IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

CHARLES E. WILSON, et. al.,
Appellants,

vs.

MURIEL E. BOWSER, et. al.,

Appellees.

No. 24-CV-0397

MOTION OF MAKE ALL VOTES COUNT DC FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Make All Votes Count DC respectfully moves for leave to file the appended proposed *amicus curiae* brief in support of affirmance pursuant to D.C.C.A. Rule 29(a)(3). While counsel for Appellees has consented to the filing of Make All Votes Count DC's proposed *amicus curiae* brief, counsel for Appellants has not responded to repeated requests for consent via e-mail and telephone.

POINTS AND AUTHORITIES

Amicus curiae Make All Votes Count DC is a grassroots ballot initiative campaign bringing together a group of District residents and neighbors who seek to allow voters to decide whether to reform how the District elects its public representatives. Make All Votes Count DC has proposed Initiative Measure No. 83, the Ranked Choice Voting and Open the Primary Elections to Independent Voters

Act of 2024 ("Initiative 83"). Earlier this month, Make All Votes Count DC submitted more than 40,000 signatures to the Board of Elections ("Board") of voters from all eight wards who support Initiative 83 appearing on the ballot this November. The Board has until August 5, 2024, to certify whether the petition has sufficient valid signatures and, if so, that Initiative 83 will appear on the ballot.

Amicus has a significant interest in this case because Appellants have challenged the Board's July 2023 decision accepting Initiative 83 as a proper subject of initiative under District law. The issue presented in this appeal is whether the Superior Court correctly dismissed the case because Appellants failed to timely file suit under D.C. Code § 1-1001.16(e)(1)(A). As the Board explains in its Appellee brief, the Superior Court's ruling was correct and thus should be affirmed.

Amicus's proposed brief is desirable and would be of assistance to the Court. Even though the untimeliness of their suit is the only issue on appeal, Appellants have devoted significant portions of their brief to their claims against, and policy disagreements with, Initiative 83. Make All Votes Count DC's proposed *amicus* brief thus responds to explain why Appellants' objections to Initiative 83 lack merit, such that, even if the Court were inclined to reach Appellants' claims in this appeal, those claims should be rejected and the Superior Court's decision affirmed.

CONCLUSION

For the reasons stated above, the motion for leave to file should be granted.

Dated: July 31, 2024

Respectfully submitted,

/s/ *Kevin P. Hancock*

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CERTIFICATE OF SERVICE

I certify that on July 31, 2024, this *amicus curiae* brief was served through this Court's electronic filing system to:

Johnny Barnes, Esq., Counsel for Appellants Charles E. Wilson, the District of Columbia Democratic Party, and Keith Silver

Terri D. Stroud, Esq. and Sonya L. Lebsack, Esq., Counsel for Appellee District of Columbia Board of Elections

Caroline S. Van Zile, Esq. and Christine Pembroke, Esq., Counsel for Appellees Muriel E. Bowser, Mayor of the District of Columbia, and the District of Columbia

/s/ Kevin P. Hancock
Kevin P. Hancock

Appeal No. 24-CV-0397

DISTRICT OF COLUMBIA COURT OF APPEALS

CHARLES E. WILSON, et al.,

Appellants,

v.

MURIEL E. BOWSER, et al.,

Appellees.

On Appeal from the Superior Court of the District of Columbia, Civil Case No. 2023-CAB-005414
Carl E. Ross, Judge, D.C. Superior Court

[PROPOSED] BRIEF OF *AMICUS CURIAE* MAKE ALL VOTES COUNT DC IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICUS

Amicus curiae Make All Votes Count DC is a grassroots ballot initiative campaign bringing together a group of District residents and neighbors who seek to allow voters to decide whether to reform how the District elects its public representatives. Make All Votes Count DC has proposed Initiative Measure No. 83, the Ranked Choice Voting and Open the Primary Elections to Independent Voters Act of 2024 ("Initiative 83"). Earlier this month, Make All Votes Count DC submitted more than 40,000 signatures to the Board of Elections of voters from all eight wards who support Initiative 83 appearing on the ballot this November.

Make All Votes Count DC respectfully submits this *amicus curiae* brief pursuant to D.C.C.A. Rule 29(a)(2) to support affirmance of the decision below and to correct Appellants' numerous incorrect claims about Initiative 83.[1]

SUMMARY OF ARGUMENT

At the outset, *amicus* urges the Court to affirm the Superior Court's decision dismissing this lawsuit because it is untimely. As Appellee Board of Elections ("Board") has explained, the Superior Court correctly dismissed this case because

[1] Although all Appellees have consented to the filing of this brief, *amicus* has moved for leave to file pursuant to D.C.C.A. Rule 29(a)(3), because Appellants have not responded to *amicus*'s repeated requests for consent to file.

Appellants failed to file their Complaint within the statutory ten-day period for objections to proposed ballot initiatives. *See* Board Br. at 23-33.

Even though the untimeliness of their Complaint is the only issue on appeal, Appellants attempt to distract from their fatal procedural failure by making lengthy assertions in support of their substantive claims against Initiative 83. As explained below, Appellants' claims lack merit, and so, even if the Court were inclined to reach those claims in this appeal, they should be rejected and the trial court affirmed.

First, Appellants' policy-based objections to Initiative 83 make clear that this suit is simply an undemocratic attempt to deny D.C. voters a say over whether to implement Initiative 83's pro-democracy reforms. If adopted and funded, Initiative 83 would end voter disenfranchisement for nearly 75,000 independent D.C. voters—roughly one out of every six District voters—by allowing them to vote in the District's primary elections. Initiative 83 would also help ensure that District politicians represent and are accountable to voters by implementing ranked choice voting, which, among other things, would guarantee the election of candidates supported by a majority of D.C. voters. The current majority political party's resistance to changing the electoral system that resulted in their own election should not be allowed to overrule the will of the more than 40,000 District voters who want Initiative 83's electoral reforms on the ballot.

Second, contrary to Appellants' claims, Initiative 83 is a proper subject of initiative under District law. District case law plainly indicates that Initiative 83 does not improperly compel the D.C. Council to allocate funds. Additionally, under Supreme Court precedent, Initiative 83's proposal to open D.C.'s primary elections to independent voters would not infringe on Appellants' or any voters' associational rights. Finally, opening D.C.'s primary elections to independent voters also would not violate the Home Rule Act's requirement that the District hold partisan primary elections, which it would continue to do under Initiative 83.

For these reasons, Appellants' suit should be dismissed.

BACKGROUND

Make All Votes Count DC submitted its proposed initiative to the Board on June 16, 2023. Supplemental Appendix ("SA") 1-12. On July 21, 2023, the Board determined that Initiative 83 is a proper subject of initiative pursuant to D.C. Code § 1-1001.16(b)(1). *See* SA 269-80. On August 23, 2023, the Board held a public hearing where it adopted Initiative 83's official formulations—*i.e.*, the measure's short title, summary statement, and legislative form. SA 294-341. On September 1, 2023, those formulations were published in the D.C. Register, *see* SA 356-64, thus triggering a 10-day period during which any qualified District elector may challenge the Board's formulations in Superior Court, *see* D.C. Code § 1-1001.16(e)(1)(A).

On August 31, 2023, before the Board published Initiative 83's formulations in the D.C. Register, Appellants filed this case in the Superior Court. SA 369-403. On March 28, 2024, that court dismissed the case as untimely. SA 486-94.

On July 1, 2024, after six months of grassroots outreach, Make All Votes Count DC submitted to the Board more than 40,000 signatures from voters in all eight District wards who support Initiative 83 appearing on the ballot. *See* Press Release, Make All Votes Count DC, The YES on 83 Campaign Submits Over 40,000 Signatures to the D.C. Board of Elections Today (July 1, 2024), https://perma.cc/B9DJ-GLBN. This is the largest number of signatures collected for any District initiative in the last decade and far more than the approximately 22,500 signatures (*i.e.*, five percent of all District registered voters) required. *See* Board Br. at 4 n.3. The Board has until August 5, 2024, to certify whether the petition has sufficient valid signatures and, if so, that Initiative 83 will appear on the ballot. D.C. Code § 1-1001.16(o)(1), (p)(1).

ARGUMENT

I. The Superior Court correctly dismissed this case as untimely.

This is a straightforward case. As the Board explains, the Superior Court correctly dismissed this suit as untimely because Appellants filed their Complaint before the start of the 10-day challenge period established by D.C. Code § 1-1001.16(e)(1)(A). *See* Board Br. at 23-31. The D.C. Code states that registered

qualified D.C. electors may only challenge the Board's formulations for an initiative "in the Superior Court of the District of Columbia within 10 calendar days from the date the Board publishes the summary statement, short title, and legislative form in the District of Columbia Register." D.C. Code § 1-1001.16(e)(1)(A).

Here, as the Superior Court correctly determined, Appellants failed to file their Complaint within the 10-day challenge period. SA 491-93. Appellants' suit is a challenge to the "Summary Statement, Short Title, and Legislative Form of Proposed Initiative No. 83" under D.C. Code § 1-1001.16(e)(1)(A). SA 369-70. The Board published Initiative 83's summary statement, short title, and legislative form in the D.C. Register on September 1, 2023, thus triggering the start of the 10-day challenge period. *See* SA 356-64; 70 D.C. Reg. 11907-15 (Sep. 1, 2023). Appellants, however, filed their Complaint before publication, on August 31, 2023. *See* SA 369 ("eFiled 08/31/2023 5:29:46 PM"), 402 ("**EXECUTED** this 31st day of August 2023"). The Superior Court should thus be affirmed.

II. Appellants' claims against Initiative 83 are irrelevant and meritless.

Unable to justify their failure to meet the D.C. Code's timeliness requirements, Appellants devote significant portions of their brief to their meritless claims against Initiative 83, which are not at issue in this appeal. But even if this Court did have occasion to address those claims, *see* Board Br. at 6 n.4 & 35 n.43, affirmance would still be warranted, *see Wilburn v. D.C.*, 957 A.2d 921, 924 (D.C.

2008) ("As an appellate court, we may affirm the trial court's dismissal order 'on any basis supported by the record.'"). First, Appellants' policy disagreements with Initiative 83 should not be allowed to deny District voters the ability to decide whether to adopt the initiative's beneficial democratic reforms, which would result in a more representative and accountable D.C. government. Second, contrary to Appellants' claims, Initiative 83 is a proper subject of initiative under District law, as the D.C. Attorney General and the Board have already concluded.

A. Appellants' opposition to Initiative 83's policies cannot deny D.C. voters of their power to choose whether to adopt its beneficial democratic reforms.

As the *Washington Post*'s editorial board has explained, Appellants' suit is nothing more than an "undemocratic" attempt to "deny D.C. residents a say over how elections are administered to defend a status quo in which local government is less representative—and therefore less responsive to the majority—than it could be." Editorial, *A D.C. Democratic Party lawsuit is decidedly undemocratic*, Wash. Post, Aug. 11, 2023, https://perma.cc/BHR4-KTN7. Although Appellants challenge Initiative 83's legality, their complaint makes clear that, at bottom, they simply disagree with Initiative 83 as a policy matter and fear the impact it may have on their own elections. *See, e.g.*, SA 381 (Compl. at 13 ("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!")); SA 390-91 (Compl. ¶¶

81-82 (wrongly claiming that ranked choice voting could cause "confusion" and "suppress the voice and influence of voters of color")). But aside from being wrong (ranked choice voting has been shown to *benefit* voters of color, for instance, *see infra* Part II.A.2), the majority political party's fears and policy disagreements cannot deny "the power of the electorate to propose laws through the initiative." *Brizill v. D.C. Bd. of Elections & Ethics*, 911 A.2d 1212, 1214 (D.C. 2006). This Court has described the initiative power as "co-extensive with the power of the legislative branch of government to pass legislative acts, ordinances, and resolutions." *Id.* (internal quotation marks omitted).

Citizen-led ballot initiatives like Initiative 83 empower voters to bypass legislative inaction or resistance and participate directly in the democratic process, voting together to enshrine binding legislation.[2] Ballot initiatives allow people to create a more honest, ethical government that puts the people's interests first—not politicians or special interests.[3] Indeed, a ballot initiative that proposes electoral reform is perhaps the most appropriate use of the initiative power imaginable. *Cf.*

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[2] *See* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 396 (2003).

[3] Anna Skiba-Crafts, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305, 1309 (2009) (citing David B. Magleby, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 28 (1984); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 431 (1998)).

League of Women Voters of Utah v. Utah Legislature, No. 20220991, 2024 WL 3367145, at *2 (Utah July 11, 2024) (holding that right to reform government through a citizen initiative is a fundamental right). It allows citizens to decide how their elections should be conducted without interference from incumbent elected officials, who naturally have a status-quo bias in favor of the system that led to their election. Sending electoral reform questions straight to the people is the paradigmatic example of a good use of direct democracy.

As described below, and contrary to Appellants' mischaracterizations, Initiative 83 would implement two beneficial democratic reforms that would promote both the constitutional rights of District voters and more representative and accountable government.

1. Primaries open to independent voters promote broader democratic access.

First, Initiative 83 would open D.C.'s primary elections to independent voters, which would expand access to democracy in the District. Specifically, Initiative 83 would allow any voter who is not registered with a political party to vote in the party primary of that voter's choosing for all offices. By doing so, Initiative 83 would strengthen our democracy by giving more voters a voice in it. Research shows that allowing all voters, not just those registered with political parties, to participate in

primary elections boosts voter turnout and results in a more functional, representative democracy.[4]

Currently, D.C. has a closed partisan primary system in which voters must register with a political party to vote in a primary election. Nearly 75,000 D.C. voters, however, are not registered with a political party and cannot currently vote in D.C.'s primary elections.[5] Moreover, national trends suggest the number of independent voters will continue to grow.[6] So enfranchising more voters to participate in District primaries will promote greater voter participation—and more representative outcomes—now and in the long-term.

Research shows that primaries open to independent voters have higher voter turnout rates and result in more representative, accountable elected officials. One study showed that when states switched from entirely closed primaries to some form of open primaries, voter turnout rates increased by an average of two percent.[7]

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[4] *See* Joshua Ferrer & Michael Thornig, *2022 Primary Turnout: Trends and Lessons for Boosting Participation*, BIPARTISAN POL'Y CTR. 17 (Mar. 2023), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/03/Primary-Turnout-Report_R03.pdf; Elizabeth Gerber & Rebecca Morton, *Primary Election Systems and Representation*, 14 J. OF L., ECON., & ORG. 304, 322 (1998).

[5] *Open The Primaries to Independent Voters*, Make All Votes Count DC, https://perma.cc/V9FX-Z3KK (last visited July 29, 2024).

[6] Carlo Macomber & Tyler Fisher, *Not Invited to the Party Primary*, UNITED AM. INST. 11 (Feb. 2024), https://docsend.com/view/kz8jkfxixy727fds.

[7] Ferrer & Thornig, *supra* note 4 at 17.

Evidence also shows that jurisdictions with primaries open to independent voters elect candidates whose views better represent and align with the views of voters.[8] That is especially true here where Initiative 83's ranked choice voting provisions would require the election of politicians supported by a majority of D.C. voters. SA 358-60 (Initiative 83, § 2(c)). Allowing more voters to participate in primary elections, in turn, makes elected officials accountable to more of their constituents.[9]

Opening primaries to independent voters also eliminates barriers to the ballot box for certain demographics of voters who are disproportionately disenfranchised because they register as independents. For example, Hispanics, young voters, and veterans make up a significant portion of registered independents nationwide, meaning that these voters are disproportionately disenfranchised in closed primaries.[10] Instead of predicating participation in democracy on political party membership, all voters should be able to have a voice in all elections.

This is especially important because in some places—including D.C.—primary elections are highly determinative of general election outcomes. Closed primaries thus exclude independent voters from a key aspect of how we choose our

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[8] Gerber & Morton, *supra* note 4 at 322.

[9] In contrast, closed primaries "force[] legislators to be accountable only to their partisan base and not the general electorate." Jeremy Gruber et. al., *Let All Voters Vote: Independents and the Expansion of Voting Rights in the United States*, 35 TOURO L. REV. 649, 652 (2019).

[10] Macomber & Fisher, *supra* note 6 at 11.

democratic leaders. Low-turnout, determinative closed primaries likewise skew the make-up of voters who choose our elected representatives. A 2020 study found that just ten percent of American voters elected 83 percent of Congress, and in the first half of 2024, just five percent of Americans have effectively already elected 62 percent of Congress in low turnout, determinative primaries.[11] Closed primaries thus contribute to disproportionate representation of a small fraction of American voters.

Acknowledging the detriments of closed primaries, forty states have moved from closed primaries to more inclusive primary systems, and seven of those states have embraced Initiative 83's proposed reform of opening party primaries to independent voters.[12] And polling shows that the majority of D.C. voters support this reform.[13] Thus, ending the disenfranchisement of independent voters in D.C.'s primary elections would strengthen the District's democracy. Initiative 83 affords D.C. voters the choice to do so.

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[11] *See* UNITE AM. INST., THE PRIMARY PROBLEM 9 (Mar. 2021), https://docsend.com/view/8g885yjfcvib3gr9; *The Primary Problem*, Unite America, https://perma.cc/4B4W-CPAM (last visited July 29, 2024).

[12] Arizona, Colorado, Maine, Massachusetts, New Hampshire, North Carolina, and Rhode Island. *State Primary Election Types*, National Conference of State Legislatures, https://perma.cc/8JT7-2V7D (last visited July 29, 2024).

[13] *See Polling*, Make All Votes Count DC, https://perma.cc/LX5S-28ZN (last visited July 29, 2024) (finding that 62 percent of D.C. voters polled support opening primaries to independent voters).

2. Ranked choice voting promotes representative government and other important civic benefits.

Second, Initiative 83 would implement ranked choice voting for all District elections, promoting voter choice and representative, accountable government. Specifically, Initiative 83 would allow voters to rank up to five candidates according to their preferences in each District election (other than for political party offices). In a ranked choice election, a candidate with a majority of first-choice rankings wins. But if no candidate wins such a majority, then an "instant runoff" occurs: the candidate who received the fewest first-choice preferences is eliminated, and voters who ranked the now-eliminated candidate first have their ballots added to the totals of their next-choice candidate. This process repeats until one candidate receives a majority of the votes and is declared the winner.

Studies show that ranked choice voting has several beneficial effects for democracy and broad civic participation.[14] Ranked choice voting's tabulation process ensures that no vote is wasted and every ballot counts: if a voter's first choice cannot win, then their vote still counts for their next choice among viable candidates. In this way, ranked choice voting frees voters to fully express their electoral

[14] *See generally, e.g.*, Alexandra Copper & Ruth Greenwood, *The Civic Benefits of Ranked Choice Voting: Eight Ways Adopting Ranked Choice Voting Can Improve Voting and Elections*, CAMPAIGN LEGAL CTR. (Aug. 17, 2018), https://perma.cc/7FBQ-EZ28.

preferences without the pressure to vote strategically or worry that their vote won't matter.

Ranked choice voting likewise promotes majoritarian outcomes *and* ensures fair minority representation. In all races for single-winner offices, ranked choice voting requires that the winning candidate get support from a majority of the electorate, ensuring the winner has broad community approval. Having to secure broad community support to be elected, in turn, makes public officials accountable to more of their constituents. In all elections, ranked choice voting also encourages a greater number of candidates with more diverse views and backgrounds to run and have a chance to be elected.[15] More candidates may run without fear of splitting votes with other likeminded candidates. Candidates from underrepresented communities with similar platforms, for example, need not compete for voters and may instead all run for office and work together to ensure representation for the group. Ranked choice voting's structure thus benefits minority candidates, including candidates of color and women, as numerous studies have confirmed.[16]

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[15] *See* Copper & Greenwood, *supra* note 14 at 5-6 (citing studies).

[16] *See, e.g.*, Cynthia R. Terrell, Courtney Lamendola & Maura Reilly, *Election Reform and Women's Representation: Ranked Choice Voting in the US*, 9 POLITICS AND GOVERNANCE 332-34 (2021), https://perma.cc/Y8TG-TZ46; Deb Otis & Nora Dell, *Ranked Choice Voting Elections Benefit Candidates and Voters of Color*, FairVote (2021), https://perma.cc/4QFW-ASZG; Cynthia R. Terrell et al., *In Ranked Choice Elections, Women WIN: RCV in the United States: A Decade in Review*,

Recognizing these many benefits, more than fifty jurisdictions across the country—including two states, three counties, and 45 cities—have adopted ranked choice voting for use in some or all elections.[17] Moreover, experience proves that voters who use ranked choice voting understand it, are satisfied with it, and have confidence in its results.[18]

In short, the benefits of ranked choice voting to democracy are numerous and it should be up to the people of the District to decide for themselves whether ranked choice voting and Initiative 83's other beneficial reforms are right for them.

B. Initiative 83 is a proper subject of initiative.

In an attempt to deny District voters their right to decide whether to adopt Initiative 83's reforms, Appellants' suit incorrectly claims that Initiative 83 is not a proper subject for an initiative under District law. *See, e.g.*, SA 383 (Compl. ¶ 61); Appellants' Br. at 14-15. Even though that claim is not at issue in this appeal, Appellants' brief asserts repeatedly that Initiative 83 is legally improper, in an apparent effort to distract from their failure to file suit on time. *See, e.g.*, Appellants'

RepresentWomen (July 2020), https://representwomen.app.box.com/s/9m839giwkro4wuhej2ponaytk98xqnzn.

[17] *See Ranked Choice Voting Information: Where Is Ranked Choice Voting Used?*, FairVote, https://perma.cc/CL33-D8TH (last visited July 29, 2024).

[18] *See, e.g.*, Copper & Greenwood, *supra* note 14 at 10-11 (collecting sources); *see also, e.g.*, Deb Otis, *Exit Surveys: Voters Love Ranked Choice Voting*, FairVote (Nov. 16, 2023), https://perma.cc/AW2D-WK3H.

Br. at 14-24. In any event, as the Board and the D.C. Attorney General have recognized, Appellants' claims lack merit.

1. Initiative 83 does not compel the D.C. Council to allocate funds to carry out its provisions.

First, Appellants incorrectly claim that Initiative 83, if adopted, would improperly appropriate District funds. *See, e.g.*, *id.* at 18-20. It would not. There is a broad right to propose initiatives in the District. *Brizill*, 911 A.2d at 1214. And although initiatives may not propose a law that would appropriate funds, D.C. Code § 1-204.101(a), the D.C. Attorney General has correctly concluded that Initiative 83 does not propose such a law, SA 37-51. By its own terms, the law Initiative 83 proposes is subject to *voluntary* appropriation by the Council. SA 44. Appropriations in this context refers to the discretionary process by which funds are identified and allocated. *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 19 (D.C. 1991). So long as an initiative includes a "subject-to-appropriations" clause that leaves the power to allocate funds with the Council, the initiative comports with District law. *See D.C. Bd. of Elections & Ethics v. District of Columbia ("Campaign for Treatment")*, 866 A.2d 788, 797 (D.C. 2005); *see also* SA 41. Initiative 83 includes exactly such a clause. *See* SA 361 (Initiative 83, § 3(a) ("This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.")) and SA 356 (Summary Statement ("This Initiative will not be implemented unless the D.C. Council separately chooses to appropriate funds for the projected costs.")).

In contrast, in *Campaign for Treatment*, this Court found that an initiative improperly appropriated funds where it contained multiple *mandatory* provisions requiring the allocation of funds. 866 A.2d at 795-96. The Court in that case explained that the "initiative d[id] not in any way condition" compliance with its requirements "upon funding by the Council." *Id.* at 797. The Court declined to read into the initiative the words "subject to the allocation of funds" when such language was "clearly not there." *Id.*

As the Attorney General has correctly explained, the *Campaign for Treatment* Court's "reliance on the lack of a subject-to-appropriations clause was central to, and necessary to explain, its holding that the initiative compelled the allocation of funds." SA 41. But here, the clause missing in *Campaign for Treatment* is unequivocally present. *See* SA 361.

Appellants' claims to the contrary are undermined by Appellants' own authorities. In their Complaint, Appellants cite the Fiscal Impact Statement that estimates the cost of implementing primaries open to independent voters and ranked choice voting in the District. SA 378 (Compl. ¶ 39). But this document itself makes clear that Initiative 83's implementation is subject to funding by the Council. *See* SA 362 ("The initiative's implementation is subject to the inclusion of the required financial resources in an approved budget and financial plan").

Appellants also cite a 1981 ruling by this Court to claim that Initiative 83 falls under the "law appropriating funds" exception to the District's broad initiative right. SA 390 (Compl. ¶ 80). But the very case Appellants rely on makes clear that "the exception does not bar initiatives that would authorize (but not fund) a new project." *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 893 (D.C. 1981). The *Convention Center* Court conducted a detailed inquiry into the legislative history of the D.C. Charter Amendment, which established the "laws appropriating funds" exception. *Id.* at 912. This analysis found a sharp distinction "between the power to authorize a substantive program, which the initiative right would confer on citizens, and the power to authorize expenditures, which the amendment explicitly reserved to the Council and Congress." *Id.* Initiative 83 authorizes a substantive program, while leaving the "final decision about allocating funds" for implementation up to the Council. SA 42 (A.G. Advisory Op. at 6 (*quoting Hessey*, 601 A.2d at 13)).

This conclusion follows from a simple application of District law and accords with analysis by courts in other jurisdictions. In states that similarly prohibit initiatives that appropriate funds, courts have also looked to whether, under the challenged initiative, the legislative body retains the power of appropriation. *See e.g. Doyle v. Tidball*, 625 S.W.3d 459, 464 (Mo. 2021) ("An initiative that simply costs money to implement does not necessarily require the appropriation of funds so long

as the General Assembly maintains discretion in appropriating funds to implement that initiative."); *Mazzone v. Att'y Gen.*, 736 N.E.2d 358, 367 (Mass. 2000) ("The legislation proposed by the petition neither makes a specific appropriation nor usurps the Legislature's authority to make specific appropriations[]" because funds remain "subject to appropriation"); *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991) (finding proper an initiative that "specifie[d] no sums that must be distributed [and] no specific purpose that must be funded"). District case law on this point thus sits comfortably alongside precedent from around the country.

Unable to cite any precedent demonstrating that Initiative 83 is improper, Appellants fall back on quotations from politicians who publicly oppose Initiative 83. For instance, Appellants quote D.C. Council Chairman Phil Mendelson at length to claim that Initiative 83 "seek[s] to bind the Council to appropriate funds, because this is the voters' will." Appellants' Br. at 32. But *choosing* to fulfill the will of District voters is not the same thing as being legally bound to do so. A legislative body taking actions in response to the express views of the people it represents is how democracy is supposed to work: "It is intrinsic to the idea of representative democracy that a democratically elected government ought to be accountable and

responsive to the popular will."[19] Arguing, as Appellants do, that the possibility of such voluntary responsiveness by the D.C. Council is instead an impermissible attempt to "bind" the Council to the appropriation of funds fails both legally and as a matter of democratic theory. Initiative 83 does not allocate funds, and its enactment is subject to appropriation by the Council, making it a proper subject for initiative.

2. Initiative 83 is Constitutional because it does not infringe Appellants' associational rights.

Appellants do not challenge the constitutionality of Initiative 83's ranked choice voting provisions—with good reason, as courts across the country have recognized the constitutionality of ranked choice voting.[20] Initiative 83's primary election reforms are also constitutional and would promote the right to vote by expanding access to the primary ballot for the District's nearly 75,000 independent voters. *See supra* Part II.A.1. Contrary to Appellants' assertions, *see* SA 377, 388, 398 (Compl. ¶¶ 31-37, 74-78, 96-98); SA 448-49 (Pls.' Opp. to Defs.' Mot. to Dismiss at 17-18); Appellants' Br. at 21-22, those primary reforms would not violate the associational rights of any political parties or D.C. voters.

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[19] James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423, 455 (2021).

[20] *See, e.g.*, *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Baber v. Dunlap*, 349 F. Supp. 3d 68 (D. Me. 2018); *Campbell v. Bd. of Educ.*, 310 F. Supp. 94 (E.D.N.Y. 1970); *Kolhaas v. State*, 518 P.3d 1095 (Alaska 2022); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009).

Appellants claim that Initiative 83 would infringe their associational rights by allowing voters lacking even "minimal . . . affiliation" with their party to help determine the identity of the party's nominees. SA 398 (Compl. ¶ 96 (citing *California Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000)); *see also* SA 388-89 (Compl. ¶¶ 75-78 (relying on *Jones*)); Appellants' Br. at 21-22 (same). But Initiative 83 does no such thing: instead, it creates an "open primary. . . in which the voter is limited to one party's ballot," such that an independent voter's "act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party." *Jones*, 530 U.S. at 577 & n.8 (citation and internal quotation marks omitted). Given this act of affiliation, Initiative 83's partisan primaries open to independent voters are constitutionally distinguishable from the blanket primary system struck down in *Jones*, where all voters could elect each party's nominee by "choos[ing] freely among" all primary candidates "regardless of party affiliation." *Id.* at 570.[21]

Since *Jones*, the Supreme Court has upheld the constitutionality of a partisan primary open to independent voters, where "in general, anyone can join a political

[21] Voters were effectively "allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office." *Jones*, 530 U.S. at 577 n.8 (citation and internal quotation marks omitted). That is a far cry from Initiative 83, which preserves the District's separate, partisan primaries and opens them only to independent voters, not voters from other parties.

party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election." *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (plurality op.) (cleaned up); *see also id.* at 601. The *Clingman* Court concluded that such primaries, even though open to independent voters, do not violate political parties' associational rights, but rather preserve parties "as viable and identifiable interest groups." *Id.* at 594; *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220, 225 (1986) (invalidating closed partisan primary banning parties from allowing independent voters, further confirming the constitutionality of such systems). The Ninth Circuit has likewise explained that, where a primary system "forces a voter to choose one party's primary ballot and thereby forego her opportunity to participate in a different party's primary," "choosing to vote in only one party's primary may constitute a valid form of party affiliation." *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1125 (9th Cir. 2016).[22]

[22] In *Nago*, the federal district court explicitly rejected arguments, like those made here, that requiring political parties to open their primaries burdens a party's associational rights by leaving it powerless to exclude voters indifferent to the party's beliefs, with only fleeting interest in the party, or who may even have worked to undermine or oppose the party. *Democratic Party of Haw. v. Nago*, 982 F. Supp. 2d 1166, 1177 (D. Haw. 2013). The court reasoned that a closed primary where the voter "must formally become a member of the party; and once the voter does so, he is limited to voting for candidates of that party" is "virtually indistinguishable" from an "open primary where voters can 'affiliate' with a party on the day of the primary" and then are "limited to one party's ballot." *Id.* at 1178 (cleaned up).

So too here. As the Attorney General has rightly explained, Initiative 83 limits "[u]naffiliated voters . . . to voting in only one party's primary election. By requesting a primary ballot for one party, to the exclusion of any other, they formally affiliate with that party." SA 43-44 (A.G. Advisory Op. at 7-8). This reasoning undercuts Appellants' claim of forced association with voters unconnected to the party; under Initiative 83, independent voters *are* associating with the party, by choosing to participate in its primary election. As a result, Initiative 83 would not force parties to associate with outsiders any more than current District laws that already allow new voters to register to vote in a party primary on the day of the election. *See* D.C. Code § 1-1001.07(g)(5).

Appellants' other contentions also fall short. Appellants vaguely suggest that opening the District's primaries to independent voters would threaten internal party functions. *See, e.g.*, SA 388-89 (Compl. ¶¶ 76-77); Appellants' Br. at 22. But Appellants provide no basis to suggest that participation of independent voters presents a "clear and present danger" that such voters—let alone "adherents of an opposing party"—will determine the party's nominees. *Jones*, 530 U.S. at 578. Nor can they. Initiative 83 is "not proposing that independents be allowed to choose the Party's nominee without Party participation." *Tashjian*, 479 U.S. at 220. All District candidates must still collect signatures from party members to appear on the ballot in the party's primary in the first place. *See* D.C. Code §§ 1-1001.08(a)(1), (i)(1)-

(2). And Initiative 83 prohibits independent voters from voting for a party's national committeeperson, delegates to a party convention or conference, alternates for those roles, and any other members or officials of the local party. *See* SA 360-61 (Initiative 83, § 2(d)(2)). Initiative 83 and existing law thus preserve party members' right to select their own representatives and candidates; "concern that candidates selected under the Party rule will be the nominees of an 'amorphous' group using the Party's name is inconsistent with the facts." *Tashjian*, 479 U.S. at 220.

Initiative 83 also does not implicate concerns about party raiding—a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). Initiative 83 does not permit party raiding because it only allows "independents, who otherwise cannot vote in any primary, [to] participat[e] in the . . . primary"—not members of other parties. *Tashjian*, 479 U.S. at 219 (citation omitted); *see also Clingman*, 544 U.S. at 596-97. Further minimizing the risk of party raiding, District law prohibits voters from changing their party affiliation fewer than 21 days prior to an election. *See* D.C. Code § 1-1001.07(g)(4), (5). As the Attorney General pointed out, this is "another barrier to voters from one party 'crossing over' to affect the message of another party," making it even more "unlikely" under Initiative 83 that a party's nominee

would be "'determined by adherents of an opposing party.'" SA 44 (A.G. Advisory Op. at 8 (citation omitted)).

In sum, allowing independent voters to participate in the District's primary elections does not violate Appellants' or any voters' associational rights.

3. Initiative 83 does not violate the D.C. Home Rule Act's requirement of partisan elections.

Third and finally, Appellants incorrectly claim that, by opening the District's primaries to independent voters, Initiative 83 would violate the Home Rule Act's partisan elections requirement. This is incorrect. The Home Rule Act requires that D.C. voters elect members of the D.C. Council, the Mayor, and the Attorney General "on a partisan basis." D.C. Code §§ 1-204.01(b)(1), 1-204.21(b)(1), 1-204.35(a). The D.C. Code defines "partisan" as "related to a political party." D.C. Code § 1-1171.01(5). Taken together, these provisions indicate that the specified D.C. elections must simply relate to political parties, meaning that candidates themselves must compete for their political party's nomination and then compete against the candidate(s) of opposing political parties for the elected position. As the Attorney General explained, however, the Home Rule Act "does not require *closed* primaries," which mandate voters register with a political party to vote. SA 42 (A.G. Advisory Op. at 6 (emphasis added)).

Under Initiative 83, the proposed primary system would continue to result in partisan primaries and, in turn, partisan nominees. Candidates would only compete

against other candidates running in the same political party's primary. Each political party would send only one candidate to the general election. Under Initiative 83, D.C. primary election voters would not have the opportunity to choose from a slate of candidates affiliated with differing political parties, as in a nonpartisan primary system like that in Alaska. *See* Alaska Stat. Ann. § 15.15.025 (West 2021). Allowing independent voters to participate in D.C.'s primaries thus does not change the partisan structure of elections as required by the Home Rule Act.[23]

CONCLUSION

Amicus respectfully requests that the Court affirm the Superior Court's dismissal of this case.

Dated: July 31, 2024

Respectfully submitted,

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[23] The remainder of Appellants' assertions also lack merit, including the contention in their Complaint that Initiative 83 would cause discrimination, SA 372-75, which is baseless for the reasons explained by the Board, *see* Board Br. at 43-49.

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** pro hac vice application pending*

CERTIFICATE OF SERVICE

I certify that on July 31, 2024, this *amicus curiae* brief was served through this Court's electronic filing system to:

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