IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. _____

PAUL ZUKERBERG,

Appellant/Plaintiff,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, and COUNCIL OF THE DISTRICT OF COLUMBIA,

Appellees/Defendants.

On Appeal from the D.C. Superior Court

APPELLANT'S BRIEF

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Dated: February 12, 2014

CERTIFICATE PURSUANT TO RULE 28 (a)(2)

The parties to this appeal are the same parties that appeared in the proceeding below: Paul Zukerberg (a resident of the District of Columbia), and Defendants District of Columbia Board of Elections and Ethics and Council of the District of Columbia. Plaintiff's counsel in this appeal is the same as below – Gary Thompson of Reed Smith LLP. Defendants also continue to be represented by the Office of Attorney General. There are no corporate interests involved.

This representation is made pursuant to District of Columbia Court of Appeals Rule 28 (a)(2) in order that the judges of this Court may consider any need for possible recusal.

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ISSUES PRESENTED FOR REVIEW

1. Whether the D.C. Board of Elections may lawfully remove the Office of Elected Attorney General from the 2014 ballot, in contravention of the 2010 D.C. Charter Amendment.
2. Whether the trial court erred in denying Appellant's motion for a preliminary injunction to keep the office of elected Attorney General on the 2014 ballot pending final resolution of this case.

STATEMENT OF THE CASE

Appellant Paul Zukerberg is a duly qualified District of Columbia voter, and a democratic candidate for the office of elected Attorney General of the District of Columbia. JA 134-38, 457-58. Appellant moved the lower court, pursuant to Rule 65 of the D.C. Superior Court Rules of Civil Procedure, for the entry of a preliminary injunction prohibiting the Defendants from (1) removing the office of Attorney General from the 2014 primary and general election ballots, or (2) enforcing the "Delay Provision" found in the recently passed "Elected Attorney General Implementation and Legal Service Establishment Amendment Act of 2013," D.C. Law 20-134 (the "2013 Act"). JA 31-165. If granted, the injunction would allow District voters to elect their Attorney General in the April 1, 2014 primary and the November 4, 2014 general elections.

Because of the pendency of the election, and the need to print and distribute ballots to overseas voters, the parties below briefed the issues and jointly moved for expedited consideration. Defendant D.C. Board of Elections and Ethics ("BOE") recently indicated that absent injunctive relief, it will print the 2014 April 1 democratic primary ballots *without* the office of Attorney General listed. JA 468-70. The ballots are apparently being printed now, and by preexisting rule, are due to be sent to overseas voters on Friday, February 14, 2014. JA 112-13. Thereafter, various deadlines built into the election schedule means that with each passing

day the opportunity to hold the Attorney General election in 2014 diminishes, and hence the need for emergency or expedited review by this Court. JA 108-117.

On February 7, 2014, following oral argument, the Honorable Laura A. Cordero of the D.C. Superior Court denied appellant's motion for a preliminary injunction in a written opinion now challenged by Appellant in this appeal. JA 1-7. A timely Notice of Appeal pursuant to D.C. Ct. App. R. 3 was filed on February 10, 2014. JA 10-19.

As addressed below, the 2010 Charter Amendment requires that there be a "partisan" election for Attorney General in the year 2014. The precise relief sought from this Court is as follows: Appellant asks this Court to remand this case with instructions that the trial court order the BOE to (1) include the election of Attorney General on the April 1, 2014 primary ballot and the November 5, 2014 general ballot, or (2) if inclusion on the April 1, 2014 primary ballot is determined to be impossible due to the passage of time, proceed with a special election that fulfills the mandate that there be a "partisan" election for Attorney General in 2014.

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over non-final orders of the Superior Court that "[g]rant, continue, modify, refuse, or dissolve an injunction, or which refuse to dissolve or modify an injunction. D.C. Code §11-721(a)(2)(A). Appellant, as a party aggrieved by the lower court's denial an injunction, "may appeal therefrom as of right to the District of Columbia Court of Appeals." D.C. Code §11-721(b).

STATEMENT OF FACTS

On Election Day, November 2, 2010, District of Columbia voters overwhelmingly approved a D.C. Charter amendment that would require the D.C. Attorney General to be publicly

elected, beginning with the 2014 election. JA 90-93, 382-84. Summary language printed on the 2010 ballot itself, and distributed to every voter, told as much to every voter:

> If voters approve of this amendment...residents of the District of Columbia would **begin voting for Attorney General *in 2014*.**

JA 90-93 (emphasis added). Amending the D.C. Charter is a two-step process: first the D.C. Council passes legislation, then the public approves or disapproves by ballot referendum. In this unique context, *the voters act as legislators and are intrinsic to the legislative process.* The legislation the voters were considering on the 2010 ballot was a portion of the "Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009," D.C. Law 18-160 & 18-160A, codified at D.C. Code §§1-204.35, 1-301.81 *et seq.* ("2010 Act"). JA 94-98.

The 2010 Act contains three provisions about the to-be elected office. First, the election for Attorney General must be a "partisan" election. D.C. Code §1-204.35(a). Second, the Attorney General shall serve a four-year term to "coincide with the term of office of the Mayor." D.C. Code §1-204.35 (c). Finally, "the first election for the position of Attorney General shall be after January 1, 2014," the year of the next mayoral election after the 2010 ratification. D.C. Code at §1-204.35(e).

The vote in favor of the elected Attorney General Charter Amendment was a landslide: over 75% voted "Yes" to the election of the Attorney General, beginning "in 2014." At the time the Elected Attorney General Charter Amendment passed, there was no doubt that the first election for Attorney General would take place *in 2014*.

However, the language in the 2010 legislation itself, D.C. Law 18-160 (the "2010 Law") is slightly different from the language BOE printed on the ballot – it provides that the first Attorney General election will be held "after January 1, 2014." JA 94.

This appeal – and the propriety of issuing a preliminary injunction – turns on the meaning of the phrase "after January 1, 2014" in the 2010 Act. Appellant contends that D.C. voters get to elect their first Attorney General in the 2014 election cycle. Appellees assert that "after" should be read literally to mean *any time* "after January 1, 2014," which could mean 2018, 2022, 2026, and so on, or possibly even never.

This distinction in language only became an issue in 2013, when disagreements arose within the D.C. Council concerning the structure of the office of the new elected Attorney General. Those issues were resolved. But the Council slipped in a last-minute provision to the 2013 law (D.C. Law 20- 60) stating that the election of the Attorney General "shall not be before January 1, 2018," without specification as to any time thereafter (the "Delay Provision"). JA 73 (by a 7-6 vote). In their brief below, Defendants concede that the "only reason" for the Delay Provision was a disagreement first arising in 2013:

> [T]his Court should remember that the only reason the 2013 Law delays the election for Attorney General is because the Mayor (another elected representative of the people) proposed extensive structural changes to the office specifically to allow for a successful transition from the status quo to a system with an elected Attorney General. Those changes then provoked substantial debate in the Council, and disagreements over the resulting decisions ultimately led to the 2013 Law in its final form (with the delay).

JA 208. Until recently, BOE has treated the Attorney General election like the eleven other elections scheduled to be on the 2014 ballot. The ballot access procedures used by BOE conformed with BOE's original interpretation of the 2010 Act – that the Attorney General election would be held in 2014. JA 108-117.

Last fall, in preparation for the April 1, 2014 primary, BOE made available official nominating petitions for the 2014 Attorney General election. JA 108-117. Two candidates filed the official Declaration of Candidacy, but only Appellant submitted the requisite number of nominating signatures (4,800, far in excess of the 2,000 signatures required). Accordingly, on

January 7, 2014, BOE officially notified Plaintiff that he had "met the qualifications to appear on the Democratic Party ballot in the April 1, 2014 Primary Election for the Office of Attorney General for the District of Columbia." JA 457-58.

However, BOE thereafter notified Appellant that pursuant to the Delay Provision of the 2013 Act, absent a court order, it would print the ballot *without* the attorney general on the ballot. JA 468-70.

On December 20, 2013, Appellant filed his motion for preliminary injunction, contending that because the Delay Provision of the 2013 Act is "ordinary legislation," it cannot override the D.C. Charter Amendment provision requiring the first election for Attorney General to *begin* in 2014. JA 31-165. *See Price v. District of Columbia Board of Elections and Ethics*, 645 A.2d 594, 600 (D.C. 1994) (invalidating legislation regarding signature petitions because it contradicted a D.C. Charter amendment). The Delay Provision, therefore, is a nullity, and Defendants must be enjoined from cancelling or delaying the 2014 Attorney General election.

THE RULING ON APPEAL

The trial court denied Appellant's motion for the issuance of a preliminary injunction. Unless reversed, the voters will not see the office of Attorney General on the April 1, 2014 primary ballot, or possibly any other ballot in 2014. JA 1-7. Judge Cordero held that the 2010 and 2013 Acts do not conflict, because the word "after" can be read literally, and since 2018 is literally after 2014, the two Acts are "entirely consistent." JA 6.

The trial court also held that Appellant failed to establish irreparable harm because he "can potentially seek elected office" in the November 2014 general election, and "certainly after January 2018." JA 4.

The lower court further characterized Appellant's motion as one for a mandatory injunction, and applied the higher standard for such found in *Fountain v. Kelly*, 630 A.2d 684 (D.C. 1983). JA 3. The trial court further found that the harm caused to Appellant is overweighed by the harm to the Defendants by "prolonged uncertainty...confusion to voters...and the public...interest in the implementation of laws passed by their elected officials." JA 4.

Finally, the trial court questioned Appellant's standing, because "he does not and cannot legally represent anyone's interest by his own" (JA 3), and also found that Appellant had waived his right to challenge the 2013 Act by failing to object "before its passage." JA 5. Appellant respectfully challenges these rulings on appeal.

STANDARD OF REVIEW FOR ALL ISSUES

On review of the denial of a preliminary injunction, the Court of Appeals is to (1) examine the trial court's findings and conclusions to see if they are sufficiently supported by the record; (2) assure that the trial court's analysis reflects a resolution of all the issues which necessarily underlie the issuance of an injunction; and (3) inquire into any other claims of an abuse of discretion by the trial court. *Don't Tear It Down, Inc., v. District of Columbia*, 395 A.2d 388, 390-91 (D.C. 1978).

Where, as in this case, the action of the trial court turns on a question of law or statutory interpretation, the Court may reach the merits of the controversy. *District Unemployment Compensation Board v. Security Storage Co.*, 365 A.2d 785, 787 (1976), *cert. denied,* 431 U.S. 939 (1977).

ARGUMENT

The trial court erred in not granting Appellant his requested injunction. "The decision to grant or deny preliminary injunctive relief is committed to the sound discretion of the trial court." *Stamenich v. Markovic*, 462 A.2d 452, 456 (D.C. 1983) (citations omitted). "A proper exercise of discretion requires the trial court to consider whether the moving party has clearly demonstrated: (1) that there is a substantial likelihood that he will prevail on the merits; (2) that he is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to him from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order." *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255 -1256 (D.C. 2003) (citing *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976)).

"The four factors have typically been evaluated on a 'sliding scale.'" *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). Under this sliding scale, "[i]f the 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." *Id.* at 1291-92. "It is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits." *Barton v. District of Columbia*, 131 F. Supp. 2d 236, 242 (D.D.C. 2001) (citing *Benten v. Kessler*, 505 U.S. 1084, 1085 (1992)). However, demonstrating success on the merits does not require a "mathematical probability of success on the merits." *See In re Antioch Univ.*, 418 A.2d 105, 110 (D.C. 1980) (citations omitted). Nor does it "require a showing of success with absolute certainty." *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 97 (D.D.C. 2011) (citation omitted) (discussing a motion for stay while on appeal, which requires the same four-part analysis as is done when considering a motion for preliminary injunction). Under the

"sliding scale" analysis applied by the state and federal courts in the District of Columbia, "[i]f the 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, 1291-92, 387 U.S. App. D.C. 205 (D.C. Cir. 2009) (internal quotation marks and citations omitted).

I. The Trial Court Erred in Ruling that Plaintiff Is Not Likely to Succeed on the Merits

It is well-settled that ordinary D.C. Council legislation cannot overrule, amend, or nullify a Charter Amendment. *Price v. D.C. Bd. of Elections & Ethics*, 645 A.2d 594, 599 (D.C. 1994). While the Council may "adopt such acts as are necessary to carry out [the Charter Amendment's] purpose," D.C. Code § 1-287, "legislation implementing the Charter Amendment is valid only if it does not conflict with the Charter Amendment" itself. *Price* at 599-600. Here, the implementing legislation would overrule the Charter Amendment by removing entirely the office of elected Attorney General from the 2014 ballot, in direct contravention of the approved ballot initiative and the 2010 Act amending the D.C. Charter. Accordingly, there is a strong likelihood that the Delay Provision of the Council's 2013 Act is invalid and that Plaintiff will succeed on the merits.

A. The 2010 and 2013 Acts are Inconsistent

The starting point of statutory interpretation is the statutory language itself, to see if there is a "plain and ordinary" meaning. *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (courts look first to statutory words as used in their "ordinary sense"). However, where "rigorous literalism would surely lead to incongruous or absurd results," such an interpretation must be rejected. *UPS v. D.C. Dep't of Empl. Servs.*, 834 A.2d 868 (D.C. 2003) (holding that the phrase "thirteen consecutive weeks immediately preceding the injury" could not

be read to *literally* include weeks where the employee was on strike because that would defeat the statutory purpose). Statutory language must be read "together with other related provisions," rather than in "isolation." *Carey v. Crane Service Co., Inc.*, 457 A.2d 1102, 1108 (D.C. 1983). *See also Hessey v. District of Columbia Bd. Of Elections and Ethics*, 601 A.2d 3 (D.C. 1991) (amendments to the D.C. Charter cannot be viewed in a vacuum).

Appellant contends that there is no ambiguity in the 2010 Act, and that the plain meaning is exactly what the BOE said – voters would begin voting for Attorney General in 2014. Where ambiguity exists, however, "the court may appropriately look beyond plain meaning...where (1) 'a review of legislative history or an in-depth consideration of alternative constructions' of the statutory language reveals ambiguities that the court must resolve; (2) the literal meaning of the statute 'produces absurd results'; (3) the plain meaning construction leads to an 'obvious injustice'; or (4) refusal to adhere to plain meaning is necessary in order to 'effectuate the legislative purpose' of the statute as a whole." *Dobyns v. United States*, 30 A.2d 155, 159 (D.C. 2011). The error below is the failure of the trial court to recognize that fundamentally the 2010 and 2013 Acts are in conflict. One creates the right to elect an Attorney General, the other takes that right away.

B. The Charter Unambiguously Requires the Election to be in 2014

The 2010 Act, in relevant part, provides that "[t]he first election for the position of Attorney General shall be after January 1, 2014" and "shall coincide with the term of office of the Mayor." JA 95-96. The next mayoral election after the passage of the 2010 ballot referendum is 2014. Defendants' alternative reading would produce "an absurd result," an "obvious injustice," and would negate the "purpose of the legislation." *Dobyns, supra*, at 195. Defendants concede that under their interpretation of the 2010 Act, the timing of the election can

be "in 2014, 2018, or so on." (emphasis added). The purpose of the legislation would thereby be entirely thwarted. The year 2098, for example, is also technically "after" January 1, 2014. This absurd outcome would effectively render the 2010 Act illusory, in defiance of the voters' express mandate and expectation that an election will occur in 2014.

No ordinary and sensible voter would countenance such a strained interpretation, and neither should a Court. Once 2014 is cast aside, there is no limit to Defendants' "forever-after" interpretation of the word "after" in the context of the 2010 Act. Moreover, the 2013 Act does not stop at 2018, it starts there, without end. That indefinite extension in the "ordinary legislation" of the 2013 Act contravenes the 2010 Act, which as a Charter amendment nullifies the 2013 Act in this regard.

Defendants' interpretation runs afoul of the well-settled principle that a law must be interpreted to provide it with a meaningful purpose and effect, without rendering it illusory or meaningless. *See Mountain States Tel & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("a statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect"); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (it is an "elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative"); *Dunn v. Commodity Futures Trading Com'n*, 519 U.S. 465, 472 (1997) ("legislative enactments should not be construed to render their provisions mere surplussage"). The only reasonable interpretation of the language, in context, is that the election must take place in 2014.

This Court has previously held the literal language of a statute is not controlling, where the result would be incongruous. *In re D.M.*, 47 A.3d 539 (D.C. 2012), the Court construed a statute providing that "determinations of whether a child is in need of care or rehabilitation may

only be made at or after the dispositional hearing." The court noted that "[r]ead literally, this language in the statute...would appear to authorize the trial court to reexamine the juvenile's need for care or rehabilitation after the delinquency adjudication" itself. *Id.* at 547. But the court declined to adopt this literal interpretation, concluding that "the words 'at or after' were not meant to convey a broad power to redetermine the need for care or rehabilitation and dismiss proceedings after adjudication of delinquency has been properly entered." *Id.* This Court rejected as "implausible in the extreme" that the Council would have acted to grant such expanded authority. *Id.* at 549. Likewise, in this case, the "after January 1, 2014" language, if read as the Defendants suggest, would negate the purpose of the statute – to elect an Attorney General at the next mayoral election.

Where "rigorous literalism would surely lead to incongruous or absurd results," such an interpretation has been repeatedly rejected by this Court. *UPS v. D.C. Dep't of Empl. Servs.*, *supra*; *800 Water St., Inc. v. D.C. Alcoholic Beverage Control Board*, 992 A.2d 1272 (D.C. 2010) (lack of a time limit for a party to surrender its liquor license for cancellation did not literally mean that no such limit could exist in order to avoid the "absurd" result of a party avoiding punitive measures by submitting it for cancellation); *D.C. Office of Tax & Revenue v. Sunbelt Bev., LLC*, 64 A.2d 138 (D.C. 2013) (tax code requirement that a person must "file a return" cannot mean literally that one can comply by submitting a blank return); *Russell v. U.S.*, 687 A.2d 213 (D.C. 1987) (where a D.C. statute required drivers to display inspection stickers in accordance with a "home jurisdiction's requirements," the court rejected as "absurd" a literal reading that the requirement does not apply to Virginia cars while in D.C. because Virginia law, by its terms, only applied to cars while driving in Virginia).

Here, the Court is faced with two competing interpretations of the 2010 Act with respect to the timing of the Attorney General election. Only Plaintiff offers a plausible interpretation. Defendants' overly literal interpretation is, to use the language of these cases, "absurd."

This Court has previously addressed the issue of questionable legislative draftsmanship in *Stevenson v. Board of Elections & Ethics*, 683 A.2d 1371 (D.C. 1996). In *Stevenson*, the drafters of a Charter Amendment left a key phase regarding the number of required signatures open to more than one interpretation, perhaps due to poor draftmanship. This Court found the language to be ambiguous, but had little trouble resolving the ambiguity by applying "normal principles of statutory construction," including the Act's other provisions, its structure, and its legislative history. *Stevenson* stands for the proposition that courts will not allow the underlying purpose of a Charter Amendment to be derailed by a superficial ambiguity. Accordingly, the lower court's finding that the 2010 and 2013 Acts are "entirely consistent" is erroneous.

C. All of the Extrinsic Evidence Supports Appellant's Contention that the Election Must be Held in 2014, as the Ballot Clearly Stated

Although there is only one plausible reading of the statutory language of the 2010 Act ("after Jan 1, 2014"), at a minimum, that language is ambiguous. This warrants a review of the extrinsic evidence relevant to an interpretation. Such a review leaves no doubt as to the proper interpretation of the timing issue. All evidence of intent – without a single exception – supports the voters' view that the election must proceed in 2014, while there is *no evidence* whatsoever to support the forever-after reading that OAG now advances.

1. The Voters' Intent Supports Appellant's Position

The single most important item of extrinsic evidence is what the voters saw on the 2010 ballot when they voted. The summary stated: "If voters approve of this amendment...residents of

the District of Columbia would begin voting for Attorney General in 2014." JA 91. That is crystal clear, and the voters said yes by an overwhelming majority of 76%. JA 383-84.

At the time in 2010, nobody noticed a drafting "mistake" in the BOEE summary, as Defendants have called it – because there wasn't a mistake. The BOEE summary reflects exactly what the 2010 Act intends, that the election take place in 2014. Indeed, the 2010 voters' ballot was drafted, approved, and implemented by *Defendants*, which further confirms both legislative and administrative intent, at the time, that the election would be in 2014. The BOEE drafted the summary and sent it to the Council, and then there a period wherein any voter could object to the BOEE summary. *See* D.C. Code §1-286 (empowering BOEE to propose a summary of a voter initiative or referendum and allowing any voter an opportunity to seek a correction in the summary at any point up to 30 days prior to the election).

Significantly, no one on the Council (nor any voter) objected to BOEE's ballot language stating that voting for Attorney General would begin in 2014 – because everyone understood the intent was to have a 2014 election. If anyone on the Council believed that BOEE's summary language was inaccurate, they had a duty to raise the issue before the election, and not three years later. The requirement of timely objection should be applicable to ballot initiatives, as it is to jury instructions, in order to prevent sandbagging – that is, waiting for the result before deciding whether to object. *See Postell v. United States*, 282 A.2d 551 (D.C. 1971).

2. Legislative Intent Supports Appellant's Position

This Court takes legislative history into account when interpreting statutory language. "[E]ven where the words of statute have a 'superficial clarity' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve." *District of Columbia v. Place*, 892

A.2d 1108, 1111 (D.C. 2006). In the Charter context in particular, the Council's intent becomes even more significant. *See Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 100-01 (D.C. 2010) (it is "paramount" to consider the Council's intent when assessing a Charter amendment approved by voters through a referendum); *Stevenson v. D.C. Bd. of Elections & Ethics*, 683 A.2d 1371, 1376 (D.C. 1996) (looking to legislative history in assessing the Council's intent when interpreting a Charter amendment approved through referendum).

The Council's intent in 2010 to the first Attorney General election in 2014 is uncontroverted. First, the Council saw and approved the BOEE 2010 ballot summary stating that the election be in 2014. Second, the only specific mention of this timing issue came from then Councilmember Mendelson, who in 2009 introduced the bill (B18-0065) and then in early 2010, introduced the relevant amendment that led to the 2010 Act. JA 133. On February 1, 2010, in his then capacity as Chair of the Committee on Public Safety and the Judiciary, the chief architect of the 2010 Act wrote that the amendment as to the timing of the election "clarifies that the first election to be held for the position of Attorney General shall coincide with the election for Mayor in 2014 general election." *Id.* The relevant legislative intent is also crystal clear, and it is the *only* specific expression of legislative intent made at the time. *See Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir.1995) ("Reference to statutory design and pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears 'superficially clear.'") (quoting *American Scholastic TV Programming Found. v. Federal Communications Commission*, 46 F.3d 1173, 1178 (D.C. Cir.1995)); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part) ("Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes").

Finally, Defendants have provided as an exhibit a letter from Mayor Vincent Gray, who was the Chairman of the D.C. Council when the 2010 Act was passed. JA 389-404. This January 12, 2013 letter from Mayor Gray to Chairman Mendelson enclosing the original proposed bill that would become the 2013 Act, which at the time *did not* contain the Delay Provision. Mayor Gray affirms that his understanding of the intent of the 2010 is identical to Appellant's, stating in relevant part: that "[i]n January 2015, pursuant to [the 2010 Act], an elected Attorney General...will for the first time take office....The District should be prepared for the coming transition and should make the important policy and practical decisions before the electoral process for the 2014 Attorney General election *begins in April 2014*" (emphasis added). JA 389. Mayor Gray's letter further demonstrates that prior to the 2013 disputes over implementation, every elected official with knowledge of the intent of the 2010 Charter Amendment believed that it required a 2014 Attorney General election.

3. Administrative Intent Supports Appellant's Position

The BOE is an independent agency charged with implementing and enforcing D.C.'s elections laws. The D.C. Charter empowers and requires the Board of Elections to submit a Charter initiative to the voters and prepare an accurate summary thereof. The District of Columbia Board of Elections and Ethics shall be empowered to propose a short title and summary of the initiative and referendum matter which accurately reflects the intent and meaning of the proposed referendum or initiative. [D.C. Code § 1-286]. A BOE summary statement must be impartial, accurate, and reflect the meaning and intent of the amendment. DCMR 3-1802.2. The summary is published in the D.C. Register for comment, with an opportunity by the Council or the public to seek correction. DCMR 3-1802.1, 1802.4. The BOEE summary was published, with the text of the Act itself following the summary. And

BOEE has thereafter, to this day, prepared for the 2014 election. This is not only evidence of administrative intent on this specific point, it creates a presumption of court deference to an agency interpretation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

By law, the summary and short titled are published in newpapers of general circulation, distributed at public meetings, posted in public libraries, and served upon the Mayor *and* the Council. Should any Councilmember or person find the summary to be inaccurate or objectionable, the Charter grants universal standing to any citizen to petition the court for mandamus, "no later than thirty (30) days prior to the election." D.C. Code § 1-286.

The purpose of the 30 day rule is to prevent just what is occurring in this case, a post-balloting contention that the ballot summary is inaccurate. In this case, no one objected to the BOE official summary, because no one disputed that the Amendment meant voting for Attorney General would "begin in 2014." Allowing Defendants to disavow the ballot language when they failed to timely object when given the opportunity would render the 30 day rule meaningless.

4. The Council's Own Lawyer Concurs with Appellant

When the Council recently grappled with the issue of the timing of the election, they asked for a legal opinion from one of their own lawyers, John Hoellen, Deputy General Counsel for D.C. He provided that opinion and he concluded that the election must take place in 2014. JA 99-101. This is more powerful evidence that defeats Defendants' "forever-after" theory. The Hoellen Memo explains that the D.C. Charter cannot be read in isolation to produce an absurd result, and further recounts the legislative record by Council Chairperson Phil Mendelson explaining that "the amendment clarifies that the first election to be held for the position of Attorney General shall coincide with the election for Mayor in 2014 general election." *Id.*

5. The Attorney General Previously Agreed with Appellant

On March 23, 2013, Irvin B. Nathan, the current appointed Attorney General, testified before the D.C. Council Committee on the Judiciary regarding the Elected Attorney General Charter Amendment and its implementing legislation. JA 139-63. Specifically, Attorney General Nathan told the Council that "by law" the first election for Attorney General would be in 2014:

> For the first time in the long history of the District of Columbia, an elected Attorney General will, by law, take office in January 2015. As a result of the 2010 legislation, the District will move from its long-standing unitary executive model, tracking the federal model, under which the Attorney General is appointed by the Mayor, and will join the 43 states that have a divided executive. These states have an elected Chief Executive and an elected Attorney General, neither subordinate to the other, and both serving in the executive branch.

JA 141. Thus, as recently as March 2013, appointed Attorney General Nathan was of the opinion that "an elected Attorney General will, by law, take office in January 2015" – *i.e.* following the November 2014 balloting. This is not to suggest that the quoted testimony reflects the appointed Attorney General's current litigation position in this case, but merely to illustrate that prior to the disagreement arising among Councilmembers in the summer of 2013, there was *universal agreement* that the 2010 Act, ratified by voter referendum, requires the first attorney general election to take place in 2014.

The current Attorney General also authored a prior memorandum addressed to the Council, in which he concluded that delaying the attorney general election would result in an "obvious injustice." JA 102-07. He stressed that the balance of equities and the public interest strongly counsel against its adoption:

> The District's voters by a substantial margin supported the Charter amendment creating an elected Attorney General and did so with the justifiable expectation of voting for one in 2014 who would take office in January 2015 concurrent with the next Mayoral term. In my view, their expectation should be respected and

fulfilled.

JA 103. At a minimum, this is a concession that the Attorney General's current interpretation of the statutory language cannot be adopted, as it would "lead to an obvious injustice." *See Dobyns*, 30 A.2d at 159 ("obvious injustice" is one of the rules of interpretation that require a court to move beyond blind literalism in interpreting statutes). The Court should avoid sanctioning the obvious injustice of thwarting the clearly expressed will of the voters to begin electing their Attorney General in 2014.

D. The Trial Court's Reliance on the "Reappointment" Clause is Misplaced

The trial court also relied upon § 102 of the 2010 Act which allows the Mayor to "reappoint" an interim, unelected Attorney General prior to the elected Attorney General taking office. JA 106. The lower court accepted that the word "reappoint" implies that the election could be at any point in the forever-after, as otherwise there would be no need for the Mayor "reappoint" an Attorney General. But the word "reappointment" does not allow for this interpretation. As Defendants themselves explain (JA 177-78), section 102 of the original bill that later would become the 2010 Act provided that the Attorney General Charter amendment would be passed by an act of Congress rather than a ballot referendum under D.C. Code § 1-203.03. There was no way to predict when Congress would pass such an act amending the Home Rule Act. Logically, then section 102 therefore provided that "until such time" as the Congress would act, the Attorney General could be "appointed" or "reappointed" by the Mayor. JA 177-78 (and exhibits referenced therein).

However, the original bill was subsequently amended (as moved by Councilmember Mendelsohn), to provide that instead of Congressional action, the Charter be amended directly by a voter ballot referendum. JA 375-81. The final amendment passed, adding that such election must be held "after January 1, 2014," and Councilmember Mendelsohn expressed the

legislative intent that the election proceed in the calendar year 2014. JA 133. The voters, an intrinsic part of this particular legislative process, then amended the Charter in reliance on the ballot representation that the election would be "in 2014." This clear directive cannot be undone because in the prior, un-amended version of the original bill, there was once a possibility that due to Congressional delay in passing its own act to amend the D.C. Charter, there might have been a scenario where the Mayor might have needed to reappoint an Attorney General.

Looking back, as irrelevant as it is to do so, one can easily provide potential meaning to the word "reappoint" in the context of the 2010 Act. For example, assume that Congress does not pass its own act until 2015, so in the interim, a new Mayor might "reappoint" the sitting Attorney General. Section 102 also could have been operative had then Attorney General Nichols resigned before January 1, 2011, causing then Mayor Fenty to appoint a new person, who then new Mayor Gray could then have "reappointed" long before the 2014 elections. The trial court's reliance on the word "reappointment," a legacy of a prior version of the Act, cannot override the purpose of the Charter Amendment – to have an elected Attorney General.

II. The Trial Court Erred in Holding that Appellant Will Not Be Irreparably Harmed

The trial court erred in analyzing the irreparable harm prong of the preliminary injunction standard. First, the trial court held that Appellant failed to establish irreparable harm because he "can potentially seek elected office" in the November 2014 general election, and "certainly after January 2018." JA 4. This conclusion is not supported by the record. The 2010 Act requires there to be a "partisan" election in 2014, so consideration of 2018 as a solution is entirely out of the question. The irreparable harm would be in not having an elected Attorney General from 2015-18. The trial court mistakenly assumed that the Delay Provision, which states that the election for Attorney General "shall not be before 2018," means that it *will* be in 2018. The 2013

Delay Provision states only that it cannot be before 2018, but can be *anytime* thereafter. Coupled with the Defendants' position that the Council has unlimited control over the date of the election, this is in effect an indefinite delay. Indeed, Defendants have represented as much to the Court.

Further, nothing the record supports the trial court's pointing to the November 2014 general election as a solution to the requirement that there be a "partisan" election in 2014. The trial court erred in pointing to "legislative proposals under consideration which *might* provide adequate compensatory relief at a later date." *Id.* (emphasis added). JA 4. There is a mere bill that has been introduced, and it may or may not pass. But whether there will be an election in 2018, or corrective legislation will intervene sooner in 2014, is only speculation. Due to time constraints, there is no possibility now that any legislative fix could substitute for the injunctive relief sought, because the April 1, 2014 primary will occur before any new law could be enacted. The only issue before the Court now is whether the D.C. Charter, as amended, requires an election in 2014. Appellant has established that it does.

As discussed further below, even a four-year delay is irreparable harm, if, as Appellant contends, the Charter requires the voting begin in 2014. *See Amarasinghe v. Quinn*, 148 F. Supp. 2d 630 at 634 (E.D. Va 2001) (finding that "there cannot be serious dispute that the plaintiff will be irreparably injured absent an injunction" requiring a qualifying candidate to be placed on the ballot); *N. Carolina Socialist Workers Party v. N. Carolina State Bd. of Elections*, 538 F. Supp. 864, 867-868 (E.D.N.C. 1982) (holding that while the harm to plaintiffs from failing to be placed on the ballot "is not technically irreparable, since if plaintiffs prevail the court could at some later date order that the Party be put on the ballot, that the election be delayed, or even that the election be overturned...these measures are all drastic and the court strives to avoid them").

Second, the trial court erred in applying the harm analysis applicable to suits for monetary damages. JA 3, citing to *Zirkle v. District of Columbia*, 830 A.2d 1250, at 1257, the trial court reasoned:

> But, "[m]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough.

Zirkle was an employment termination case, where this Court held that plaintiff's injury could be redressed because "economic and reputation-type injuries" could be adequately compensated at the conclusion of the litigation by a damage award. *Id.* at 1257. *Zirkle* is inapplicable to the instant case because the only relief Appellant seeks is injunctive. Appellant is not asking for monetary damages, because monetary relief cannot redress denial of the right to vote or run for public office. Long experience has shown that the right to vote is fundamental and inseparable from the concept of ordered liberty. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax unconstitutional). Other rights, even the most basic, are illusory, if the right to vote is undermined. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Third, the trial court erred in applying the higher "mandatory injunction" standards found in *Fountain v. Kelly*, 630 A.2d 684 (D.C. 1993) when characterizing the relief requested by Appellant. JA 3. In *Fountain*, the injunctive relief requested by the homeless plaintiffs was for the construction of "apartment style shelter housing units...equipped with separate cooking facilities...outdoor areas [for]...exercise" and other amenities, which did not then exist. *Id.* The *Fountain* court defined "mandatory injunctions" as those "which would require significant changes in the situation which existed when the suit was filed."

In the present case, Appellant's motion is more accurately described as a preliminary injunction to preserve the status quo which does not require "*significant*" changes, such as constructing a building. At the time this suit was filed, the office of elected Attorney General

was on the ballot, pursuant to the then existing law. To the extent that Appellant's motion can be described as "mandating" that the BOE add a line to the ballot in an election, which will already includes eleven other elected offices, this would not equate to "significant changes in the situation," comparable to *Fountain*, where the plaintiff was requesting that new apartment buildings be constructed. Accordingly, it was error to apply the higher mandatory injunction standard.

Finally, the trial court erred in suggesting that Appellant lacks standing, because "he does not and cannot legally represent anyone's interest by his own," and finding that Appellant in any event waived his right to challenge the 2013 Act by failing to object "before its passage." JA 3, 5. Appellant has standing as both a voter and a qualified candidate. *LaRoque v. Holder*, 650 F.3d 777, 786-87 (D.C. Cir. 2011) (a candidate has both standing and a cause of action to challenge election procedures where "non-compliance [with the law] prevents candidates' from appear[ing] on the ... ballot.") *Id.* at 786. Plaintiff also has standing as a voter. *See League of United Latin Am. Citizens v. City of Boerne*, 659 F.3d 421 (5th Cir. 2011) ("'complete deprivation of [the] right to vote' confers standing even if shared by the entire electorate"); *Federal Elections Commission v. Akins*, 524 U.S. 11 (1998) (voters had standing to challenge their collective inability to obtain a non-profit organization's donor lists).

Nor is there any support for the proposition that waiver or estoppel requires a candidate or voter to object to the passage of an Act, or else lose the right to challenge the law should it be enacted. Plaintiff objected to the 2013 Delay Provision by filing his lawsuit to enjoin the delay the day after it passed. The delay in resolving this case was caused because the initial federal court agreed with the Defendant the case was not ripe for review until the Delay Provision also passed the 30 day period of Congressional review. Of course, the Council was aware before it

passed the 2013 Act that it was treading on thin ice, without any need for Appellant's input. Its own attorney warned the Council that the Delay Provision ran afoul of the Charter Amendment. Defendants can hardly claim that this suit came as a surprise, when the decision to delay went against the advice of their own lawyer. Neither waiver nor estoppel bars the relief Appellant seeks.

III. The Trial Court Erred in Balancing the Equities and Assessing the Public Interest

In his prior memorandum, the current Attorney General accurately summarized how the Court should weigh the "balance of equities" and the "public interest." JA 102-07. The voters approved the ballot and had, and have, a "justifiable expectation" that the election will proceed in 2014. The Attorney General warned: "the Council should fully consider the consequences of dashing such a justifiable expectation." JA 107. Unfortunately, seven members of the Council did not heed this advice, nor that of their own lawyer. These justifiable voter expectations are of the highest and most fundamental nature that we recognize in our society: the right to vote. Nevertheless, the trial court ruled that the harm caused to Appellant is overweighed by the harm to the Defendants by "prolonged uncertainty...confusion to voters...and the public...interest in the implementation of laws passed by their elected officials." JA 7. While voters do have an interest in certainty, and in the implementation of laws passed, they have a greater interest in reaching the correct result, and having invalid laws which conflict with the Charter struck. They certainly have a strong interest in seeing the Charter Amendment they overwhelmingly approved respected.

It is clear that "more harm will result to the movant from the denial of the injunction than will result to the nonmoving party from its grant." *District of Columbia v. Greene*, 806 A.2d 216, 223 (D.C. 2002) (quotations omitted). Without the injunction, Appellant and the voters are injured irreparably. With the injunction, no harm will result for Defendants. They will simply

proceed with the election, without any appreciable additional cost. There are currently eleven public offices on the ballot for 2014, including Attorney General. Because of these other races, the BOE will still have to fulfill all the administrative burdens to complete those elections. Indeed, at this point, it would probably be more cost and trouble to remove the office of Attorney General from the ballot than to go forward with it as BOE has long planned. Certainly, it would be very costly to later hold a special election for Attorney General, should this Court later decide to grant Plaintiff's requested relief.

The public interest weighs especially heavy in favor of granting the motion. The results of the 2010 ballot referendum speak for themselves. The public wants an independently elected Attorney General beginning in 2014 and it would not be in the public interest to cancel that election in the name of resolving uncertainty.

CONCLUSION: THE PRECISE RELIEF SOUGHT

For all of the reasons addressed above, the trial court erred in failing to grant Appellant's motion for a preliminary injunction, and such denial was an abuse of discretion. Accordingly, the decision of the trial court should be reversed. The 2010 Charter Amendment requires that there be a "partisan" election for Attorney General in the year 2014. The Delay Provision violates the Charter and must be struck down.

The precise relief sought from this Court is as follows: Appellant asks this Court to remand this case with instructions that the trial court order the BOE to (1) include the election of Attorney General on the April 1, 2014 primary ballot and the November 5, 2014 general ballot, or (2) if inclusion on the April 1, 2014 primary ballot is determined to be impossible due to the passage of time, proceed with a special election that fulfills the mandate that there be a "partisan" election for Attorney General in 2014.

Date: February 12, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2014, the Appellant's Brief and Joint Appendix were filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia. A copy was served on counsel for Appellees Richard Love (richard.love@dc.gov), Todd Kim (todd.kim@dc.gov), and Loren AliKhan (loren.alikhan@dc.gov) by electronic mail on February 12, 2014.

Gary S. Thompson