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Superior Court
of the District of Columbia

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

DISTRICT OF COLUMBIA DEMOCRATIC PARTY **80 "M" STREET, S.E.** **WASHINGTON, D.C. 20003** **CHARLES E. WILSON, CHAIR** **1344 MAPLE VIEW PLACE, S.E.** **WASHINGTON, D.C. 20020** Plaintiffs, vs. **MURIEL E. BOWSER** In her official capacity as Mayor of the District of Columbia, and **THE DISTRICT OF COLUMBIA**, and **THE D.C. BOARD OF ELECTIONS** Defendants **Serve: Attorney Brian L. Schwalb** **D.C. Attorney General** **441 – 4th Street, N.W.** **Washington, D.C. 20001**	:	**Case Number** 2023-CAB-004732

A "PROTEST" COMPLAINT FOR DECLARATORY JUDGMENT, AND INJUNCTIVE RELIEF, MANDATING EXPEDITED CONSIDERATION BY THE D.C. SUPERIOR COURT AND JURY DEMAND AS TO COUNT ONE (I) ONLY OF FOUR COUNTS

Plaintiffs, by and through Counsel, bring this **PROTEST** action against Defendants **MURIEL BOWSER**, in her official capacity as Mayor of the District of Columbia, **THE DISTRICT OF COLUMBIA** and **THE D.C. BOARD OF ELECTIONS**. The allegations herein are based on the personal knowledge of Plaintiffs, and on information and belief. Under D.C. Code § I–I001.I6, expedited consideration by the Court is mandated.

I. BACKBROUND

On 12 September 1978, in the Democratic Primary, Marion Barry defeated Sterling Tucker by a particularly small margin of 1,400 votes, close enough that Tucker did not concede until after a recount had taken place. Incumbent Mayor Walter Washington finished third, with just under 3,000 votes less than Barry. Had the D.C. Board of Elections approved the recent Initiative, "Make All Votes Count Act of 2024", as it did on 21 July 2023, Marion Barry may never have been Mayor of the District of Columbia. This is no minor matter. My Colleague, Professor Jason Newman (Retired, Georgetown University Law Center) and I, the undersigned Counsel, worked on Christmas Eve, 24 December 1973, because White House Counsel, John Dean, called, on 23 December 1973, to inform us that President Richard Nixon would sign the D.C. Home Rule Act (which included the "District Charter") the next day. Professor Newman and I worked on Christmas Eve, completing the preparation of material for distribution to the public, explaining the Home Rule Act and the Advisory Neighborhood Commission (originally called Council) Referendum. Marion Barry won a plurality of the vote and became Mayor. Every local election in the District of Columbia, since that time, has been determined by a plurality vote. Imagine the local history in the District of Columbia, for the past 45 years, had the outcome of elections been determined by Open Primaries and Rank Choice Voting! The Make All Votes Count Act of 2024, Initiative Number 83 (a number has precipitously been assigned to it) seeks to change how residents cast votes in elections and would enable more than 80,000 additional people, currently registered as non-affiliated with any party, to participate in the primaries of Democrats, Republicans or the D.C. Statehood Green Party, which are closed to those voters. The independent voters could very easily dominate the roughly 4,000 voters in the D.C. Statehood Party. This Protest Action makes the argument, for several reasons at law, that the D.C. Board of Elections is not authorized to approve this Initiative, and the process of voting in local elections in Washington, D.C. cannot be changed through an Initiative.

II. INTRODUCTION

This is a Protest, undertaken pursuant to D.C. Code § 1–1001.16. Initiative and referendum process, Subsection (e)(1)(A), which provides:

"If any registered qualified elector of the District of Columbia objects to the summary statement, short title, or legislative form of the initiative measure formulated by the Board pursuant to subsections (c) and (d) of this section, that person may seek review in the Superior Court of the District of Columbia within 10 calendar days from the date the Board publishes the summary statement, short title, and legislative form in the District of Columbia Register stating objections and requesting appropriate changes. The Superior Court of the District of Columbia shall expedite the consideration of this matter."

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

While both the General Counsel of the Council of the District of Columbia and the Attorney General of the District of Columbia have opined, as they must, on the appropriateness and permissibility of the Initiative "Make All Votes Count Act of 2024" (hereafter, "The Initiative"), their Opinions are antipodal and diametrically opposite. Both agree on the legal limitations of Initiatives. No Initiative

should be accepted and approved by DCBOE if 1) it appropriates funds,[1] 2) it violates or seeks to amend the D.C. Home Rule Act (formally Titled "The District of Columbia Self-Government and Governmental Reorganization Act" (which Plaintiffs will continue to refer to hereafter as the "D.C. Home Rule Act"), 3) it violates the United States Constitution, 4) it authorizes discrimination prohibited by the D.C. Human Rights Act, 5) it vitiates and negates an Act of the D.C. Council, D.C. Code §§ 1-204.101(a) and 1–1001.16(b)(1). For the reasons that follow, this initiative violates all of those legal limitations and more.

III. ARGUMENT

Further, Relevant Legal, Historical and Procedural Matters

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

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

Amendment …" and then, ultimately, it goes to Congress, Jason Newman, Director and Johnny Barnes, Deputy Director and others, *The District of Columbia, Its History, Its Government, Its: People,* Page 484, published by the D.C. Project: Community Legal Assistance, Georgetown University Law Center (September 1975).

The sad truth is that "[T]hose residing in Washington, D.C. lack political standing and sovereignty. No other citizens are similarly situated. District residents cannot vote for senators or representatives, although they do vote for a non-voting delegate to the House. No matter the population, citizens are entitled to only as many electors to the Electoral College as the least populous state. As a result, the District [of Columbia's] representation does not correspond with its population. Moreover, while the Home Rule Act gave District residents the right to vote for a local elected government, Congress placed such severe restraints on that right, that some refer to the Act as 'Home Fool'. Others liken District residents to Native Americans, commenting that with Home Rule, District residents were given "the reservation without the buffalo." This label is particularly poignant at times when the District government seeks to manage and conduct its financial affairs. Congress must pass an appropriations bill for the District, as it does for every federal agency. Thus, from local budget formulation to implementation the process can take as many as eighteen months … The form and structure of the District makes it very different from any state and makes it difficult to conduct an efficient government," 13 U. D.C. L. Rev. 1, 3, University of the District of Columbia Law Review (Spring 2010) *TOWARDS EQUAL FOOTING: RESPONDING TO THE PERCEIVED CONSTITUTIONAL, LEGAL AND PRACTICAL IMPEDIMENTS TO STATEHOOD FOR THE DISTRICT OF COLUMBIA*, Johnny Barnes. That difficulty raises its ugly head when the District of Columbia and its citizens seek to do that which all other citizens of the states can. As here, they cannot.

The ñAccepted ò Initiative ï The Heller Case Precedent D. C. Hon

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

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

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

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

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

While the *Hechinger* Court spent much time on the First and Fifth Amendment rights of individual, independent voters, in the end, the Court ruled that the limitations imposed by Congress in the Home Rule Charter, as here, should stand. To the contrary, this Initiative's open primary provision openly violates the District of Columbia Home Rule Charter, as it guts the Home Rule Charter's requirement that the Mayor, DC Council, and Attorney General be elected on a partisan basis, D.C. Code §§1-204.21, 1- 204.01, 1-204.35. D.C. Code §1-1171.01 (5) defines the term "partisan," stating "when used as an adjective means related to a political party." Further, DC Code §1-1171.01(6) provides that a "partisan political group" means any committee, club, or other organization that is regulated by the District and that is affiliated with a political party or candidate for public office in a partisan election, or organized for a partisan purpose, or which engages in partisan political activity." In short, the Home Rule Chater and D.C. laws defining partisan elections require the Mayor, D.C.

Council, and Attorney General to be elected on a partisan basis. The *Hechinger* Court did not seek to legislate how best to ensure that the First and Fifth Amendment rights of independent voters are protected --- and the Court reasoned that those rights should be protected --- the Court simply made certain that while it may be fine for Congress, as the sovereign authority over the District of Columbia to do so, only Congress could do so, not the D.C. Board of Elections. As the United States Supreme Court has long instructed in the context of statutory interpretation, when the wording of a rule is clear and unambiguous and is not capable of more than one meaning, "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion," *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). The Court's task in construing a statute "`is to ascertain and give effect to legislative intent and to give legislative words their natural meaning,'" *Citizens Association of Georgetown v. Zoning Commission of the District of Columbia,* D.C. App., 392 A.2d 1027, 1032 (1978) (en banc) (quoting *Rosenberg v. United States,* D.C. App., 297 A.2d 763, 765 (1972) (citations omitted)). The Court begins this process of course with the language of the statute itself, *Citizens Association of Georgetown, supra; March v. United States,* 165 U.S. App. D.C. 267, 274, 506 F.2d 1306, 1313 (1974). The Court must read these words, however, in their legislative context. *See Citizens Association of Georgetown, supra* at 1033; *March, supra* at 274-75, 506 F.2d at 1313-14.

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

funds," *id.* — an exception reflected in the "Dixon Amendment," *id.* § 1-1116(k)(7), to the Initiative, Referendum, and Recall Procedures Act, *id.* §§ 1-1116 to -1119.3 (Initiative Procedures Act)" Erecting the voting apparatus for electing the Mayor, D.C. Council and Attorney General plainly belongs to Congress, and the D.C. Board of Elections may not "accept" and approve an Initiative that seeks to remove that right from Congress.

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

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

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

the association's being," *Id*. at 574-75 (quoting *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 n.22 (1981)). Like D.C. law, the California law considered in *Jones* provided that political parties can only nominate their candidates through primaries. 530 U.S. at 569. In such circumstances, the Court asserted that "in no area is the political association's right to exclude more important than in the process of selecting its nominee," *Id*. at 575. The Court concluded that the initiative considered in that case imposed a substantial intrusion into the associational freedom of members to allow nonparty members to participate in the selection of the nominee in violation of party rules, *Id*. at 576. Nor did the proposed initiative serve a compelling state interest that was narrowly tailored, *Id*. Accordingly, the Court held that the deleterious effects of California's primary system not only would allow nonmembers to alter the identity of a party's nominee but even where the person favored by a majority of the party members prevails, the nominee may have prevailed by taking different positions from the party to secure her election, *Id*. at 579-80. In total contrast to the D.C. Home Rule Act's mandate of partisan elections, a state law that provides for an open primary and does not provide for partisan registration and Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 453 (2008) is distinguishable from *California Democratic Party v. Jones*, discussed above. Unlike in the California primary which the Court held violated a political party's First Amendment rights by allowing nonmembers of the political party to choose the party's nominees, the open primary at issue in Washington State Grange did not choose party nominees but rather allowed the top two vote getters, regardless of party, to advance to the general election. See *Miller v. Brown*, 503 F.3d 360, 368, 371 (4th Cir. 2007) (4th Circuit held Virginia's open primary law unconstitutional as applied because it burdened party associational rights even though Virginia allows nomination of candidates by primary and other methods; the court held that the state's interest in encouraging broad voter participation "cannot overcome the severe burden placed upon a political party when it is forced to associate with those who

may not share its views.") prohibits declaration of party preference or nonpartisanship would not be facially unconstitutional as a violation of associational rights, *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1121,1125 (9th Cir. 2016).

The Council Accepted Wrongfully and Without Authority Appropriates Funds

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

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

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

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

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

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

The D.C. Human Rights Act was enacted by the D.C. Council with the intention "…to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit …" It is a broad remedial statute, to be generously construed, *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991). The Courts have also described the Human Rights Act as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds," *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000).

(a) Discrimination:

Discrimination – D.C. Code § 2–1402.73. Application to the District Government

Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, place of residence or business, or status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking.

(b) Disparate Treatment

Both disparate impact and disparate treatment are discriminatory practices. Disparate impact is often referred to as unintentional discrimination, whereas disparate treatment is intentional. Disparate impact occurs when policies, practices, rules or other systems that appear to be neutral result in a disproportionate impact on a protected group.

In *Rap, Inc. v. D.C. Com'n on Human Rights* 485 A.2d 173 (1984), the D.C. Court of Appeals noted that the order and burdens of proof for a claim of disparate treatment under Title VI of the Civil

Rights Act of 1964, 42 U.S.C. §2000 (e) et. seq. (1982) was established in the U.S. Supreme Court, and that D.C. Courts generally follow the Title VI analysis in discrimination cases brought under the D.C. Human Rights Act. Citing *Greater Washington Business Center v. District of Columbia Commission on Human Rights*, 454 A.2d 1333, 1338 (D.C.1982); and *Newsweek Magazine v. District of Columbia Commission on Human Rights*, 376 A.2d 777, 789 (D.C.1977).

(c) Prima Facie Case of Discrimination and Disparate Treatment

Although many courts do not compel plaintiffs to present comparator evidence,[2] an important element of a *prima facie* case of disparate treatment is a showing that two similarly situated individuals or classes were treated differently. The U.S. Supreme Court laid out the elements of a *prima facie* case of discrimination. In the instant matter a *prima facie* case can be shown by establishing that 1) Plaintiffs are members of a protected class;[3] 2) Plaintiffs suffered adverse, disparate, wrongful action at the hands of Defendants; and 3) similarly situated individuals or classes, outside of the protected class, receive more favorable treatment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). All of the elements of the *McDonnell Douglas* test are met. "[T]he burden of establishing a *prima facie* case of disparate treatment is not onerous," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A plaintiff can establish a *prima facie* case by "offering evidence adequate to create an inference that decisions by those authorized to make them were based on a [illegal] discriminatory criteria, " *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 846

[2] See *Brown v. Henderson*, 257 F.3d 246, 253 (2d Cir. 2001) ("Thus, though it is helpful in proving sex discrimination, we have held that it is not strictly necessary for a plaintiff to identify an employee who was treated more favorably than the plaintiff and who was similarly situated to the plaintiff, except for being of the opposite sex."); *Sarullo v. U.S. Post. Serv.*, 352 F.3d 789, 798 n.7 (3d Cir. 2003); *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997); and *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 859 n.9 (8th Cir. 2005) ("Of course, a discharged employee need not rely on comparisons with similarly situated employees to prove unlawful discrimination.) "Nothing in the case law in this circuit requires a plaintiff to compare [himself] to similarly situated co-workers to satisfy the fourth element of [his] prima facie case," *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.6 (10th Cir. 2000).

(9th Cir. 1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)); and see *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985) (plaintiff can establish a *prima facie* case of disparate treatment without satisfying the *McDonnell Douglas* test if he or she or they provides evidence suggesting rejection was based on discriminatory criteria), amended, 784 F.2d 1407 (1986). The D.C. Human Rights Commission citing *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317 (5th Cir.1981), which held that an employee proves a prima facie case when she shows that "two employees were involved in or accused of the same offense and are disciplined in different ways." This question was precisely the inquiry made by the Court in a recent matter, *Coleman v. Donahoe*, 667 F.3d 835 (2012). In *Coleman*, the Court stated, "… we reiterate here that the similarly-situated inquiry is flexible, common-sense, and factual. It asks 'essentially, are there enough common features between the individuals to allow a meaningful comparison?' *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir.2007), aff'd, 553 U.S. 442 (2008).

The *Durant* Case

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

"For the foregoing reasons, we conclude that the Commission has failed to justify a conclusion that the proposed PUD would be a moderate-density use." The Application was denied.

Two very recent decisions from federal appeals courts illustrate that the courts will extend significant judicial deference to agencies that are wrestling with controversial and complicated issues subject to their jurisdiction, *Mozilla Corporation v. Federal Communications Commission and United States of America,* decided October 1, 2019 by the D.C. Circuit and three days later, on October 3, 2019, the U.S. Court of Appeals for the Fifth Circuit decided the case of *Sierra Club, et al. v. Environmental Protection Agency*. Both decisions upheld the principle of the court giving deference to the administrative agency. The principle of deference is well established in the D.C. Court of Appeals. The Court affords deference to an agency's "interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose," *District of Columbia Office of Human Rights v. District of Columbia Dep't of Corr.*, 40 A.3d 917, 923 (D.C.2012). This deference stems from "the agency's presumed expertise in construing the statute it administers," *Id.* (quoting *United States Parole Comm'n v. Noble,* 693 A.2d 1084, 1096 (D.C.1997), *adopted on reh'g,* 711 A.2d 85 (D.C.1998) (*en banc*)). Moreover, when, "the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order," *1330 Connecticut Ave., Inc. v. District of Columbia Zoning Comm'n,* 669 A.2d 708, 714 (D.C.1995).

In reviewing this court's interpretation, "[w] e must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning," *Davis v. United States*, 397 A.2d 951,956 (D.C.1979), "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64 (D.C. 1980) (en banc) (quoting *United States v. Goldenberg*, 168 U.S.

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

The Supreme Court's DACA Case

Ordinarily, the Agency's interpretation of the Statute under current precedents, is dispositive. Executive agencies charged with implementing regulatory statutes adopt policies and processes to put statutes into action, *Chevron U.S.A.v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* extends to interpretations by an agency on the extent of its own jurisdiction, *City of Arlington* v. *FCC*, 569 U.S. 290 (2013). Absent a textual directive to the contrary, a compact commission overseeing an interstate compact is not reviewed under this deferential model of judicial review, *Alabama v. North Carolina*, 560 U.S. 330 (2010). Therefore, when an agency rulemaking is challenged in court, an agency's interpretation of their statutory authority is central to determining the legitimacy of the regulation.

The *Chevron* decision created a two-part test to determine regulatory authority. First is the idea that in litigation over agency action, the courts will defer to the agency's own construction of its operating statute, unless that construction is outside the range of reasonableness, usually because the meaning of the statute is clear. Second, the court must determine if the agency's response to the statute is based on a "permissible" interpretation of the statute. If so, then the court must defer to the agency. A very recent, groundbreaking Case, however, decided by the United States Supreme Court illuminates standards to which all agencies are bound and to which all courts must adhere. It appears that the DCBOE did not. Commonly referred to as the *DACA* Case, the Court repeated that agency officials are subject to the "reasoned explanation" standard. Under the "reasoned explanation" standard, a court "…

is not to substitute its judgment for that of the agency", *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), but instead to assess only whether the decision was "based on consideration of the relevant factors and whether there has been a clear error of judgment," *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402, 416 (1971). In performing this inquiry, courts cannot inquire as to why agencies relied upon particular data to make their decisions; however, courts can inquire as to what data the agency reviewed; little here. In the *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance*, 463 U.S. 52 (1983), the Supreme Court held that "the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action" including a "rational connection between facts and judgment . . . to pass muster under the 'arbitrary and capricious' standard."

It cannot be reasonably said that 1) the D.C. Government relied on any data in reaching its decisions and certainly not the kind of exacting data mandated by the *DACA* and related cases; and 2) there is a rational connection between facts and judgment; how could there be when there are no findings of fact or conclusions of law accompanying the agency's decision. "An agency['s] [actions] would be arbitrary and capricious if the agency has relied on factors in which [the Congress or the D.C. Council] has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise", *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance*, 463 U.S. 52, 53 (1983).

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

in situations regarding the decisions of an agency.

The DCBOE did rely on *Clingman v. Beaver*, 544 U.S. 581 (2005) in its decision to allow the Initiative on the ballot. That case is distinguishable. The state law in that case allowed political parties to invite independents to vote in their primaries but did not allow political parties to invite voters to vote in their primary if they were already affiliated with other parties. The Libertarian Party argued that its associational rights were impaired because the party could not, based on state law, allow everyone to vote in their primary. The plaintiff argued associational harm because the state law didn't allow them to associate with every voter. That Case is clearly distinguishable from the instant Case. The DCBOE also apparently relied upon a passage in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), at page 577 of the opinion. This discussion in the opinion states that when it is quite easy to change party affiliation the day of the primary and crossover and formally become a member of the party, that would not infringe on associational rights. However, it should be noted that the open primary provision of the Initiative doesn't require even this minimal declaration of affiliation if the Democratic Party is not aware of the identity of the voter. And, the DCBOE relied upon *Kohlhass v. State of Alaska*, 518 P.3d 1095 (Alaska 2022). But that case had to determine whether the blanket primary initiative violated the Alaska constitution. The initiative In *Kohlhass* changed the entire state voting system from a partisan system to a nonpartisan system. The primary was not used for parties to choose their nominees for the general election. Instead, the primary was used only to narrow the number of candidates whose names would appear on the general election ballot to 4 persons. This is contrary to the D.C. Home Rule Act that requires the parties to choose their nominees in the primary to represent their party in the general election. The Alaska state court said the initiative in that case places no burden on the political parties' associational rights because it decouples the state's election system from political parties' process of selecting their standard bearers. Again, in D.C., the Home Rule Act links the political parties' process to

the parties' associational rights. As the court stated in ***Kohlhass,*** the Alaska initiative is like the initiative in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). The Alaska case is distinguishable from the D.C. case because the Home Rule Act prescribes a partisan system for mayor, Attorney General, and the D.C. Council and provides for a nonpartisan system for ANCs and other offices.

III. THE PARTIES

Plaintiffs - At all times relevant, each Plaintiff is a Resident of or does business in the District of Columbia.

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

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

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

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

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

IV. JURISDICTION AND VENUE

Jurisdiction – This Court has jurisdiction over this action pursuant to the D.C. Code §§ 1 1-921. This Court has the authority to grant declaratory relief under Title 28 U.S.C. § 2201. This Court has jurisdiction over Defendants pursuant to D.C. Code Ann. §§ 13-422 and 13-423. D.C. Superior Court Civil Rule, Declaratory Judgment. This Rule governs the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201 or otherwise. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

Venue - Venue is appropriate in the District of Columbia given that all of the events and omissions giving rise to this action have taken place in the District of Columbia. Defendants have sufficient minimum contacts with the District of Columbia to be sued in this jurisdiction and have intentionally availed themselves of the Markets and services of the District of Columbia by serving as an elected official and a District of Columbia Government employee.

V. ELEMENTS OF THE COMPLAINT

COUNT I – VIOLATION OF THE D.C. HUMAN RIGHTS ACT - D.C. Code § 2–1402.73.

1. Plaintiffs repeat, re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.
2. Plaintiffs contend that as a result of the traits or characteristics listed, they have been and continue

to be subjected to unlawful discriminatory and disparate treatment that has denied and continues to deny them the full and equal quality of life and benefits as is available to other District of Columbia residents.

3. The D.C Human Rights Act Prohibits Discrimination by the D.C. Government.
4. Indeed, the D.C Human Rights Act of 1977, as amended, declares that:
5. "Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations", D.C Code § 2–1402.01.
6. The DC Human Rights Act was enacted by the D.C. Council with the intention "…to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit …" It is a broad remedial statute, to be generously construed, D.C. Code § 2–1401.01.
7. The protected classes, of which Plaintiffs are members include, but not limited to, discrimination by reason of race, color, age, place of residence and source of income.
8. With regard to the newer added "source of income" definition, the D.C. Court of Appeals in *Blodgett v. The University Club*, 930 A.2d 210 (2007), stated that this term is extraordinarily broad and demonstrates that the D.C. Council intended the prohibition against "source of income" discrimination to have a significant reach.
9. Both disparate impact and disparate treatment are discriminatory practices. Disparate impact is often referred to as unintentional discrimination, whereas disparate treatment is intentional. Disparate impact, as here, occurs when policies, practices, rules or other systems appearing to be neutral result in a disproportionate impact on a protected group.

10. Defendants' discrimination, intentional or not, has caused and will cause ongoing harm to Plaintiffs and other residents especially those in Wards East of the Anacostia River.
11. All actions of a District of Columbia Agency shall be conducted in accordance with the District of Columbia Administrative Procedure Act (D.C. Code § 2-501 et seq.).
12. The decisions of an Agency must not be "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510(a)(3)(A) (2001).
13. This Honorable Court may find instructive similar principles that have been rendered in cases involving laws or government policy based on preferential class distinction of any sort that falls within the Equal Protection Clause of the 5th Amendment. Official action will be held unconstitutional where there is proof of discriminatory intent or purpose evidencing a violation of the equal protection clause, *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977). Determining whether invidious discriminatory purpose was the motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it "bears more heavily on one race [class] than another," *Washington v. Davis*, 426 U.S. at 242 (1976) may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than residence, race or another suspect class, emerges from the effect of the state action even when the governing legislation appears neutral on its face, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S 437 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions, as here, taken for invidious purpose. See *Lane v. Wilson*, supra; *Griffin v. School Board*, 377 U.S. 218 (1964); *Davis v. Schnell*, 81 F.Supp. 872 (S.D. Ala.) aff'd per curium, 336 U.S. 933 (1949); cf. *Keyes v. School Dist. No. 1, Denver Colo*., supra, 413 U.S., at

207. The specific sequence of events leading up [to] the challenged decision also may shed some light on the decision maker's purpose, *Reitman v. Mulkey*, 387 US. 369, 373-376 (1967); *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S. Ct. 444, 449, 80 L.Ed. 660 (1936) . . . Departures from the normal procedural sequences also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached.

14. The D.C. Human Rights Act protects against discrimination based upon Place of Residency and Race, among other things. Unlike equal protection, however, Plaintiffs do not need to prove intent. Once Plaintiffs prove disparate treatment, the Defendants have the burden of proving that their purported justification is a genuine legal justification that they relied on and that motivated them.
15. It is an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual.
16. Plaintiffs need not show that Defendants intended to discriminate against Plaintiffs on the basis of place of residence, race or income. The District of Columbia Court of Appeals has read the Effects clause of the DCHRA to mean that "despite the absence of any intention to discriminate, practices are unlawful if they bear disproportionately on a protected class and are not independently justified for some nondiscriminatory reason," *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C.1987); see also *Ramirez v. District of Columbia*, No. 99-803(TFH), 2000 WL 517758 (D.D.C.2000) (holding that "the effects clause of the DCHRA prohibits unintentional discrimination as well as intentional"), *Mitchell v. DCX, Inc*., 274 F. Supp.

2d 33, 47 (D.D.C. 2003).

17. The Court has held that statistical data can be used to show disparate impact and make a prima facie showing of discrimination, based on place of residence, "…[t]he tenants charge the District with "place of residence" discrimination in violation of the D.C. Human Rights Act. See D.C. Code § 2- 1402.21(a). The DCHRA makes it unlawful "to refuse or restrict facilities, services, repairs or improvements for a tenant or lessee" "wholly or partially for a discriminatory reason based on ... race, color ... or place of residence." *Id.* A separate provision states that "[a]ny practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice." § 2-1402.68. The D.C. Court of Appeals has held that this "effects clause" imports into the Act "the concept of disparate impact discrimination developed by the Supreme Court in *Griggs v. Duke Power Co.*" *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C.1987).
18. Defendants 1) intentionally, knowingly and willfully ignored the fact that there are reasonable and available alternatives to allowing 80,000 currently independent voters to effectively invade the three standing political parties in Washington, D.C.

COUNT II – VIOLATION OF THE D.C. HOME RULE ACT - D.C. Code § 2–1402.73

19. Plaintiffs repeat, re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs, 1 through 18, of this Protest Complaint.
20. Title IV, Part A, Subpart 1 of the District Charter specifically states that the Council of the District of Columbia and its members shall be elected by the registered qualified electors of the District.
21. Section (b)(1) explicitly states that these members shall be elected on a "partisan" basis.
22. The same is true for candidates for the Mayor of the District of Columbia.
23. This means that the intention behind the District Charter was to have partisan political parties

nominate their candidates for election in the subsequent general election.

24. Subsequently, the District Charter included partisan elections for the newly created Attorney General.
25. Moreover, the District Charter limits the number of At-Large Councilmembers from the same political party and directs that the political party of an At-Large Councilmember vacating his or her position be filled by the political party of the councilmember vacating that position.
26. Other elected officials are elected on a nonpartisan basis. For example, Advisory Neighborhood Commissioners (ANCs) are elected on a nonpartisan basis. 8 State Board of Education (SBOE) candidates are also elected on a nonpartisan basis.
27. All of this demonstrates that the drafters of the Charter intentionally differentiated between partisan and nonpartisan elections and left the method for determining partisan elections up to the parties.
28. Open primaries would be a direct violation of the DC Home Rule Charter. Allowing 80,000 non-affiliated voters to participate in partisan elections would undermine the intent of the Charter and dilute the votes of party members who seek to nominate party candidates to stand in subsequent general elections.
29. It is crucial that we respect and uphold the provisions of the Home Rule Charter to maintain the integrity of our electoral system.

COUNT III – VIOLATION OF THE UNITED STATES CONSTITUTION

30. Plaintiffs repeat, re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs, 1 through 29 of this Protest Complaint.
31. The open primary provision violates D.C.'s Democratic party members' and voters' right to freedom of association guaranteed by the First and Fifth Amendments to the U.S. Constitution.

32. U.S. Supreme Court precedent provides that the First Amendment protects the freedom to join together in furtherance of common political beliefs which necessarily presupposes the freedom to identify those who constitute the association, and to limit the association to those people only.
33. As a corollary, Court precedent provides that "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."
34. Like D.C. law, a California law provided that political parties can only nominate their candidates through primaries. In such circumstances, the Court asserted that "in no area is the political association's right to exclude more important than in the process of selecting its nominee."
35. The Court concluded that the initiative considered in that case imposed a substantial intrusion into the associational freedom of members to allow nonparty members to participate in the selection of the nominee in violation of party rules.
36. Nor did the proposed initiative serve a compelling state interest that was narrowly tailored.
37. Accordingly, the Court held that the deleterious effects of California's primary system not only would allow nonmembers to alter the identity of a party's nominee but even where the person favored by a majority of the party members prevails, the nominee may have prevailed by taking different positions from the party to secure her election.

COUNT IV – VIOLATION OF THE PROHIBITION AGAINST APPROPRIATING

38. Plaintiffs repeat, re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs, 1 through 37 of this Protest Complaint.
39. Implementing Ranked Choice Voting and Open Primaries would require DCBOE to commit to a significant financial obligation that has neither been agreed to nor appropriated by the D.C. Council.

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

COUNT V – VIOLATION OF DECISION MAKING UNDER THE D.C. ADMINISTRATIVE PROCEDURE ACT

43. Plaintiffs repeat, re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs, 1 through 42, of this Protest Complaint.
44. All actions of a District of Columbia Agency shall be conducted in accordance with the District of Columbia Administrative Procedure Act (D.C. Code § 2-501 et seq.).
45. The decisions of an Agency must not be "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510(a)(3)(A) (2001).
46. There is nothing in the Order of the DCBOE that rise to the level of sufficient findings of fact and conclusions of law.
47. Defendants' violations will cause ongoing harm to Plaintiffs and other citizens.

COUNT VI - VIOLATION OF RULE MAKING UNDER THE D.C. ADMINISTRATIVE PROCEDURE ACT

48. Plaintiffs repeat, re-allege and incorporate by reference each and every allegation contained in

Paragraphs 1 through 47 and makes them a part hereof.

49. D.C. Code § 2–502 (6)(A) defines the term "rule" to mean the whole or any part of any Mayor's or agency's statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Mayor or of any agency.

50. D.C. Code § 2–505 (a) provides that when making rules, "The Mayor and each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice. The notice shall also contain a citation to the legal authority under which the rule is being proposed. The publication or service required by this subsection of any notice shall be made not less than 30 days prior to the effective date of the proposed adoption, amendment, or repeal, as the case may be, except as otherwise provided by the Mayor or the agency upon good cause found and published with the notice."

51. The exception for emergency rulemaking is found at D.C. Code § 2–505 (c) and provides that, "Notwithstanding any other provision of this section, if, in an emergency, as determined by the Mayor or an independent agency, the adoption of a rule is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, the Mayor or such independent agency may adopt such rules as may be necessary in the circumstances, and such rule may become effective immediately. Any such emergency rule shall forthwith be published and filed …"

52. Defendants have never published any recent Rule changing the voting process for elections.

53. In anticipation that there could be changes to the Rules, Plaintiffs began widespread protesting, writing to Defendants and others, informing them of their opposition to the subject matter of the instant Initiative.

54. It is widely accepted that Federal Court rulings are persuasive in D.C. Court decisions.[4] In executing significant policy changes or other reversals, an agency is required to comply with the Administrative Procedure Act, *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), holding that the same procedures that an Agency uses when making a rule must be used when repealing or amending that rule.

55. Moreover, an Agency rule that implements a change by repealing or amending an exist rule is clearly subject to the arbitrary and capricious standard, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 52 (1983).

56. Defendants did not comply with the D.C. APA in "accepting" Initiative 83.

57. Defendants' violations are causing ongoing harm to Plaintiffs and other residents.

Plaintiffs Meet the Legal Standards for Injunctive Relief

A plaintiff may demonstrate its entitlement to preliminary injunctive relief by showing that (1) it has a substantial likelihood of success on the merits, (2) it would suffer irreparable injury if injunctive relief is denied; (3) injunctive relief would not substantially injure the opposing party or other third parties; and (4) injunctive relief would further the public interest, *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). "These factors interrelate on a sliding scale and must be balanced against each other," *Davenport v. AFL-CIO*, 166 F.3d 356, 360-61 (D.C. Cir. 1999). Thus, "[a]n injunction may be justified … where there is a particularly strong

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

likelihood of success on the merits even if there is a relatively slight showing of irreparable injury," *City Fed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). The purpose of injunctive relief "is merely to preserve the relative positions of the parties until a trial on the merits can be held," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The instant matter more than satisfies all four prongs of this standard. a. Plaintiffs are likely to succeed on the merits "[A]n injunction may be justified … where there is a particularly strong likelihood of success on the merits," *City Fed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). If a movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor, *Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1292 (D.C. Cir. 2009). The factors for securing injunctive relief have typically been evaluated on a sliding scale, *Id*. at 1291. b. Plaintiffs will suffer irreparable injury if Defendants are not enjoined A court's "first step" is to balance the likelihood of irreparable harm to the plaintiff with the likelihood of harm to the defendant, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). "If a decided imbalance of hardship should appear in plaintiff's favor," a lesser demonstration of likelihood of success would be required," *Blackwelder Furniture Company v. Selig Manufacturing, Inc.*, 550 F.2d 189, 195 (4th Cir. 1977). "The plaintiff need only raise questions going to the merits … as to make them fair ground for litigation and thus more deliberate investigation," *Id.* This Initiative, if it is allowed to go forward, will cause considerable confusion in the voting process, beginning in 2026.

Defendants will not suffer substantial harm if the requested relief is issued. In fact, there I likely no harm these Defendants will face if the Initiative is either delayed or not implements or both.

The public interest favors granting relief It is always in the public interest when laws, regulations and policies are not properly followed, *Air Terminal Services, Inc. v. Department of Transportation*, 400 F. Supp. 1029 (D.D.C. 1973), aff'd 515 F.2d 1014 (D.C. Cir. 1975). These Defendants have flaunted

District of Columbia and Federal laws in many ways, at many levels. The public interest favors granting declaratory and injunctive relief when an Agency fails to competitively secure services as required, *Aero Corporation v. Department of the Navy*, 558 F. Supp. 404 (D.D.C. 1983). Federal courts routinely depart from a strict application of the traditional four-factor test when it comes to environmental cases. This movement can be traced in part to the United States Supreme Court's decision in Tennessee Valley Authority (TVA) v. Hill, 437 U.S. 153, 171, 195 (1978). In TVA the Court concluded that it had no choice but to enjoin the Tellico Dam project—after construction of the dam was nearly complete at a cost in excess of $100 million, based on the finding that the project would violate the Endangered Species Act.

WHEREFORE, Plaintiffs request that this Honorable Court:

1. Grant Plaintiffs a Declaratory Judgment on its Complaint against Defendants.
2. Declare the decision of Defendants to "accept" and approve the subject Initiative as wrongful, unlawful and null and void;
3. Declare that the actions taken by Defendants are substantively unlawful under various laws and Regulations of the District of Columbia;
4. Declare that the actions taken by Defendants as procedurally unlawful under various laws and Regulations of the District of Columbia;
5. Granting immediate injunctive relief to Plaintiffs forthwith to permanently block the implementation of the subject Initiative.
6. Find that Defendants violated the District of Columbia Home Rule Act, the United States Constitution, the D.C. Human Rights Act of 1977, as amended, and award damages to Plaintiffs.
7. Grant Plaintiffs Judgment forever enjoining Defendants from interfering with the rights of

Plaintiffs.

8. Awarding Plaintiffs other appropriate injunctive relief.
9. Awarding Plaintiff the costs and expenses of this action, including reasonable attorneys and expert fees.
10. Granting injunctive relief against Defendants to prevent future wrongful conduct.
11. Awarding Plaintiffs such other and further relief as this Court deems just, equitable, and proper.

JURY DEMAND

Plaintiffs hereby demand trial by a Jury of twelve (12) individuals, as to Count I.

VERIFICATION

Pursuant to 28 U.S.C. Section 1746, I declare, under penalty of perjury that the foregoing Statements, found on thirty-three pages and thirty-three pages only, including this Verification Page and my Attorney's Signature Page, is true and correct, based upon my personal knowledge, recollection and beliefs, and based upon information supplied by potential witnesses to this Case.

EXECUTED this 1st day of August 2023 by:

/s/ *Charles E. Wilson*

_____

(CHARLES E. WILSON)
On behalf of and by Authority from the
District of Columbia Democratic Party
(Wet Signature Available Upon Request)

Respectfully Submitted,

/s/ *Johnny Barnes*

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DATED: 1 August 2023