specify the name(s), if legible, sheet, and line number(s) of any challenged signature(s); and
- specify the basis for the challenge(s) by citing the regulation that describes the defect in the petition or petition signature and providing a clear and concise explanation of the alleged petition or signature defect.

Challenger's Name: Bruce V. Spiva

Challenger's Residence Address: 1718 Crestwood Drive NW, Washington, DC 20011

Challenger's Mailing Address (if different): _____

Challenger's Phone Number: 202-253-4868

Challenger's Email Address*: bvspiva@gmail.com

Challenged Candidate: Kenyan McDuffie

Office Sought: Attorney General

*I understand that by providing my email address, I am consenting to the electronic receipt of any official Board communications regarding this challenge at the email address provided.

Signature of Challenger

-FOR OFFICE USE ONLY-

Date of Filing: 3/29/2022 Received by: _____
Signature of Board Official

CHALLENGE TO A NOMINATING PETITION

Bruce V. Spiva, a registered qualified elector in the District of Columbia, brings this challenge to the nominating petitions of Councilmember Kenyan McDuffie as candidate for Attorney General. District of Columbia law in relevant part requires an Attorney General candidate to have been "actively engaged" in the "practice of law" or "as an attorney employed" in the District of Columbia for five of the last ten years immediately prior to assuming office. Councilmember McDuffie has not practiced law or been actively engaged as an attorney employed in the District of Columbia in any of the last ten years, and therefore is not legally qualified to be on the ballot for or serve as Attorney General in January 2023.

The District of Columbia requires that a candidate for Attorney General be an experienced attorney and advocate who is ready to serve residents of the District as their attorney on day one. In 2010, the Council enacted and District voters overwhelmingly approved an amendment to the District of Columbia Charter transforming the Attorney General position into an independent, elected official. Charter Amendment IV includes specific, minimum qualifications for an Attorney General candidate, including the same experience requirement long established for judicial nominees to the District of Columbia Courts. An Attorney General candidate must have been "actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as: [a]n attorney in the practice of law in the District of Columbia" or "an attorney employed in the District of Columbia by the United States or the District of Columbia." D.C. Code § 1-301.83(a)(5)(A),(D).[1]

---

[1] Two other provisions that are not relevant to Councilmember McDuffie's experience allow a candidate to qualify if they have been actively engaged as a judge of a court in the District of Columbia or as a professor of law in a law school in the District of Columbia for five of the ten years preceding their assumption of the position of Attorney General. D.C. Code § 1-301.83(a)(5)(B),(C).

There is good reason for this experience requirement. As the leader and manager of a 700-person public law firm, the Attorney General represents D.C. residents' interests in almost 30,000 wide-ranging and complex cases every year. From fighting slumlords and protecting tenants' rights, to enforcing civil rights laws, protecting consumers from deceptive business practices, going after employers who violate workers' rights, helping parents with child support, and prosecuting crimes, the District's Attorney General must be ready to litigate and develop legal strategy as well as to lead as soon as their service begins. The Attorney General is also responsible for providing unbiased legal advice to the District's government agencies and, where appropriate, defending government agencies and Council legislative enactments from legal challenge. Prior significant experience in litigation and legal strategy is only made more necessary by the District's unique and complicated legal system, with its laws and actions subject to constant scrutiny and criticism from Congress and others, and with functions that typically would be performed by a city or county attorney's office entrusted to the District's Office of the Attorney General. In the District of Columbia, learning the legal skills the Attorney General needs while on the job is simply not an option.

Councilmember Kenyan McDuffie—who has not been engaged in the practice of law or been employed as an attorney for any of the past ten years—does not meet these minimum qualifications and does not have the experience required to run for Attorney General in the District.[2] For this reason, Bruce V. Spiva brings this challenge and respectfully requests that the Board of Elections issue a determination on the issue expeditiously and within the 20-day period prescribed by District of Columbia law.

---

[2] Profiles of Councilmember Kenyan McDuffie's work experience from LinkedIn and Wikipedia are attached as Exhibits A and B.

STATEMENT OF JURISDICTION & GROUNDS FOR CHALLENGE

Any registered qualified elector may file a petition challenging the validity of any nominating petition of a candidate for elected office within the ten days following the Board of Elections' public posting of the nominating petition, and this Board has jurisdiction to hear such a challenge. D.C. Code § 1-1001.08(o)(1). Challenges to the validity of a nominating petition may include "challenges to the placing of a proposed nominee on the ballot both as to qualifications and to procedural formalities." *Lawrence v. D.C. Bd. of Elections & Ethics*, 611 A.2d 529, 531 (D.C. 1992).

Challenger Bruce V. Spiva is a registered qualified elector, because he is a registered voter residing at the address listed in the Board's records. D.C. Code § 1-1001.02(20). Mr. Spiva challenges the nominating petitions filed by Councilmember Kenyan McDuffie as a candidate for Attorney General and publicly posted on March 26, 2022, because Councilmember McDuffie does not meet the minimum qualifications required to serve as Attorney General under D.C. Code § 1-301.83.

BACKGROUND

Qualifications to Serve as Attorney General for the District of Columbia

In 2010, the Council of the District of Columbia enacted the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010. D.C. Act 18-351, 57 D.C. Reg. 3012 (March 30, 2010). The purpose of the new law was to require the Attorney General to be qualified, independent, obligated to act in the public interest, and elected directly by the people. In discussing the need for minimum qualifications, the Committee on Public Safety and Judiciary noted that the Attorney General must be able to "manage a large law office," "be responsible for a broad range of legal matters," and be able to oversee a "diverse

range of legal responsibilities" spanning several areas of litigation. D.C. Council Comm. on Pub. Safety & Judiciary, "Report on Bill 18-65, 'Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009'" 5-6 (Dec. 16, 2009) ("Comm. Rep.").[3] The bill therefore "requires that the Attorney General be a member in good standing of the District of Columbia Bar for a minimum period of time, have engaged in the practice of law for a specified period of time, and be a bona fide resident of the District." *Id.* at 8. More specifically, the law as enacted establishes the following experience requirement:

> (a) No person shall hold the position of Attorney General for the District of Columbia unless that person:
>
> . . .
>
> (5) Has been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as:
>
> (A) An attorney in the practice of law in the District of Columbia;
>
> (B) A judge of a court in the District of Columbia;
>
> (C) A professor of law in a law school in the District of Columbia; or
>
> (D) An attorney employed in the District of Columbia by the United States or the District of Columbia.

D.C. Code § 1-301.83(a)(5).

The Council's choice to require actual experience as an attorney rather than require only bar membership was deliberate. A predecessor bill introduced in the prior Council session, the Attorney General of the District of Columbia Clarification Act of 2007, had simply required that the Attorney General "be a member in good standing of the District of Columbia bar for no less than 7 years at the time he or she assumes office" and "throughout his or her tenure as Attorney

[3] *Available at* https://lims.dccouncil.us/downloads/LIMS/22220/Committee_Report/ B18-0065-CommitteeReport1.pdf.

General." Bill 17-548, 55 D.C. Reg. 218 (Jan. 4, 2008).[4] Former and then-current Attorney Generals for the District, a former Councilmember and Chair of the Judiciary Committee, and several other witnesses testified at a public hearing on that bill in January 2008, and the D.C. Appleseed Center for Law and Justice subsequently submitted detailed written research findings and recommendations. Comm. Rep. at 23-53, 74-100, 114-133. These experts emphasized the need to tighten the bill to include a minimum experience requirement.

For example, Kathy Patterson, former Chair of the Committee on Public Safety and the Judiciary, explained:

> Because the attorney general is both the lawyer for the city and the manager of a significant government agency, both legal expertise and management experience are necessary to be successful in the position. I recommend that you add a reference to the practice of law in addition to membership in the bar. And you may wish to have a longer period of time engaged in the practice of law - say, 10 years.

Id. at 30-31, Test. of Kathy Patterson (Jan. 28, 2008). Former D.C. Attorney General Robert Spagnoletti also testified in support of a minimum practice requirement, emphasizing the unique breadth and depth of responsibilities of the office:

> [T]he Office of the Attorney General for the District of Columbia, while similar to many such offices across the country, is unique. It has the statutory obligation to conduct the District's "law business," which means exercising more than 300 mandatory and discretionary duties that — in most states — fall to city and county attorneys as well as state Attorneys General. Thus, in addition to conducting the District's civil litigation, it is responsible for virtually every aspect of the city's law practice. This includes real estate, tax, bankruptcy, child protection, domestic violence, mental health, economic development, juvenile delinquency, antitrust, consumer protection, and all of the city's appellate work. The Office also shares criminal prosecution authority with the US Attorney's Office, handling more than 10,000 criminal matters annually.

---

[4] *Available at* https://lims.dccouncil.us/Legislation/B17-0548.

Id. at 24, Test. of Robert J. Spagnoletti (Jan. 28, 2008); *see also id.* at 43, 52, Test. of Peter J. Nickles, Interim Atty. Gen. (Jan. 28, 2008) (describing the breadth of functions of the Attorney General and noting that bar membership alone would be a "token requirement"); *id.* at 74-100, 114-33, Comments of D.C. Appleseed Center for Law & Justice, Inc. (Sept. 5, 2008) (recommending minimum qualifications, including minimum-experience requirement, based on multi-state survey and interviews with D.C. stakeholders). The Committee Report accompanying the revised 2010 bill makes clear that the Council strengthened the minimum qualifications in response to these comments and recommendations. *See id.* at 5-6, 8, 12-13.

In order to strengthen the minimum qualifications, the Council adopted language patterned on the following longstanding statutory qualification for judges serving on the District of Columbia's Courts:

> (b) A person may not be appointed a judge of a District of Columbia court unless that person —
>
> . . .
>
> (2)
>
> (A) is a member of the bar of the District of Columbia and
>
> (B) (i) has been a member of such bar for a period of at least five years, or
>
> (ii) in the case of a professor of law in a law school in the District of Columbia or of an attorney employed in the District of Columbia by the United States or the District of Columbia, has been eligible for membership in the bar of the District of Columbia for at least five years prior to appointment;
>
> (3) has been actively engaged, for at least five of the ten years immediately prior to appointment, as an attorney in the practice of law in the District of Columbia, as a judge of a District of Columbia court, as a professor of law in a law school in the District of Columbia, or as an attorney employed in the District of Columbia by the United States or the District of Columbia . . .

D.C. Code § 11-1501. This provision was part of the Congressional act to reorganize the District's Courts as part of Home Rule, the District of Columbia Reform and Criminal Procedure Act of 1970. Pub. L. 91-358, 84 Stat. 473 (July 29, 1970). The District of Columbia Charter, enacted in 1973, later superseded this provision with nearly identical language:

> (b) No person may be nominated or appointed a judge of a District of Columbia court unless the person —
>
> . . .
>
> (2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the five years immediately preceding the nomination or for such five years has been on the faculty of a law school in the District, or has been employed as a lawyer by the United States or the District of Columbia government . . .

D.C. Code § 1-204.33. The revised Attorney General of the District of Columbia Clarification Act of 2009 was introduced with language nearly identical to the provision in the 1970 courts reorganization bill. The only relevant differences, italicized below, strengthen the existing provision for judges, requiring seven (instead of five) years of membership in or eligibility for membership in the D.C. Bar:

> (a) No person shall hold the position of Attorney General for the District of Columbia unless that person:
>
> . . .
>
> (2) Is a member in good standing of the bar of the District of Columbia;
>
> (3) (A) Except as provided in subparagraph (B), has been a member in good standing of the bar of the District of Columbia for at least *seven* years prior to assuming the position of Attorney General;
>
> (B) In the case of a professor of law in a law school in the District of Columbia or of an attorney employed in the District of Columbia by the United States or the District of Columbia, *has been employed in such capacity for at least five years* and has been eligible for membership in the bar of the District of Columbia for at least *seven* years prior to appointment;
>
> (4) Has been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as an attorney in the practice of law in the District of Columbia, as a judge of

> the District of Columbia court, as a professor of law in a law school in the District of Columbia, or as an attorney employed in the District of Columbia by the United States or the District of Columbia.

Bill 18-65, *supra* (emphasis added). In sum, in choosing qualifications for the new elected Attorney General position, the Council chose minimum qualifications nearly identical to those long established for judges—and indeed, in at least one respect, stronger requirements.

The Council's choice to require qualifications above and beyond bar membership is not unique. While some states simply require their Attorney Generals to be licensed as members of the state bar, other states impose practice requirements. For example, the Maryland Attorney General must have "practiced Law in th[e] State for at least ten years," Md. Const. Art. V § 4, a requirement similar to, though not as specific as, the District's. The Maryland Court of Appeals enforced this requirement in a 2007 decision, interpreting the plain language of the Maryland constitutional provision to require practice in the state of Maryland as a member of the Maryland Bar for at least ten years, and thus holding candidate Tom Perez ineligible to run for Attorney General. *See Abrams v. Lamone*, 919 A.2d 1223 (Md. 2007). Tom Perez had been a practicing attorney employed by the U.S. Department of Justice in various capacities for ten years, had run the Office of Civil Rights at the U.S. Department of Health and Human Services for another two years, and then had supervised students in practice as a law professor in Maryland for three years. *See id.* at 1226-27. The Court of Appeals held that this experience was insufficient to meet the Maryland requirement, because the majority of Mr. Perez's years of practice had not been in the state of Maryland as a member of the Maryland Bar. *See id.* at 1239-48. In so holding, the Court rejected various arguments that the practice requirement should be interpreted more liberally:

> Moreover, we decline to give the provision, and specifically the phrase at issue, a different meaning "on such theories that a different meaning would make [it]

> more workable, or more consistent with a litigant's view of good public policy, or more in tune with modern times, or [on the theory] that the framers of the provision did not actually mean what they wrote."

Id. at 1241 (*quoting Bienkowski v. Brooks*, 873 A.2d 1122, 1134 (Md. 2005)). The same approach should be applied in interpreting the District's minimum qualifications.

The Council's choice to require minimum qualifications for candidates for Attorney General of the District of Columbia was affirmed by the people. Following approval by the Council, as well as Mayoral and Congressional review, the new requirements for the Office of Attorney General, including the minimum qualifications now found at D.C. Code § 1-301.83, were placed on the ballot in the 2010 election as Charter Amendment IV. Voters overwhelmingly approved the Charter Amendment, which was "ratified by almost 76 percent of the electorate." *Zukerberg v. D.C. Bd. of Elections*, 97 A.3d 1064, 1070 (D.C. 2014).

Councilmember Kenyan McDuffie's Career

Councilmember Kenyan McDuffie graduated from the University of Maryland School of Law in 2006 and became a member of the Maryland Bar on December 13, 2006. Ex. A, LinkedIn, "Kenyan McDuffie" (last accessed Mar. 21, 2022); Ex. B, Wikipedia, "Kenyan McDuffie" (last accessed Mar. 21, 2022); Ex. C, Maryland Courts, "Maryland Attorney Listing," Kenyan McDuffie (last accessed Mar. 22, 2022). After graduating from law school, Mr. McDuffie served as a law clerk to a Prince George's County, Maryland Associate Judge for one year, and then as an assistant state's attorney in Prince George's County for one year. Exs. A, B. On June 16, 2008, Mr. McDuffie became a member of the District of Columbia Bar. Ex. D, District of Columbia Bar, "Find a Member Results," Kenyan McDuffie (last accessed Mar. 22, 2022). In 2008, Mr. McDuffie became an attorney in the Civil Rights Division of the U.S. Department of Justice. Exs. A, B. Two years later, in 2010, he left the Department of Justice to

run in the election for the Ward 5 representative to the Council of the District of Columbia. *Id.* Following an election defeat, Mr. McDuffie became a legislative and policy advisor to the District's Deputy Mayor for Public Safety and Justice in 2011, a position he held for a year. *Id.* All told, it appears from the public record that Kenyan McDuffie spent at most two years practicing law as a member of the District of Columbia Bar.

In 2012, Councilmember McDuffie won a special election for Ward 5 Council representative. *Id.* He took office in January 2013, and was re-elected in 2014 and 2018. *Id.* He continues to serve in this role today. *Id.* There is no public record that the undersigned has been able to find of Councilmember McDuffie having practiced law while serving as a Councilmember. Accordingly, without regard to the number of years Councilmember McDuffie was actively engaged in the practice of law in D.C. prior to becoming a Councilmember, it is clear that during the ten years immediately preceding the date the next Attorney General will take office in January 2023 (i.e., since January 2013), Councilmember McDuffie has not been actively engaged in the practice of law, and though he has been employed by D.C., it has not been as an attorney.

ARGUMENT

I. The Board of Elections Has Jurisdiction to Determine Whether Councilmember Kenyan McDuffie Meets the Minimum Qualifications to Serve as Attorney General.

The District's elections statute provides the Board of Elections with broad authority to ensure that all candidates for elected office meet the minimum qualifications prescribed by law, specifically authorizing the Board to ensure that any candidate for Attorney General meets "the qualifications required by [D.C. Code] § 1-301.83 before the day on which the election for Attorney General is to be held." *Id.* § 1-1001.08(b)(1)(D).

Candidates for elected office must file a Declaration of Candidacy with the Board, along with their nominating petitions, including a statement that the candidate "meets the qualifications for holding the office sought." 3 D.C.MR § 601.2(h). The Board's Executive Director makes a preliminary determination of eligibility based "solely upon information contained in the Declaration of Candidacy and upon information contained in other public records and documents as may be maintained by the Board." *Id.* §§ 601.6, 601.8. A preliminary finding of eligibility does not preclude "further inquiry into or challenge to the eligibility of an individual for candidacy or office made prior to the certification of election results," and the initial determination may be reversed "based upon evidence which was not known to the Executive Director at the time of the preliminary determination." *Id.*

Candidates also must present a sufficient number of nominating petitions for their name to be placed on the ballot. D.C. Code § 1-1001.08(i). On the third day after the deadline to submit these nominating petitions, and coinciding with the initial determination of qualification to hold office, the Board posts the nominating petitions in a public place, opening a ten-day period within which any registered qualified elector may file a petition challenging the validity of any nominating petition. *Id.* § 1-1001.08(o)(1). Challenges to the validity of a nominating petition may include "challenges to the placing of a proposed nominee on the ballot both as to qualifications and to procedural formalities." *Lawrence v. D.C. Bd. of Elections & Ethics*, 611 A.2d 529, 531 (D.C. 1992).

Petitioner Bruce V. Spiva is a registered qualified elector, because he is a registered voter residing at the address listed in the Board's records, and therefore has standing to bring this challenge. D.C. Code § 1-1001.02(20).

II. Councilmember McDuffie Does Not Meet the Minimum Qualifications Required of Candidates to Serve as Attorney General of the District of Columbia.

Neither Councilmember McDuffie's two years as a practicing attorney in the District of Columbia over ten years ago, nor his role as Ward 5's representative on the D.C. Council, qualify him to run for Attorney General. To serve as Attorney General, a candidate must be a registered qualified elector, a bona fide resident in the District of Columbia, a member in good standing of the District of Columbia Bar currently and for the past five years, and meet the following experience requirement:

> (5) Ha[ve] been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as:
>
> (A) An attorney in the practice of law in the District of Columbia;
>
> (B) A judge of a court in the District of Columbia;
>
> (C) A professor of law in a law school in the District of Columbia; or
>
> (D) An attorney employed in the District of Columbia by the United States or the District of Columbia.

D.C. Code § 1-301.83(a)(5). Councilmember McDuffie is not a judge in a District of Columbia court, nor is he a professor of law in a law school in the District. He has spent at most two years practicing law as an attorney in the District of Columbia, and that work took place over ten years ago. Indeed, he has spent the entirety of the ten years immediately preceding the date on which he would assume office as Attorney General should he prevail in the election (in January 2023) as the Ward 5 representative on the Council of the District of Columbia, not actively engaged in the practice of law and not as an attorney employed by the District. He therefore is ineligible to serve as Attorney General of the District of Columbia.

A. Councilmember McDuffie Has Not Been Actively Engaged for Five of the Last Ten Years as an Attorney in the Practice of Law in the District of Columbia.

The Rules of the District of Columbia Court of Appeals govern admission to the District of Columbia Bar and, along with the D.C. Rules of Professional Conduct, regulation of the practice of law in the District of Columbia. Rule 49 of the Rules of the District of Columbia Court of Appeals defines the "practice of law" as "providing professional legal advice or services where there is a client relationship of trust or reliance." D.C. App. R. 49(b)(2). With limited exceptions, practicing law in the District of Columbia requires active membership in the District of Columbia Bar. Rule 49 lists examples of what is included in the practice of law: preparing legal documents, appearing in court, or providing legal advice and counsel to another person. The practice of law encompasses not only attorneys providing these services directly, but also those attorneys supervising or managing other attorneys' work. It also encompasses attorneys who are employed by the United States or District of Columbia government to provide legal services to the government. Among other provisions, Rule 49 specifically addresses attorneys who are engaged in the practice of law "as a lawyer for the government of the District of Columbia" "provid[ing] legal services to the government of the District of Columbia." *Id.* at R. 49(c)(4) (allowing these attorneys to practice for up to 360 days before joining the D.C. Bar).

Councilmember McDuffie's work over the past ten years as Ward 5 representative on the D.C. Council does not constitute the practice of law. The residents of Ward 5 are his constituents, not his clients, and he is their political representative, not their attorney. He does not maintain attorney-client relationships with his constituents, and the services he provides as their political representative are not legal services. As a result, neither he nor any other Councilmember is required to be a member of the District of Columbia Bar to provide those services. No matter how useful a legal education may be to a member of the D.C. Council, no

Councilmember is employed by the District *as an attorney*, because the position does not require a law degree, much less admission to practice as a member of the D.C. Bar. Only four of the thirteen current Councilmembers are attorneys, and many of the Council staff who draft legislation and engage in similar tasks also are not attorneys.[5] Indeed, the Council has its own Office of General Counsel to provide those legal services, including advising Councilmembers and staff on legal matters and representing the Council in any legal action to which it is a party. It is the attorneys in the Office of General Counsel, not the Councilmembers themselves, who are actively engaged in the practice of law, including representing the Council as their client.[6]

B. Councilmember McDuffie Has Not Been Actively Engaged for Five of the Last Ten Years as an Attorney Employed in the District of Columbia by the United States or District of Columbia.

For similar reasons, Councilmember McDuffie's role as the Ward 5 representative on the D.C. Council does not meet the requirement that he be actively engaged as an attorney employed by the District of Columbia government. While it is true that as a Councilmember McDuffie is both an attorney and a District of Columbia government employee, he is not employed "*as an attorney*." D.C. Code § 1-301.83(a)(5)(D). He is not providing legal services to the District of

---

[5] At the time the statute was enacted in 2010, five of thirteen Councilmembers were attorneys - Councilmembers David Catania, Mary Cheh, Jack Evans, Jim Graham, and Tommy Wells. Councilmember Michael A. Brown was a law school graduate but never became a member of the bar. The other six members - Chairman Vincent Gray and Councilmembers Marion Barry, Muriel Bowser, Kwame Brown, Phil Mendelson, Harry Thomas, Jr. - had no formal legal training.

[6] Reinforcing this understanding is the treatment of lobbyists and lobbying activities under the Rules of the District of Columbia Court of Appeals and the District of Columbia Rules of Professional Conduct. Both the Committee on Unauthorized Practice of Law of the District of Columbia Court of Appeals and the District of Columbia Bar have concluded that lawyers, law firms, and lobbying associates may conduct lobbying activities in the District of Columbia without their conduct constituting the practice of law. *See* D.C. Bar Ethics Op. 344 (July 2008); Unauthorized Practice of Law Opinion 19-07, Applicability of Rule 49 to U.S. Legislative Lobbying (Dec. 17, 2007).

Columbia by serving as a member of the Council—a job that does not require a law degree or bar membership.

This plain language reading of the statutory text is reinforced by comparison to other contexts. For example, the same language is used in the statute governing judicial nominees to District of Columbia Courts, and it has been interpreted in this manner. As explained by the D.C. Judicial Nomination Commission, the experience requirement is satisfied by an attorney "engaged in the active practice of law in the District of Columbia for the five years preceding the nomination...*serving as an attorney* in the U.S. or District of Columbia government expressly counts." Judicial Nomination Commission, *Joining the District of Columbia Courts* (Jan. 2016) (emphasis added).[7] A Councilmember is not "serving as an attorney" and would not qualify under that longstanding standard for judicial nomination, which informed the standard the Council and then the voters adopted for the Attorney General.

C. The History of the Elected Attorney General Charter Amendment Supports the Same Conclusion.

In interpreting statutory text, this Board must look to the plain language first, giving the words of the text their ordinary meaning. *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983). To the extent any particular provision could have more than one meaning, the Board should adopt an interpretation that makes sense of the statute as a whole. *Cass v. District of Columbia*, 829 A.2d 480, 482 (D.C. 2003). The Board can look to legislative history to confirm that its interpretation is consistent with and effectuates the legislative purpose, particularly if the plain language of the statute is unclear. *Cass*, 829 A.2d at 486-87; *Peoples Drug Stores*, 470 A.2d at 754.

[7] *Available at* https://jnc.dc.gov/sites/default/files/dc/sites/jnc/publication/attachments/Joining%20the%20District%20of%20Columbia%20Bench.pdf.

Here, the plain language of the statutory text fully supports the conclusion that an Attorney General candidate who has not been engaged in the practice of law by representing clients for any time during the past ten years, and also has not been employed by the United States or District government as an attorney during this time period, does not meet the required minimum qualifications. To the extent the plain language of the statute leaves any doubt or potentially admits of more than one meaning—and it does not—evidence of the intent of the Council in enacting this minimum experience requirement for future Attorney Generals confirms that interpretation. The Council initially proposed an experience requirement that simply looked to years of membership in the District of Columbia Bar. Bill 17-548, *supra*. Witnesses with extensive knowledge regarding the D.C. legal system and the role of the Attorney General—including holders of the office—then testified in support of requiring more specific experience, given the scope and magnitude of legal issues handled by the Office of the Attorney General. Comm. Rep. at 23-53. The Council responded by adopting language requiring the same level of experience for the Attorney General as that required for judges nominated to the District of Columbia Courts—*active* engagement in the *practice of law* or government employment *as an attorney* during five of the past ten years. *Id.* at 1-22.

This legislative history fully supports a finding that the Council intended the minimum experience requirement to have the import and impact the plain language suggests, imposing a degree of presumptive capability appropriate for the complex obligations the Attorney General of the District of Columbia must perform. This Board should enforce the statutory requirement by finding that Councilmember McDuffie lacks eligibility to stand as a candidate for Attorney General.

Conclusion

Challenger Bruce V. Spiva requests that the Board of Elections promptly consider this challenge to determine whether Councilmember Kenyan McDuffie meets the minimum qualifications required by the District of Columbia to serve as Attorney General. Mr. Spiva and his counsel are available at the Board's convenience for any proceedings necessary for the Board to reach its decision within the prescribed 20 days, including any pre-hearing conference and hearing.

Date: March 29, 2022

Respectfully submitted,

/s/ Theodore A. Howard
Theodore A. Howard
Wiley Rein, LLP
2050 M St., NW
Washington, D.C. 20036
(202) 719-7120
thoward@wiley.law
Counsel for Challenger

/s/ Bruce V. Spiva
Bruce V. Spiva
bspiva@spivafordcag.com
Challenger

CERTIFICATE OF SERVICE

On March 29, 2022, Counsel for Challenger Theodore A. Howard electronically served a courtesy copy of this Challenge on Councilmember Kenyan McDuffie via his contact on file with the Board of Elections, Marisa Flowers, team@mcduffie22.com.

/s/ Theodore A. Howard
Theodore A. Howard

Exhibit A

LinkedIn, "Kenyan McDuffie"

Kenyan McDuffie
DC Councilmember (Ward 5), Candidate for Attorney General

Message

Experience

Council of the District of Columbia
10 yrs 3 mos

Ward 5 Councilmember and Chair Pro Tempore (Vice Chair)
May 2012 - Present · 9 yrs 11 mos
washington d.c. metro area

Kenyan R. McDuffie | District of Columbia Councilmember - Ward 5
It is an honor to represent Ward 5 on the Council of the District of Columbia. Since taking office, I have focused...

Ward 5 Candidate
Jan 2012 - May 2012 · 5 mos
Ward 5, Washington, DC

Legislative and Policy Advisor
District of Columbia Office of the Deputy Mayor for Public Safety and Justice
2011 - Jan 2012 · 1 yr 1 mo
Washington D.C. Metro Area

Ward 5 Candidate (Primary Election)
Council of the District of Columbia
2010 · Less than a year
Ward 5, Washington, DC

Trial Attorney
U.S. Department of Justice, Civil Rights Division
2008 - 2010 · 2 yrs

Assistant State's Attorney
Office of the State's Attorney for Prince George's County, MD
2007 - 2008 · 1 yr

Judicial Law Clerk
7th Judicial Circuit of Maryland
2006 - 2007 · 1 yr

Public Defender Service
2004 · Less than a year

Aide to Delegate Eleanor Holmes Norton
U.S. House of Representatives
2002 - 2003 · 1 yr

Community Outreach Liason
North Capitol Neighborhood Improvement
2001 · Less than a year
Washington, DC

Exhibit B

Wikipedia, "Kenyan McDuffie"

WIKIPEDIA

Kenyan McDuffie

Kenyan R. McDuffie (born c. 1975) is an American lawyer and Democratic politician in Washington, D.C. He is a member of the Council of the District of Columbia representing Ward 5 since 2012.

Kenyan McDuffie

Member of the Council of the District of Columbia from Ward 5

Incumbent

Assumed office
May 30, 2012

Preceded by Harry Thomas Jr.

Personal details

Born	1975 (age 46–47)
Political party	Democratic
Education	University of the District of Columbia Howard University (BA) University of Maryland, Baltimore (JD)

Contents

Early life

McDuffie grew up in Stronghold, a neighborhood in Ward 5 in Washington, D.C.[1] After graduating from Woodrow Wilson High School, he sold ice cream at the National Zoo in Washington D.C. and briefly attended the University of the District of Columbia.[2] He later worked for the United States Postal Service, delivering mail in the Friendship Heights and Spring Valley neighborhoods.[2]

After four years with the Postal Service, McDuffie enrolled in the University of the District of Columbia before graduating from Howard University summa cum laude with a bachelor's degree in political science and community development[3] in 2002.[4] He received a juris doctor from University of Maryland School of Law[5] in 2006. At the University of Maryland School of Law, he served as an Associate Editor of The University of Maryland Journal of Race, Religion, Gender, and Class, and research assistant to then-Professor Tom Perez.[4]

Following his graduation, McDuffie was hired by Prince George's County, Maryland, first working as a law clerk for an Associate Judge on the 7th Judicial Circuit of Maryland and later as an assistant state's attorney where he prosecuted misdemeanor and felony cases in District Court and on appeal in Circuit Court.[5] McDuffie later worked for Delegate Eleanor Holmes Norton in both her local constituent services office and Capitol Hill office, where he drafted legislation.[6] In 2008, he served

as a trial attorney for the Civil Rights Division of the U.S. Department of Justice, where he conducted investigations and managed complex cases throughout the United States regarding enforcement of key federal civil rights statutes, including defending the rights of the mentally ill. During his tenure at DOJ, he worked on cases to reform the policies and procedures of police departments.[1][5] In 2010, McDuffie became a policy advisor to Public Safety and Justice Deputy Mayor Paul Quander,[5][7] serving as a liaison to public safety agencies.[8] He has also served as president of the Stronghold Civic Association.[9]

Political career

2010 election

In February 2010, McDuffie resigned from his position in the mayor's administration[10] and declared his candidacy to represent Ward 5 on the Council of the District of Columbia.[1] McDuffie supported expanding employment opportunities and tackling HIV.[6] He criticized incumbent Harry Thomas Jr. for being reactive rather than proactive.[6] During his campaign, McDuffie stressed several urgent problems in the ward, including lack of quality education, lack of effective job-training programs, lack of affordable housing, and a need for more services for senior citizens.[11] Thomas won the Democratic Party primary election[12] and went on to win the general election as well.[13]

2012 election

In January 2012, Thomas resigned from the Council and pleaded guilty to two federal crimes: theft and filing three years of false tax returns.[14] McDuffie entered the special election to fill the vacant Ward 5 seat.[15]

The District's firefighter union, the Service Employees International Union Maryland and DC State Council, National Nurses United union, Local 25 Hospitality Workers' Union, AFL-CIO, DC Latino Caucus, Gertrude Stein Democratic Club and Councilmember Tommy Wells[16] endorsed McDuffie's candidacy.[16][17][18][19]

McDuffie won the special election,[20] receiving 43 percent of the votes.[21]

2014 election

McDuffie ran for re-election in the 2014 election[22] and won the primary against Kathy Henderson, Advisory Neighborhood Commissioner for Carver Langston;[23] and Carolyn C. Steptoe, Advisory Neighborhood Commissioner for Brookland.[24] Libertarian Preston Cornish is the only candidate who opposed him in the General Election.[25][26] He was re-elected with 83.93% of the vote.

2018 election

McDuffie ran for re-election in the 2018 election. He won with 79.3% of the vote, defeating Kathy Henderson, Joyce Robinson-Paul, and Amone Banks on November 6, 2018.

D.C. Council Committees

Committee on Government Operations, Chair (2013 - 2015)

As Chairman of the Committee on Government Operations, McDuffie successfully passed campaign finance reform to close the "LLC loophole," which historically has allowed limited liability companies to make campaign contributions well above individual limits. His bill also requires campaigns to report all fundraising data online for the Office of Campaign Finance to publish publicly, mandates campaign finance training for candidates, expands the range of penalties for violations, and restricts money order donations to $100. Additionally, the legislation requires lobbyists to disclose any contributions bundled and forwarded to a campaign. This bill constituted the most significant reform in the financing, accountability, and transparency of District elections seen in years.[27]

Judiciary Committee, Chair (2015 - 2017)

As Chair, McDuffie oversaw sweeping updates to the District's criminal justice law. He passed comprehensive juvenile justice reform that ended the use of solitary confinement, life sentences, and indiscriminate shackling of juveniles in court. McDuffie also oversaw the creation of the police body-worn camera program, including ensuring that there was a fair process for the video footage to be made public. He advanced "Ban the Box" legislation that bans the use of criminal background checks in housing as well as passing legislation to end the unfair use of credit history in hiring.[28] McDuffie also passed the innovative Neighborhood Engagement Achieves Results Act (NEAR Act),[29] which reforms the District's criminal justice system by incorporating behavioral and mental health professionals to perform tasks that previously fell to law enforcement officers.[30]

Committee on Business and Economic Development, Chair (2017 - present)

In 2017, McDuffie was appointed the Chairman of the Committee on Business and Economic Development and remains in that role currently.[31] Kenyan has focused on tackling systemic barriers to access capital and supporting workers & small businesses. He introduced the Clean Hands Certification Equity Amendment Act of 2021, a bill that reduces the obstacles imposed on small business owners, returning citizens, and low-income residents to obtain licenses and permits.[32] He was also a leader in pandemic recovery and reopening efforts, providing support for the nightlife industry, advocating for equitable recovery, and helping to secure $100 million to assist District businesses. McDuffie also prioritized addressing the District's racial wealth gap through the Child Wealth Building Act, a child trust fund, or "baby bonds," aimed at eliminating the District's stark racial wealth gap and ending generational poverty.[33]

As a leader on racial equity and social justice in the District, McDuffie passed the transformative REACH Act (Racial Equity Achieves Results) in 2020.[34] This legislation established the Office of Racial Equity, led by the District's new Chief Equity Officer, created a new Racial Equity Impact Assessment for Council legislation, and established the Council Office on Racial Equity (CORE), which trains all DC government employees on racial equity, creates a Racial Equity Tool to ensure the District government is accountable and establishes a Commission to advance racial equity into the future. In the same year, he introduced legislation to create a Task Force to research and develop reparation proposals for African American descendants of slavery.[35]

In addition, McDuffie serves as a member of the following committee's:[36]

- Committee on Transportation and the Environment
- Committee on Housing and Executive Administration
- Committee on Recreation, Libraries and Youth Affairs

Personal life

McDuffie lives on North Capitol Street with his wife, Princess, and their daughters, Jozi and Kesi.[37]

References

1. Abrams, Amanda (June 26, 2010). "Where We Live: The Stronghold neighborhood of Northeast Washington" (https://www.washingtonpost.com/wp-dyn/content/article/2010/06/25/AR2010062500216.html). *The Washington Post*.
2. "A New Councilman for D.C.'s Ward 5" (http://thekojonnamdishow.org/shows/2012-05-16/new-councilman-dcs-ward-5). *The Kojo Nnamdi Show*. WAMU-FM. May 16, 2012.
3. "Kenyan McDuffie" (http://lawyers.law.cornell.edu/lawyer/kenyan-mcduffie-774779). *Legal Information Institute*. Cornell University Law School. Retrieved May 17, 2012.
4. Suderman, Alan (May 23, 2012). "The Thomas Antidote" (http://www.washingtoncitypaper.com/blogs/looselips/2012/05/23/the-thomas-antidote/). *Washington City Paper*.
5. Craig, Tim; DeBonis, Mike (May 15, 2012). "Kenyan McDuffie wins Ward 5 seat on D.C. Council in race to replace Thomas" (https://www.washingtonpost.com/local/dc-politics/ward-5-special-election-turnout-picks-up-after-heavy-rains/2012/05/15/gIQAhA3mRU_story.html). *The Washington Post*.
6. Marimow, Ann E. (August 11, 2010). "Harry Thomas Jr.'s challengers say deep roots aren't enough in D.C. Council's Ward 5 race" (https://www.washingtonpost.com/wp-dyn/content/article/2010/08/10/AR2010081006255.html). *The Washington Post*.
7. DeBonis, Mike (April 29, 2012). "Council candidates try to reassure Ward 5 voters" (https://www.washingtonpost.com/local/dc-politics/council-candidates-try-to-reassure-ward-5-voters/2012/04/29/gIQA34n5pT_story.html). *The Washington Post*.
8. Howell Jr., Tom (May 16, 2012). "Gray: McDuffie 'an outstanding choice' for Ward 5" (http://www.washingtontimes.com/news/2012/may/16/gray-mcduffie-outstanding-choice-ward-5/). *The Washington Times*.
9. Salmon, Barrington M. (March 29, 2012). "'Tenacity' Puts Hunter Back into Council Race" (http://washingtoninformer.com/index.php/local/item/6110-hunter-knocks-on-ward-5-council-door-again). *The Washington Informer*.
10. Howell Jr., Tom; Noble, Andrea (May 15, 2012). "McDuffie wins Ward 5 D.C. Council seat handily" (http://www.washingtontimes.com/news/2012/may/15/early-turnout-light-for-vote-to-replace-5ths-thoma/). *The Washington Times*.
11. "2010 Election: Kenyan McDuffie" (http://projects.washingtonpost.com/elections/2010/dc/city-councilor/1429/kenyan-mcduffie/). *The Washington Post*. 2010.
12. "Primary Election 2010 Certified Results" (https://web.archive.org/web/20110725221954/http://www.dcboee.org/election_info/election_results/results_2010.asp?prev=0&electionid=4&result_type=3). *District of Columbia Board of Elections and Ethics*. September 29, 2010. Archived from the original (http://www.dcboee.org/election_info/election_results/results_2010.asp?prev=0&electionid=4&result_type=3) on July 25, 2011.

13. "General Election 2010 Certified Results" (https://web.archive.org/web/20101106010504/http://www.dcboee.org/election_info/election_results/general_election_results/2010). *District of Columbia Board of Elections and Ethics*. November 19, 2010. Archived from the original (http://www.dcboee.org/election_info/election_results/general_election_results/2010) on November 6, 2010. Retrieved March 14, 2013.
14. DeBonis, Mike (January 5, 2012). "Harry Thomas Jr. charged: What happens next" (https://www.washingtonpost.com/blogs/mike-debonis/post/harry-thomas-jr-charged-what-happens-next/2012/01/05/gIQAZNO4cP_blog.html). *The Washington Post*.
15. DeBonis, Mike (January 6, 2012). "The Ward 5 special election contenders" (https://www.washingtonpost.com/blogs/mike-debonis/post/the-ward-5-special-election-contenders/2012/01/06/gIQAdIcufP_blog.html). *The Washington Post*.
16. Craig, Tim (May 9, 2012). "Special council election comes at an anxious time for D.C.'s Ward 5" (https://www.washingtonpost.com/local/dc-politics/2012/05/09/gIQAPZDSEU_story.html). *The Washington Post*.
17. Howell Jr., Tom (April 11, 2012). "Separating from pack in Ward 5 race tough" (http://www.washingtontimes.com/news/2012/apr/11/separating-from-pack-in-ward-5-race-tough/). *The Washington Times*.
18. Chibbaro Jr., Lou (April 22, 2012). "Stein Club endorses McDuffie in Ward 5 Council race" (http://www.washingtonblade.com/2012/04/22/stein-club-endorses-mcduffie-in-ward-5-council-race/). *Washington Blade*.
19. "The DC Latino Caucus PAC Announces Support of Kenyan McDuffie for Ward 5 Councilmember" (http://www.dclc.org/docs/supportforkmcduffiemay2012.pdf) (PDF) (Press release). District of Columbia Latino Caucus. May 11, 2012.
20. Chibbaro Jr., Lou (May 16, 2012). "McDuffie wins Ward 5 Council race" (http://www.washingtonblade.com/2012/05/16/gay-backed-candidate-wins-ward-5-council-race/). *Washington Blade*.
21. "Unofficial Election Results: District of Columbia Special Election May 15, 2012" (http://www.voteresults.org/may152012.asp). *District of Columbia Board of Elections and Ethics*. Retrieved May 30, 2012.
22. "Candidates - April 1, 2014 Primary Election" (https://web.archive.org/web/20160226120519/https://www.dcboee.org/election_info/election_results/2014/November-4-General-Election). *District of Columbia Board of Elections*. January 2, 2014. Archived from the original (https://www.dcboee.org/election_info/election_results/2014/November-4-General-Election) (pdf) on February 26, 2016. Retrieved February 16, 2014.
23. "Advisory Neighborhood Commission 5D" (https://www.webcitation.org/6NRKVQmrE?url=http://anc.dc.gov/page/advisory-neighborhood-commission-5d). *District of Columbia Board of Elections*. Archived from the original (http://anc.dc.gov/page/advisory-neighborhood-commission-5d) on February 16, 2014. Retrieved February 16, 2014.
24. DeBonis, Mike (January 27, 2014). "Has Kenyan McDuffie brought fractious Ward 5 together at last?" (https://www.washingtonpost.com/blogs/mike-debonis/wp/2014/01/27/has-kenyan-mcduffie-brought-fractious-ward-5-together-at-last/). *The Washington Post.*.
25. "Preston Cornish" (https://www.lp.org/candidates/liberty-candidates-14/preston-cornish). *Libertarian Party*. Retrieved September 3, 2014.
26. "Preston Cornish" (https://twitter.com/Cornish4Council). *Twitter*. Retrieved September 3, 2014.
27. Cohen, Matt; Hughes, Sarah Anne. "Council Unanimously Approves Campaign Finance Reform Legislation" (https://dcist.com/story/13/12/04/dc-council-unanimously-approves-cam/). *dcist.com*. WAMU 88.5. Retrieved 4 November 2021.
28. Patterson, Kathleen. "The Impact of "Ban the Box" in the District of Columbia" (https://lims.dccouncil.us/downloads/LIMS/35902/Introduction/AU21-0046-Introduction.pdf) (PDF). Office of the District of Columbia Auditor. Retrieved 4 November 2021.

29. "Bill 21-0360" (https://lims.dccouncil.us/Legislation/B21-0360). D.C. Register. Retrieved 4 November 2021.
30. *Council of the District of Columbia*. Council of the District of Columbia https://dccouncil.us/council/kenyan-mcduffie/ (https://dccouncil.us/council/kenyan-mcduffie/). Retrieved 3 November 2021. {{cite web}}: Missing or empty |title= (help)
31. "Resolution R22-0002" (https://lims.dccouncil.us/Legislation/PR22-0002). D.C. Register.
32. "Bill 24-0237" (https://lims.dccouncil.us/Legislation/B24-0237). D.C. Register. Retrieved 3 November 2021.
33. Austermuhle, Martin. "Low-Income D.C. Kids Will Get Up To $1,000 A Year Under New 'Baby Bonds' Program" (https://dcist.com/story/21/10/20/low-income-dc-kids-will-get-up-to-1000-a-year-under-baby-bonds-program/). *dcist.com*. WAMU 88.5. Retrieved 3 November 2021.
34. "Bill 23-0968" (https://lims.dccouncil.us/Legislation/B23-1000). D.C. Register. Retrieved 3 November 2021.
35. Diller, Nathan. "D.C. Could Explore Reparations For Descendants Of Enslaved People" (https://www.npr.org/local/305/2020/10/07/921122447/d-c-could-explore-reparations-for-descendants-of-enslaved-people). *npr.com*. Retrieved 3 November 2021.
36. "Ward 5 Councilmember Kenyan R. McDuffie • Council of the District of Columbia" (http://dccouncil.us/council/kenyan-mcduffie/). *Council of the District of Columbia*. Retrieved Nov 3, 2021.
37. "Kenyan McDuffie Enters Race for Ward 5 Seat" (https://web.archive.org/web/20130908124220/http://www.thecapitalnews.com/wp-content/uploads/2013/03/2012-02.pdf) (PDF). *The Capital News*. February 2012. p. 3. Archived from the original (http://www.thecapitalnews.com/wp-content/uploads/2013/03/2012-02.pdf) (PDF) on 2013-09-08.

Retrieved from "https://en.wikipedia.org/w/index.php?title=Kenyan_McDuffie&oldid=1062754091"

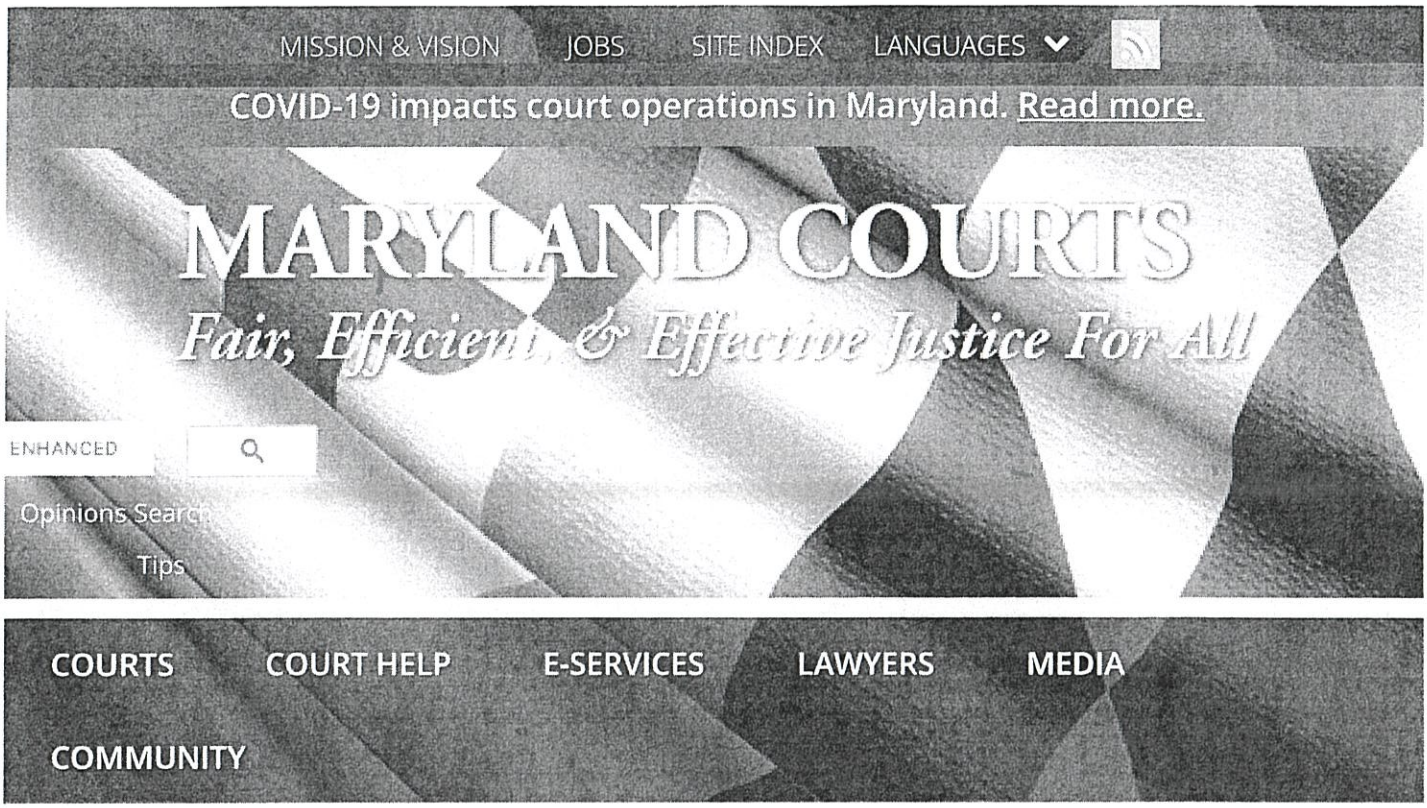
This page was last edited on 30 December 2021, at 09:21 (UTC).

Text is available under the Creative Commons Attribution-ShareAlike License 3.0; additional terms may apply. By using this site, you agree to the Terms of Use and Privacy Policy. Wikipedia® is a registered trademark of the Wikimedia Foundation, Inc., a non-profit organization.

Exhibit C

Maryland Courts, "Maryland Attorney Listing"

Kenyan McDuffie



Maryland Attorney Listing

This listing is an index of all attorneys who have been admitted to the bar in the State of Maryland. The list includes attorneys authorized to practice, as well as those who may no longer be authorized to practice because they are on inactive/retired status, are serving as judges, or because of a disciplinary or administrative action that affects their eligibility to practice. Any attorney whose status is listed as "active" is considered in good standing and is authorized to practice law.

If you are unable to find a name you are searching for, or if you have questions about the listing, please contact the **Maryland Court of Appeals Clerk's Office at 410-260-1500**. The Maryland Judiciary provides this information as a public service. Information contained in this listing is believed to be accurate but is not guaranteed.

To search the attorney listing:

- Partial names can be entered. Enter as many known characters of the last name as possible. If you are unsure of the spelling, click the "similar last names" check box.
- Do not include abbreviations such as Jr. and Sr. in the last name field.
- Search results are limited to 100 matches. Enter a partial or full first name to reduce the number of matches.

The information displayed is drawn from the Attorney Information System (AIS). Changes made to AIS may not appear immediately on this list. The data is refreshed regularly and changes made in AIS should appear within approximately one hour.

Attorney Search

mcduffie ☐ (check for similar last names)

kenyan

Search New Search

Found 1 match(es).

Atty ID	Last Name	First Name	Address	Phone	Admitted	Status
0612130102	MCDUFFIE	KENYAN R.			12/13/2006	Active

YOU ARE IN:

Lawyers

Amicus Curiarum

Appointed Attorneys Program

Attorney Code/Address Change (District Court Only)

Attorney Grievance Commission

Attorney Information System (AIS)

Attorney Listing

Attorney Compliance Requirements

Bar Associations

Board of Law Examiners

Certificate of Good Standing

Change of Address

Client Protection Fund

Commission on Judicial Disabilities

Disciplinary Actions

E-Filing

Fee Waiver Procedures

Guardianship Proceedings

Judicial Vacancies

Legal Resources

Pro Bono

Rules Committee/Rules Orders

Copyright © 2022 Maryland Judiciary. All rights reserved. Terms of Use/Disclaimer

Exhibit D

District of Columbia Bar, "Find a Member Results"

Kenyan McDuffie

(https://www.dcbar.org/)

(https://join.dcbar.org/eweb/StartPage.aspx?site=dcbar)

Share Print

Membership

Find A Member Search Results

Records matching your search criteria: 1

Search Again (DynamicPage.aspx?Site=dcbar&WebCode=FindMember)

To learn if there is any disciplinary proceedings for the following attorneys, please visit the disciplinary system (https://www.dcbar.org/attorney-discipline/disciplinary-decisions).

See the Membership Classes (https://www.dcbar.org/for-lawyers/membership/classes-of-membership) page for a complete description of license types and status definitions.

1. **Kenyan Renard McDuffie**

   Membership Status: GOOD STANDING
   Membership Type: ACTIVE ATTORNEY
   Date of Admission: 06/16/2008

For Lawyers (https://www.dcbar.org/for-lawyers)

Membership (https://www.dcbar.org/for-lawyers/membership)
Resources (https://www.dcbar.org/for-lawyers/external-resources)
Continuing Legal Education (https://www.dcbar.org/for-lawyers/continuing-legal-education)
Communities (https://www.dcbar.org/for-lawyers/communities)
Legal Ethics (https://www.dcbar.org/for-lawyers/legal-ethics)
Lawyer Assistance Program (https://www.dcbar.org/for-lawyers/lawyer-assistance-program)

Practice Management Advisory Service (https://www.dcbar.org/for-lawyers/practice-management-advisory-service)

For the Public (https://www.dcbar.org/for-the-public)

Legal Resources (https://www.dcbar.org/for-the-public/legal-resources)

Hiring a Lawyer (https://www.dcbar.org/for-the-public/hiring-a-lawyer)

Free Legal Help (https://www.dcbar.org/pro-bono/free-legal-help)

Resolve Attorney Problems (https://www.dcbar.org/for-the-public/resolve-attorney-problems)

Representing Yourself (https://www.dcbar.org/for-the-public/representing-yourself)

D.C. Courts (https://www.dccourts.gov/)

For Students (https://www.dcbar.org/for-students)

Committee on Admissions (https://www.dcbar.org/for-lawyers/membership/joining-the-d-c-bar)

Communities (https://www.dcbar.org/for-students)

Regulation Council (https://www.dcbar.org/for-lawyers/lawyer-assistance-program/who-we-help/law-students)

Fulfill My Community Service (https://www.dcbar.org/for-students/pro-bono-opportunities-for-law-students)

Student Volunteer Opportunities (https://www.dcbar.org/for-students/pro-bono-opportunities-for-law-students)

About (https://www.dcbar.org/about)

Who We Are (https://www.dcbar.org/about/who-we-are)

Awards (https://www.dcbar.org/about/awards)

Frequently Asked Questions (https://www.dcbar.org/about/faqs)

Get Involved (https://www.dcbar.org/about/get-involved)

Employment Opportunities (https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=bad4b6e6-1272-437f-945c-31c2bbefc978)

About the Pro Bono Center (https://www.dcbar.org/pro-bono/about-the-center)

Donate to the Pro Bono Center (https://www.dcbar.org/pro-bono/donate)

Contact Us (https://www.dcbar.org/about/contact)

Serving our members so they can serve the community

901 4th Street, NW, Washington, DC 20001
202.737.4700

(https://www.linkedin.com/company/dc-bar/) (https://www.facebook.com/DCBarAssociation) (https://www.instagram.com/dcbarassociation/)

© 2022 The District of Columbia Bar. All rights reserved.
Terms of Use (https://www.dcbar.org/terms-conditions)
Privacy Policy (https://www.dcbar.org/privacy-notice)

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS
1015 Half Street SE
Suite 750
Washington, DC 20003
(202) 717-2525 Phone (202) 347-2648 Fax

BRUCE V. SPIVA, Complainant, v. KENYAN R. MCDUFFIE, Respondent.	No. 22-_____ Re: Challenge to Candidacy of Kenyan McDuffie for Attorney General

RESPONDENT'S MOTION TO DISMISS COMPLAINANT'S CHALLENGE TO QUALIFICATIONS AS A CANDIDATE

Kenyan R. McDuffie ("Respondent"), candidate for Attorney General, files this motion to dismiss Bruce V. Spiva's ("Complainant") challenge to Respondent's qualifications as a candidate for District of Columbia Attorney General, pursuant to D.C. Mun. Regs. tit. 3, § 412.5(e). For the reasons set forth herein, taking all of Complainant's factual allegations as true, he has failed to state a claim for which relief can be granted, and the Board of Elections ("Board") should dismiss his complaint without the need for a hearing.

INTRODUCTION

In 2010, D.C. voters overwhelmingly ratified an amendment to the District Charter making the position of District of Columbia Attorney General elected by the people, rather than appointed by the Mayor. In crafting the new framework for the elected Attorney General, the Council intentionally sought to ensure a candidate pool to allow attorneys from a broad spectrum of the D.C. Bar to run. This law and its history are now being invoked in a perverse attempt to ignore the clear statutory requirements that qualify a native Washingtonian who has, without

dispute, spent more than a decade as a public servant and attorney, to be a candidate for Attorney General.

The Board should not indulge any effort to turn back the clock on democracy, a democracy that has been so long denied to D.C. residents by denying them the opportunity to elect their Attorney General. Nor can it, as a matter of law. The plain language of the statute, the legislative history, and the relevant case law make clear that Respondent's qualifications are *precisely* what the Council contemplated when it decided that members of the Bar who have been actively engaged as an attorney employed in the District of Columbia by the District of Columbia for five of the past 10 years are qualified to run for Attorney General under D.C. Code § 1-301.83(a)(5)(D).

The Council's objective was not to reserve the position of the District's chief legal officer to the most well-connected of the white shoe legal establishment that has happened to locate here, more often than not to profit from matters before the federal government in which D.C. residents are denied full representation. The Council's intent was not to further subject D.C. residents to governance by hand-picked elites, but to give D.C. voters the opportunity to make a choice from the diverse array of experiences and backgrounds of District attorneys in the D.C. Bar.

It is undisputed that Respondent has been engaged as an attorney for five of the last 10 years. It is undisputed that during this time, he has been employed in the District. And it is undisputed that this employment has been with the District government. Thus, it cannot be disputed that the Respondent "[h]as been actively engaged" for the requisite time as "[a]n attorney employed in the District of Columbia by . . . the District of Columbia" as required by

D.C. Code § 1-301.83(a)(5)(D). Accordingly, Respondent is clearly qualified as a candidate for Attorney General, and Complainant's complaint should be dismissed for failing to state a claim.

STANDARD OF REVIEW

D.C. Mun. Regs. tit. 3, § 412.5(e) is nearly identical to D.C. Superior Court Rule 12(b)(6). Pursuant to this rule, dismissal is proper where "taking the material allegations of the complaint as admitted, and construing them in [complainant's] favor, the court finds that the [complainant] ha[s] failed to allege all the material elements of their cause of action." *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007). A complainant must plead "sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." *Id.*

ARGUMENT

The Board should dismiss the complaint because it fails to state a claim for which relief may be granted. Taking all the Complainant's factual allegations as true, Respondent has been actively engaged as an attorney employed in the District by the District for the required period, and, accordingly, is qualified to be candidate for Attorney General under D.C. Code § 1-301.83(a)(5)(D).

1. Respondent Has Been Actively Engaged As an Attorney Employed in the District by the District, and Is Therefore Qualified Under D.C. Code § 1-301.83(a)(5)(D).

Complainant's complaint presents the Board with one, simple question that can be decided on the parties' filings without a hearing: Has Respondent, as an attorney member of the Council of the District of Columbia, been actively engaged as an attorney employed by the District in the District for five of the past 10 years? The answer is clearly yes, under the plain language of the statute, as confirmed by the legislative history and case law.

A. The District's Minimum Qualifications for Serving as Attorney General

The minimum qualifications and requirements for holding the position of Attorney General are set forth by D.C. Code § 1-301.83(a). The requirements are that a person must:

- Be a registered qualified elector
- Be a *bona fide* resident of the District
- Be a member in good standing of the District of Columbia Bar, and have been a member in good standing of the District of Columbia Bar for at least five years prior to assuming the office, and
- Have been actively engaged, for at least five of the 10 years immediately preceding years, as:
    - An attorney in the practice of law in the District of Columbia,
    - A judge of a court in the District of Columbia,
    - A professor of law in a law school in the District of Columbia, or
    - An attorney employed in the District of Columbia by the United States or the District of Columbia.

D.C. Code § 1-301.83(a).

The Council adopted these requirements through the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009, A. 18-351, § 103(a), 57 D.C. Reg. 3012, 3014 (Apr. 9, 2010) ("Act").[1] The purpose of the Act was to "codif[y] the

[1] Complainant erroneously states that the qualifications were placed before the voters as a proposed charter amendment to suggest that it was the voters' will to deny someone of Respondent's qualifications the opportunity to run for Attorney General. Complaint at 9. The qualifications were enacted through the ordinary legislative process and applied upon completing congressional review, regardless of the outcome of the charter amendment referendum. Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009, A. 18-351, § 302, 57 D.C. Reg. 3012, 3018 (Apr. 9, 2010). The only provision of the Act that was—or could be—placed before the voters for ratification as a charter amendment was Section 202, which proposed to amend the charter to make the attorney general elected. Elected Attorney General Referendum Emergency Amendment Act of 2011, § 2, 58 D.C. Reg. 3878 (Apr. 27, 2011) (amending the applicability date of the Act's provision amending the District

institutional independence and make[] modifications to strengthen the position of Attorney General through the establishment of minimum qualifications and a term of services."[2] The Act additionally authorized an amendment to the District Charter making the Attorney General elected, rather than appointed by the Mayor. *See* D.C. Code § 1-204.35. District voters ratified that change by 76% in the 2010 general election.

The legislative history does not speak directly to § 1-301.83(a)(5)(D) ("Subparagraph (D)"), which allows for an individual to qualify for the office by having been actively engaged as an "attorney employed in the District of Columbia by the United States or the District of Columbia." The intent of the qualifications requirements generally, however, as expressed by the D.C. Council, was to "ensure[] experience, connection and commitment to the District." Committee Report at 8. The history suggests that the Council desired to have an appropriately tailored, but expansive candidate pool to accomplish this.[3]

The Committee Report includes the hearing record for the Act's original introduction as Bill 17-548, the Attorney General of the District of Columbia Clarification Act of 2007 ("2007 Bill"). The "("2007 Bill") required the attorney general to be: (1) a member in good standing of

---

Charter—Section 202—to depend on ratification by the voters pursuant to the charter amendment process).

[2] Committee on Public Safety and the Judiciary, Report on Bill 18-65, "Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009" at 1–2 (Dec. 16, 2009), https://lims.dccouncil.us/downloads/LIMS/22220/Committee_Report/B18-0065-CommitteeReport1.pdf ("Committee Report").

[3] Legal experts share this analysis of the legislative history. According to Kathleen Clark, a legal ethics expert and vice chair of the DC Bar's Global Legal Practice Committee, "The council decided to allow more flexibility, a wider range of experience to count as meeting the experience requirements. It's true that in the years [Respondent] has served as a council member he's not acting as a lawyer on behalf of a client. But he is a lawyer, trained as a lawyer and has some experience as a lawyer." Michael Brice-Saddler, *Spiva Challenges McDuffie's Eligibility in D.C. Attorney General Race*, Wash. Post (Mar. 29, 2022), https://www.washingtonpost.com/dc-md-va/2022/03/29/dc-attorney-general-spiva-mcduffie-challenge/.

the District of Columbia Bar for no less than 7 years, (2) be a member in good standing of the District of Columbia Bar throughout the tenure as Attorney General, and (3) be a resident of the District of Columbia or become a resident of the District within 180 days after taking office. Among the witnesses to testify at the hearing on the 2007 Bill were Robert Spagnoletti, who served as (appointed) Attorney General from 2003 to 2006, and former Councilmember Kathy Patterson, who chaired the Council's Judiciary Committee from 2001 to 2004. Mr. Spagnoletti urged the Council to consider allowing a candidate with seven years of experience—as opposed to D.C. Bar membership—because many attorneys can work in the District without being a member of the D.C. Bar, such as federal government attorneys. Committee Report, Spagnoletti Testimony at 3. Ms. Patterson spoke to the variety of expertise and experience that are needed to succeed as Attorney General. Committee Report, Patterson Testimony at 2.

The language of Subparagraph (D) was not included in the 2007 Bill, but was included in the Act as introduced in the subsequent Council period and eventually passed. Thus, consistent with the testimony of Mr. Spagnoletti and Ms. Patterson, the Council ultimately decided to tailor the qualifications for serving as Attorney General to broaden the candidate pool to ensure "experience, connection, and commitment to the District."

B. Respondent Is Qualified to be a Candidate for Attorney General under Subparagraph (D).

To determine whether an attorney Councilmember in Respondent's position is qualified to be a candidate for the office of Attorney General, accepted rules of statutory construction must be applied to Subparagraph (D).

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Chamberlain*, 931 A.2d at 1023. "A basic principle [of statutory construction] is that each provision of the statute should be construed so as

to give effect to all of the statute's provisions, not rendering any provision superfluous." *D.C. Bd. of Elections & Ethics v. District of Columbia*, 866 A.2d 788, 795 (D.C. 2005) (internal citations omitted). Based on that principle, the addition of Subparagraph (D) to the list of qualifications must represent, in order to give it meaning and to not subsume it within D.C. Code § 1-301.83(a)(5)(A), an expansion of the concept of simply "practicing law."

More specifically, to give meaning to Subparagraph (D), it must be distinguished from the alternative requirements of being "actively engaged" as either an attorney in the practice of law in the District of Columbia, a judge of a court in the District, or a professor of law in a law school in the District (alternative statutory requirements). D.C. Code § 1-301.83(a)(5). Under the express language, practicing law, serving as a judge, working as a law professor, or being an attorney employed in the District by the District are each distinct engagements. If one is actively engaged in the practice of law, the individual need not be a judge, law professor, or attorney employed in the District by the District to qualify. Similarly, if one is actively engaged as an attorney employed in the District by the District, the individual need not also be engaged in the practice of law, as a judge, or as a law professor. It is true that some attorneys employed in the District by the United States or the District of Columbia are attorneys "in the practice of law in the District of Columbia." Subparagraph (D), however, necessarily encompasses another category of attorneys who are employed in the District by the United States or the District, but who are not actively engaged "in the practice of law in the District."

i. Councilmember McDuffie is Actively Engaged as (1) an Attorney (2) Employed by the District (3) in the District of Columbia, as Required by Subparagraph (D).

A Councilmember who meets the threshold requirements of being a qualified elector, resident, and Bar member, and who is an attorney employed in the District of Columbia by the District of Columbia, is qualified under Subparagraph (D). A Councilmember in Respondent's

position is necessarily an attorney employed in the District, by the District government. As a member of the Bar, such a Councilmember may "[h]old out as authorized or competent to practice of law in the District of Columbia," including by indicating that he is an "*attorney*." *See* D.C. Ct. App. R. 49(b)(4). Since Respondent is actively engaged as an attorney (meaning an active attorney), employed in the District of Columbia, by the District, he meets the requirements of Subparagraph (D) by its plain language.

In fact, Complainant admits that Respondent is both an attorney and a Councilmember. Complaint at 14. Since this admission is fatal to the complaint, Complainant goes on to contend that Respondent is not qualified because "he is not employed '*as an attorney*.'" Complaint at 14. The statute's requirement, however, is to be an engaged (i.e., active) attorney "employed in the District of Columbia by . . . the District of Columbia." D.C. Code § 1-301.83(a)(5)(D). Whether the attorney's position of employment includes the title "attorney" or requires Bar membership is irrelevant. *See* Complaint at 15. Under the statute, and for Subparagraph (D) to have meaning, if the attorney is employed by the District in the District, the attorney is qualified.

Further, Complainant's reliance on the Judicial Nominating Commission's commentary is also not persuasive. *See* Complaint at 15. As presented by Complainant, this commentary conflates "serving as an attorney" with being "engaged in the active practice of law." The legislature, however, cannot be afforded this level of ambiguity in its use of language. The statute already provides for active practice being one of four possible ways to be qualified, under D.C. Code § 1-301.83(a)(5)(A). For Subparagraph (D) to also require active practice would render it meaningless and superfluous.

ii. In any Case, Respondent is Actively Engaged "As An Attorney."

However, even if serving "as an attorney" is somehow distinguishable from "being an attorney" employed by the District in the District, Respondent is "actively engaged as an attorney" (i.e., acting as an attorney) as required. *See* D.C. Code § 1-301.83(a)(5)(D). He has elected to be an active attorney in good standing with the D.C. Bar, which he may without actively practicing law. As such, he may hold himself out as an attorney and is subject to the D.C. Bar's Rules of Professional Conduct at all times. For example, it is professional misconduct for an attorney to "engage in conduct involving, deceit, or misrepresentation" in "whatever capacity they are acting," even when not representing clients. D.C. Bar Ethics Op. 323 (quoting Rule 8.4(c)), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-323. Given his standing professional obligations as a member of the Bar, he, as an attorney, cannot work as a Councilmember without also being actively engaged as an attorney and upholding the standards for attorney ethical conduct.

Furthermore, Respondent is actively engaged with the legal profession as a member of multiple voluntary bar associations, including the Washington Bar Association and the National Bar Association. Through these memberships, he has participated in legal conferences, panels, and other events, as well as received awards. These include being named by the National Bar Association as "Top 40 Trailblazers Under 40" and receiving the association's Trailblazer Award at the Young Lawyers Division conference in 2016. In these respects, Respondent is clearly actively engaged as, and in acting as, an attorney.

Additionally, although working as a Councilmember does not require one to be an attorney, Respondent applies his knowledge and skills as an attorney in doing so. In this capacity, he has authored numerous laws and exercised oversight over multiple District agencies

to evaluate their compliance with legal obligations, and supervised the attorneys employed on his staff. As a Councilmember, Respondent routinely investigated the real-world impact of District laws on residents, assessed legal barriers to better outcomes for the public, and crafted laws designed fundamentally to advance the greater good. These include the Racial Equity Achieves Results Amendment Act, juvenile justice reform, the police body-worn camera program, the Neighborhood Engagement Achieves Results Act, and public financing of elections. Respondent has dedicated his career as an attorney and public servant to use the law to "uphold[] the public interest." D.C. Code § 1-301.81(a)(1). This is, by law, the core obligation of the Attorney General.

Complainant's narrow definition of what it means to be an attorney, for purposes of D.C. Code § 1-301.83(a)(5)(D), would disqualify attorneys who have dedicated their careers to public service from candidacy simply due to their job title or for not actively practicing law. This is not at all what the Council intended. Just as the Council decided that judges and law professors who did not have active legal practices were qualified, so too are individuals who are actively engaged as non-practicing attorneys employed in the District by the District.

iii. A Candidate Need Not Also Be Actively Engaged in the Practice Law to Qualify Under Subparagraph (D).

Under the Attorney General qualifications statute, a Councilmember does not also need to be in the "practice of law in the District" to run for Attorney General because, as discussed above, so long as he or she is an attorney, he or she is qualified under Subparagraph (D). S (D) is just one of several alternative means to qualifying for Attorney General, in addition to "active practice."

To this point, although the D.C. Court of Appeals has not construed the provision establishing qualifications for the office, in a decision by the Montana Supreme Court is

instructive. *See Cross v. VanDyke*, 332 P.3d 215 (Mont. 2014). The issue there was whether a person who was in inactive status with the state Bar was qualified to run for the office of justice of the state supreme court. *Id.* at 215–216. Under the state constitution, the officeholder must be "admitted to the practice of law" in the state for at least five years prior to the election. *Id.* at 217. In reaching its conclusion that the candidate was qualified, the court distinguished the "admitted to the practice law" requirement from the additional requirement for candidates for attorney general, which included that the candidate must "engaged in the active practice" of law. *Id.* at 219. Thus, the Montana court recognized a clear distinction between an "active practice" requirement, and other types of requirements.

District law provides for such alternative qualification requirements. Being "actively engaged . . . [a]s an attorney *in the practice of law* in the District of Columbia" is one way to qualify to run for Attorney General, but it is not the *exclusive* way to be so qualified. An attorney who is *not* actively engaged in the practice of law can be qualified by being employed in the District by the U.S. or District government, such as serving as a member of the Council of the District of Columbia, or as a judge or law professor in the District.

Complainant focuses nearly exclusively on the "active practice" provision in an attempt to disqualify Respondent. He cites a Maryland Court of Appeals case holding that Maryland's constitutional requirement to have "practiced Law in this State for at least ten years" barred the candidacy of an attorney who had actively practiced outside the state. Complaint at 8 (citing *Abrams v. Lamone*, 919 A.2d 1223 (Md. 2007)). Yet this case only highlights the distinct nature of the District's requirements. There is no need for the District law to "be interpreted more liberally" to determine that Respondent is qualified because District already includes multiple ways to be qualified. *See* Complaint at 8. While the District may not be unique in requiring

qualifications beyond Bar membership, the Board should, of course, consider only those qualifications that are *actually set forth in the District's statute*. Unlike under the Maryland Constitution, active practice is but one of several ways to qualify under District law. The Council deliberately chose to have multiple ways to qualify so as to ensure a broader representation of the Bar could come before the voters and take on the wide-ranging responsibilities of the office.

2. The Board Should Not Hold a Hearing Because There are No Material Facts at Issue.

If the Board were to hold a hearing in this case, it would take evidence, evaluate the evidence, and issue a decision. *See* D.C. Mun. Regs. tit. 3, § 407; *see also* D.C. Code § 2-509. In this case, however, there is no material fact in dispute. The issue before the Board is purely legal: Whether Respondent, as an attorney and Councilmember, is actively engaged as an attorney employed in the District by the District is qualified to be a candidate for Attorney General under D.C. Code § 1-301.83(a)(5)(D). Holding a hearing to take evidence would serve no purpose in the absence of any dispute over material facts. It also would not benefit the Board or the public, given approaching deadlines to finalize the ballot for the June 21, 2022 election. Upon the parties fully briefing the complaint, the Board will have the information necessary to decide this purely legal case without a hearing.

CONCLUSION

There is no material fact in dispute in this case. The parties agree that Respondent is an attorney, and is employed in the District by the District. The Board need not look further than the statute and the parties' filings to conclude that Respondent is therefore qualified to be on the ballot as a candidate for Attorney General under D.C. Code § 1-301.83(a)(5)(D). Complainant devotes the bulk of the complaint to discussing how Respondent is not engaged "in the practice

of law" and not "employed as an attorney." Yet Complainant never acknowledges that practicing law is one of several ways to be qualified, as was the Council's intent. One could alternatively be a judge, or a law professor, or, like Respondent, actively engaged as an attorney employed in the District by the District. The actual requirement at issue here is to be an attorney "employed in the District of Columbia by . . . the District of Columbia"—which precisely describes Respondent.

For the foregoing reasons, Respondent respectfully requests that the Board dismiss Complainant's complaint for failure to state a claim for which relief may be granted and allow the voters to make their choice as to who will be the Attorney General for the District of Columbia.

Respectfully submitted,

GOLDBLATT MARTIN POZEN LLP

By: */s/ Thorn Pozen*

Thorn L. Pozen (D.C. Bar: 463061)
Kevin M. Hilgers (D.C. Bar: 1022820)
1432 K Street, N.W., Suite 400
Washington, D.C. 20005
(202) 795-9999 (phone)
(202) 795-9192 (facsimile)
khilgers@gmpllp.com
tpozen@gmpllp.com
Counsel for Respondent

Dated: April 6, 2022

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2022 a copy of the foregoing document was filed with the Board of Elections via email as follows:

D.C. BOARD OF ELECTIONS
Christine Pembroke
Senior Staff Attorney
1015 Half Street, S.E.
Washington, D.C. 20003
(202) 727-2525
cpembroke@dcboe.org

and served on the following via email:

WILEY REIN, LLP
Theodore A. Howard
2050 M Street, N.W.
Washington, D.C. 20036
(202) 719-7120
thoward@wiley.law
Counsel for Complainant

/s/ Kevin Hilgers
Kevin M. Hilgers (D.C. Bar: 1022820)

DISTRICT OF COLUMBIA BOARD OF ELECTIONS
1015 Half Street, SE, Suite 750
Washington, DC 20003

Bruce Spiva, Complainant. v. Kenyan McDuffie, Respondent.	No. 22-_____ Re: Challenge to Candidacy of Kenyan McDuffie for Attorney General

REPLY & OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Respondent Kenyan McDuffie's Motion to Dismiss clarifies the issues before this Board in resolving whether Mr. McDuffie meets the qualifications to serve as Attorney General of the District of Columbia. Mr. McDuffie does not attempt to argue he has been actively engaged as an attorney in the practice of law in the District of Columbia for five of the past ten years. Resp. Mot. at 2-3, 10-12. As he concedes, Mr. McDuffie can only meet the statutory qualifications to serve as Attorney General if this Board determines he is "actively engaged. . .as. . .an attorney employed in the District of Columbia by. . .the District of Columbia." D.C. Code § 1-301.83(a)(5)(D). But he is not. While Mr. McDuffie is a dedicated public servant, he is not employed as an attorney in his role as Ward 5 Councilmember. For this reason, he does not meet the minimum qualifications established by the Council and approved by the voters to serve as Attorney General of the District of Columbia.

1. To Be Actively Engaged as an Attorney Employed by The District of Columbia, the Position Must Require a Law Degree and Bar Membership.

As Mr. McDuffie notes, a cardinal rule of statutory construction is that statutes should be read to give meaning to all of their words and phrases. The plain language of section 1-301.83(a)(5)(D) requires that a candidate for Attorney General relying on subsection D's eligibility criterion, as is Mr. McDuffie, be employed "as an attorney" by the District of Columbia to qualify. Mr. McDuffie reads this language as applying to any attorney who happens to be employed by the District of Columbia. Resp. Mot. at 8. However, many attorneys with law degrees and bar membership go on to a variety of careers, including in the public sector. D.C. Public Schools teachers, dual-degree M.B.A. recipients working on economic issues, and countless other District employees are attorneys with active bar memberships who have decided to take a break from the practice of law or use their skills in other ways. While all of these individuals are dedicated public servants, they are not employed "as an attorney" by the District of Columbia government. The Council may have intended to sweep broadly in considering who might qualify to serve as Attorney General—and previously in crafting who might qualify to serve as judge, with an identical practice requirement—but that breadth is not infinite.

This interpretation of section 1-301.83(a)(5)(D) does not render the provision superfluous. There are many District of Columbia government employees who are employed *as attorneys*, but nonetheless are not—or at least arguably are not—practicing law. For example, hearing examiners and administrative judges at the D.C. Office of Employee Appeals and many other agencies are required to be admitted to the D.C. Bar, and thus employed as attorneys, but their roles are quasi-judicial and do not involve representing specific District of Columbia agencies or other clients. *See, e.g.*, D.C. Code § 1-606.01(m). One might therefore argue that these attorneys are not "actively engaged. . .as. . .an attorney in the practice of law," as

contemplated by section 1-301.83(a)(5)(A). The Council, however, wanted to ensure that these types of District of Columbia government employees would be eligible to serve as Attorney General, just as they appropriately qualify to serve as District of Columbia judges. Section 1-301.83(a)(5)(d) accomplishes that objective.

District of Columbia law recognizes this distinction between attorney and non-attorney government employees in other ways. Executive Branch employees who are required to be licensed attorneys as a prerequisite for their positions must submit a certificate of good standing from the D.C. Bar every year to maintain their employment. D.C. Code § 1-608.81. As the Council recognized in crafting this requirement, it is not only attorneys, but also hearing officers and administrative law judges, who are required to be licensed members of the D.C. Bar to hold their positions in the District of Columbia government. *Id.* § 1-608.81(a). A similar requirement applies to individuals employed by the D.C. Council as attorneys, i.e., "each attorney who is required to be a member of the District of Columbia Bar as a prerequisite of employment, and who is employed by the Council." *Id.* § 1-608.82(a). While a range of District government employees are required to be licensed attorneys as a prerequisite for their positions, *members* of the D.C. Council, like Mr. McDuffie, are not. Rather, like schoolteachers, economists, or others in non-attorney government positions, Councilmembers may benefit from having a law degree—or indeed any other degree or life experience—but that does mean they are "actively engaged. . .as. . . .an attorney" in their work for the District of Columbia government.[1]

---

[1] Some Councilmembers have maintained an active law practice while serving on the Council, including former Councilmember Jack Evans. Councilmember Mary Cheh maintains active outside employment as a professor at a District of Columbia law school. Mr. McDuffie, however, does not claim to have represented clients, practiced law, or served in any other qualifying capacity. The fact that Mr. McDuffie has participated in voluntary bar associations and received awards from these groups, as he notes in his response, does not change the analysis. Resp. Mot. at 9.

2. It Is Mr. McDuffie's Interpretation That Would Render Parts of the Statute Superfluous.

Contrary to Mr. McDuffie's arguments, it is Mr. Spiva's interpretation of the statute that "read[s] its text as a whole," giving meaning to all of its words and reading them in harmony, not Mr. McDuffie's. *Zukerberg v. D.C. Bd. of Elections*, 97 A.3d 1064, 1075 (D.C. 2014). The statute already requires all candidates for Attorney General to be members of the D.C. Bar. If the Council had wanted to ensure that any District of Columbia government employee who also is an active member of the D.C. Bar would be eligible to serve as Attorney General, there simply would have been no reason to include the phrase "actively engaged. . .as. . .an attorney" in subsection D:

> (a) No person shall hold the position of Attorney General for the District of Columbia unless that person:
>
> . . .
>
> (3) ***Is a member in good standing of the bar of the District of Columbia***;
>
> . . .
>
> (5) Has been ***actively engaged***, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, ***as***:
>
> (A) An attorney in the practice of law in the District of Columbia;
>
> (B) A judge of a court in the District of Columbia;
>
> (C) A professor of law in a law school in the District of Columbia; or
>
> (D) ***An attorney*** employed in the District of Columbia by the United States or the District of Columbia.

D.C. Code § 1-301.83(a) (emphasis added). Instead, the Council could have modified the longstanding requirement for judicial service, for example, as follows:

> (a) No person shall hold the position of Attorney General for the District of Columbia unless that person:
>
> . . .
>
> (3) Is a member in good standing of the bar of the District of Columbia:
>
> . . .
>
> (5) (A) Has been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as:
>
> (~~A~~1) An attorney in the practice of law in the District of Columbia;
>
> (~~B~~2) A judge of a court in the District of Columbia; or
>
> (~~C~~3) A professor of law in a law school in the District of Columbia; ***or***
>
> (~~D~~B) Has been ~~An attorney~~ employed in the District of Columbia by the United States or the District of Columbia.

D.C. Code § 1-301.83(a) (emphasis, deletions, and additions added). But that is *not* the statute the Council enacted. Reading the current statute to cover all D.C. Bar members who are employed by the District of Columbia government in any role whatsoever renders the phrase "actively engaged. . .as. . .an attorney" superfluous. Moreover, it makes subsection D— the final category in a list of four items constructed in parallel— very different in application, contrary to the principle of *ejusdem generis*. *See, e.g., Sydnor v. United States*, 129 A.3d 909, 912 (D.C. 2016) ("When using this principle (a Latin term meaning 'of the same kind or class'), this court interprets general words or phrases that follow a specific list to include only items of the same type as those listed."). While an attorney in practice, a judge, or a professor of law all must hold law degrees and apply their legal skills and experience to perform their daily work out of necessity, the same is not true for all District of Columbia government employees—unless, of course, they are employed *as attorneys* in positions where active D.C. Bar membership is a

prerequisite. The only interpretation that gives meaning to all of the words of the statute and reads them as a cohesive whole is to read subsection D as applying only to attorneys employed *as attorneys*, in roles where D.C. Bar membership is a prerequisite.

Mr. McDuffie also fails in his attempt to fit within the statutory language—which he plainly does not—by arguing that he is an "active attorney" and "acting as an attorney" by virtue of the fact that he has maintained his membership in the D.C. Bar, and thus can hold himself out as an attorney. Resp. Mot. at 9. But the ability to hold oneself out as an attorney is very different from being actively engaged as an attorney. And the statute recognizes this. The statute already requires all candidates to be current members of the D.C. Bar and to have been members in good standing for the past five years; the phrase "actively engaged as an attorney" must therefore mean something more.

Mr. McDuffie goes on to argue that because he is an active D.C. Bar member, he necessarily must be actively engaged as an attorney and uphold his ethical obligations as an attorney in all that he does—an argument that presumably would apply, in his view, regardless of the nature of his work. That is not the law. For example, a public school teacher who also happens to be a non-practicing attorney is a *mandatory* reporter who must disclose information shared in confidence by a student if it concerns child abuse or similar allegations, and that teacher cannot avoid this obligation to report by arguing that as a D.C. Bar member, he is bound to protect the student's confidentiality and afford the student attorney-client privilege. *See* D.C. Code § 4-1321.02 (listing mandatory reporters, including teachers). Attorneys are governed by the Rules of Professional Conduct when they are employed and acting *as attorneys*. By the same token, attorneys who are members of the D.C. Council or members of Congress do not have to maintain active D.C. Bar membership to perform their jobs in the District of Columbia. They are

not employed or acting *as attorneys*, and their failure to maintain active Bar membership does not render them vulnerable to claims of unauthorized practice of law or otherwise violate the Rules of Professional Conduct.

Under the plain language of the statute, Mr. McDuffie is not legally qualified to serve as the Attorney General of the District of Columbia. This is no mere technicality. The Council put the minimal qualifications into the statute for good reason. The D.C. Attorney General is the chief legal officer of a government with an approximately $19.5 billion budget, and the leader of an office with approximately 700 professionals and a $150 million budget, which has 11 major divisions covering legal issues that span from consumer protection, juvenile justice, and civil rights issues to child support and antitrust enforcement. The Council carefully crafted minimum qualifications that would ensure candidates for Attorney General would have sufficient preparation to lead an office of such scope, breadth and critical importance to the lives of the people of the District of Columbia. Mr. McDuffie—who has not been engaged in the practice of law or been employed as an attorney for any of the past ten years—does not meet these minimum qualifications and does not have the experience required to run for Attorney General.

CONCLUSION

For the foregoing reasons as well as those set forth in the initial Challenge to a Nominating Petition, Respondent's Motion to Dismiss should be denied and Complainant's Challenge should be sustained.

Date: April 11, 2022

Respectfully submitted,

/s/ Theodore A. Howard
Theodore A. Howard (D.C. Bar No. 366984)
Wiley Rein LLP
2050 M St., NW
Washington, D.C. 20036
(202) 719-7120
thoward@wiley.law
Counsel for Complainant Bruce V. Spiva

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, I served this Reply electronically by email on:

D.C. Board of Elections

Christine Pembroke, Senior Staff Attorney
1015 Half Street, SE
Washington, D.C. 20003
(202) 727-2525
cpembroke@dcboe.org

Counsel for Respondent Kenyan McDuffie

Thorn L. Pozen & Kevin M. Hilgers
Goldblatt Martin Pozen, LLP
1432 K Street, NW, Suite 400
Washington, D.C. 20005
khilgers@gmpllp.com
tpozen@gmpllp.com

/s/ Theodore A. Howard
Theodore A. Howard