SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CHARLES E. WILSON *et al.*, *Plaintiffs*, v. MURIEL E. BOWSER *et al.*, *Defendants*.	Civil Action No. 2023 CAB 005414 Before Veronica M. Sanchez, Associate Judge Next Event: Status Conference Scheduled for March 13, 2026 at 10:30 a.m. Oral Hearing Requested

INTERVENOR-DEFENDANTS LISA D. T. RICE AND GROW DEMOCRACY D.C.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As Plaintiffs' opposition brief demonstrates, Intervenor-Defendants' motion for summary judgment should be granted. The sole question before the Court is whether the District of Columbia Board of Elections' ("Board" or "BOE") proper-subject determination for Initiative 83 is supported by substantial evidence in the administrative record and is otherwise in accordance with law. As this Court has repeatedly held, that inquiry is confined to the record before the Board and presents a question of law appropriately resolved on summary judgment. Plaintiffs' opposition does not meaningfully contest those fundamentals. Instead, it reflects a persistent effort to recast this appeal from agency action as an ordinary civil case—replete with discovery, extra-record evidence, disputed facts, and jury issues. That effort is incompatible with the governing standard of review and squarely foreclosed by this Court's prior orders.

The Court has already made clear, twice, that its role here is appellate, not factfinding. In its September 3 and November 17, 2025 Orders, the Court struck extra-record materials, denied discovery, and confirmed that review is limited to the administrative record under the substantial-evidence standard. Plaintiffs nominally acknowledge those rulings, yet their opposition repeatedly disregards them—invoking doctrines like stare decisis and law of the case when no merits decision has been made, asserting "disputed material facts" that are irrelevant in agency review, and attaching new exhibits and raising new arguments that the Court has already ruled it will not consider. Most strikingly, Plaintiffs contend that the Court's September 3 Order somehow resolved the merits of the substantial-evidence question in their favor. The Order did the opposite: it expressly reserved that question for summary judgment and invited full briefing on the appropriate level of deference. Intervenor-Defendants did exactly what the Court instructed. Plaintiffs' claim of impermissible "relitigation" turns the Court's Order on its head.

Plaintiffs' opposition also attempts to expand the case beyond the pleadings and the record. Plaintiffs raise new theories concerning voter education, administrability, and implementation timelines; assert new First Amendment challenges to ranked-choice voting that were never pled; and revive arguments about signature gathering, standing, and jury trial rights that this Court has already rejected. None of these arguments are properly before the Court in an agency review confined to the administrative record, and their repetition underscores Plaintiffs' continued misunderstanding—or disregard—of this Court's rulings and the procedural posture of the case.

When the analysis returns to what actually matters—the administrative record and the Board's decision—Plaintiffs' claims collapse. They have failed to show that the D.C. Administrative Procedure Act ("DCAPA") provides them a cause of action here, and they do not meaningfully defend those claims. On the remaining claims, Plaintiffs bear the burden of demonstrating that the Board's proper-subject determination is unsupported by substantial evidence. They have not carried that burden. The record reflects a full public process, extensive testimony and submissions, and careful consideration by the Board, informed by advisory opinions from the Attorney General and the D.C. Council's General Counsel. On that record, the Board reasonably concluded that Initiative 83 does not authorize discrimination under the D.C. Human Rights Act, does not violate the Home Rule Act's partisan-election requirements, and does not infringe First Amendment associational rights. Plaintiffs point to no contrary evidence in the record—because none exists.

Because this case is a deferential review of agency action confined to the administrative record, and because Plaintiffs have failed to demonstrate that the Board's decision is unsupported by substantial evidence, summary judgment is required.

ARGUMENT

I. Plaintiffs Misunderstand the Procedural Posture of This Agency Review Case and Its Deferential Standard of Review

As Intervenor-Defendants explained in their October 22, 2025 motion for summary judgment, and as this Court has now confirmed repeatedly, this case is an agency review proceeding in which the Court's task is limited and deferential: to determine, as a matter of law, whether the Board's proper-subject determination is supported by substantial evidence in the administrative record and is otherwise in accordance with law. *See* Intervenor-Defs.' Mot. for Summ. J. ("Intervenors' MSJ") at 8-14 (Oct. 22, 2025); Order at 14-16 (Sept. 3, 2025) [hereinafter "Sept. 3 Order"]; Order at 3-4 (Nov. 17, 2025) [hereinafter "Nov. 17 Order"]. Plaintiffs' opposition brief does not meaningfully dispute these foundational principles. Instead, Plaintiffs repeatedly mischaracterize the posture of this case, misapply doctrines like law of the case and stare decisis, and persist in treating this appeal from agency action as though it were an ordinary civil case involving factfinding, discovery, and trial. It is not.

A. This Is an Agency Review Case Governed by the Substantial Evidence Standard, Confined to the Administrative Record

The governing standard of review is not in dispute and has been settled by this Court. On November 17, 2025—after Intervenor-Defendants filed their motion for summary judgment but before Plaintiffs filed their opposition to that motion—this Court issued an order denying Plaintiffs' request to take discovery. As the Court explained, discovery would be inappropriate given that this case involves review of agency action, where "the entire case on review is a question of law, and the court 'sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the [agency action] was factually flawed.'" Nov. 17 Order at 3 (quoting *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225 (D.C. Cir. 1993)). As this Court further explained, "the Court holds that the Superior Court must apply the 'substantial evidence'

standard in reviewing decisions by an agency." *Id.* at 2 (quoting *Kegley v. District of Columbia*, 440 A.2d 1013, 1018 (D.C. 1982)). Under that standard, "[t]he Superior Court's role is limited to evaluating the agency's decision based solely on the administrative record that was before the agency at the time" of its decision. *Id.* at 3.

This Court has twice applied these principles to this case—not only in its November 17, 2025 Order denying Plaintiffs' discovery request but also in its September 3, 2025 Order striking Plaintiffs' attempt to introduce extra-record materials. In that Order, the Court reaffirmed that "the Superior Court must review the administrative record alone and not duplicate agency proceedings or hear additional evidence." Sept. 3 Order at 14 (citing *Kegley*, 440 A.2d at 1018).

Plaintiffs do not seriously contest these rulings, nor could they. Indeed, in their opposition, Plaintiffs explicitly acknowledge that "judicial review of agency action on summary judgment presents a pure question of law for the court" and that "in an action challenging an agency decision, summary judgment is the proper mechanism for the Court to resolve the case as a matter of law." Pls.' Opp'n to Intervenor MSJ ("Pls.' Opp'n") at 20, 35 (Dec. 19, 2025). Plaintiffs likewise do not meaningfully challenge Intervenor-Defendants' showing that *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), has no bearing on this case, *see* Intervenors' MSJ at 14-17, nor did Plaintiffs provide the briefing the Court specifically requested on that issue, *see* Sept. 3 Order at 6-7; Pls.' Opp'n at 21, 43, 46.

Given these concessions, Plaintiffs' continued insistence, elsewhere in their brief, on reframing this case as something other than a deferential review of agency action is inexplicable.

B. The Court's September 3, 2025 Order Did Not Decide the Merits of the Substantial Evidence Question, as Plaintiffs Claim

Plaintiffs' central procedural argument is that this Court's September 3, 2025 Order denying the motions to dismiss in part somehow resolved the merits of this case in Plaintiffs' favor,

such that Intervenor-Defendants' summary judgment motion is merely an impermissible attempt to "relitigate" issues already decided. *See* Pls.' Opp'n at 22-23. That argument is wrong.

The September 3 Order did not decide whether the Board's proper-subject determination is supported by substantial evidence. To the contrary, the Court expressly declined to do so. The Court denied summary affirmance precisely because it concluded that "a review of the agency's findings of fact and conclusions of law would be more appropriate through a Motion for Summary Judgment," where the parties could "fully brief the level of deference they believe should be afforded to the agency's decision." Sept. 3 Order at 6-7; *see also* Intervenors' MSJ at 7.

In other words, the Court did not reject Intervenor-Defendants' legal arguments; it deferred them. The Court made clear that summary judgment—not a motion to dismiss—was the proper procedural vehicle for resolving the dispositive legal question in this agency review case. Intervenor-Defendants did exactly what the Court instructed: they filed a motion for summary judgment squarely addressing the substantial evidence standard and applying it to the administrative record. Plaintiffs' suggestion that doing so violates the September 3 Order turns that Order on its head.

Nor is there any merit to Plaintiffs' invocation of stare decisis or the law-of-the-case doctrine. Those doctrines apply only to issues that were actually decided. *See G.W. v. United States*, 323 A.3d 425, 433 (D.C. 2024); *Briscoe v. United States*, 181 A.3d 651, 658 (D.C. 2018). But the September 3 Order did not decide whether the Board's decision was supported by substantial evidence; it explicitly reserved that question for later briefing. *See* Sept. 3 Order at 6-7. Because the legal issue now before the Court was not decided in September, nor at any other time, neither stare decisis nor the law-of-the-case doctrine have any application here.

If anything, it is Plaintiffs—not Intervenor-Defendants—who are disregarding the law of the case. In its November 17, 2025 Order, the Court conclusively held that this case must be litigated on the administrative record alone, that the substantial evidence standard governs, and that discovery and extra-record evidence are impermissible. *See* Nov. 17 Order at 2-4. Yet Plaintiffs continue to rely on allegations, materials, and supposed factual disputes that fall well outside the administrative record and that the Court has already ruled it will not consider.

C. Plaintiffs' Claims of "Disputed Material Facts" Reflect a Fundamental Misunderstanding of Agency Review

Plaintiffs repeatedly assert that summary judgment is inappropriate because there are "genuine issues of disputed material fact." *See* Pls.' Opp'n at 26-34. But this argument is incompatible with the standard of review Plaintiffs themselves recite. *See id.* at 20-21.

In an agency review case, summary judgment does not turn on whether there are disputed facts in the abstract. Rather, the Court asks a single legal question: whether "the requirements of procedural due process are met, and whether the decision of the [agency] is supported by substantial evidence on the whole record." Nov. 17 Order at 2-3 (quoting *Kegley*, 440 A.2d at 1018). The Court does not resolve factual disputes; it reviews the agency's resolution of those disputes for substantial evidentiary support.

The purported "disputed facts" Plaintiffs identify are therefore irrelevant. Many simply restate Plaintiffs' legal disagreements with the Board's conclusions. Others consist of new allegations not pleaded in the Complaint or arguments about Intervenor-Defendants' conduct that the Court has already ruled are outside the scope of review. *See* Sept. 3 Order at 14-16. None of these assertions creates a triable issue because, indeed, there will be no trial. The "trial," as it were, already occurred before the Board, which received testimony, written submissions, and advisory

opinions before issuing its proper-subject determination. *See* Intervenors' MSJ at 4 (citing Rec. at 36-240). This Court's role is purely appellate.

Plaintiffs' own briefing acknowledges this reality. At the conclusion of their opposition, Plaintiffs ask the Court to "remand the matter to the Board for further proceedings." Pls.' Opp'n at 50. That request concedes that there is no mechanism for resolving supposed factual disputes in this Court. And it underscores Plaintiffs' deep confusion about the posture of this case. Remand is appropriate only if Plaintiffs carry their burden of demonstrating that the Board's decision is unsupported by substantial evidence or contrary to law. As fully explained below, *see infra* Part III, they have not done so. The Board conducted a full public process, considered extensive testimony and written submissions, and relied on advisory opinions from the Attorney General and the General Counsel to the D.C. Council. *See* Intervenors' MSJ at 4 (citing Rec. at 36-240). As Intervenor-Defendants demonstrated in their opening brief, that record easily satisfies the substantial evidence standard with respect to each of Plaintiffs' claims. *See* Intervenors' MSJ at 17-29. Plaintiffs' attempt to sidestep that showing by mischaracterizing prior orders, invoking inapplicable procedural doctrines, and insisting on fact disputes that are irrelevant in agency review cannot succeed.

Because this case is—and always has been—a deferential review of agency action confined to the administrative record, summary judgment is not only appropriate; it is the precise mechanism the Court identified for resolving this dispute. Plaintiffs' opposition confirms their misunderstanding of that posture, but it does not undermine the legal sufficiency of the Board's decision or Intervenor-Defendants' entitlement to judgment as a matter of law.

II. Plaintiffs' New and Already Rejected Arguments and Extra-Record Materials Are Improper and Irrelevant, Reflecting a Willful Disregard of this Court's Prior Orders

Despite this case involving a review of agency action, *see supra* Part I, Plaintiffs nevertheless attempt to introduce new arguments and materials beyond the scope of the agency record—or even their own Complaint—while also attempting to revive arguments and claims already dismissed by this Court. The Court should reject each as baseless and improper.

First, Plaintiffs raise in their opposition arguments and claims wholly outside the administrative record and their own Complaint, which the Court should disregard or strike in their entirety. In their list of disputed material facts—which are, as explained *supra*, irrelevant to the purely legal question at hand—Plaintiffs point for the first time to alleged questions about the sufficiency of voter education resources and the administrability and timeline for implementation of Initiative 83. *See* Pls.' Opp'n at 15-17 (listing as disputed material facts, e.g., "whether the Board meaningfully assessed the operational feasibility, staffing capacity, budgetary constraints, and technological readiness required to implement Ranked Choice Voting and semi-open primaries within mandated timelines"; "[w]hether voter education resources are sufficient and equitably distributed . . ."; "whether the Board possesses the resources, time, and staffing necessary to provide meaningful, accessible voter education across all wards prior to implementation"; and "whether I-83 imposes legally or practically impossible implementation timelines on the Board."). But these are issues and allegations raised nowhere before this, either by Plaintiffs in their Complaint or anywhere in the administrative record,[1] and are thus wholly inappropriate and irrelevant to raise at this late stage.

[1] The only discussions of voter education supporting Initiative 83 in the administrative record centered around: (1) the issue of Council funding therefore, *see, e.g.*, Rec. at 88, 172-73, 178, 200-01, 230-31, 350-51; (2) the mission of the Board to educate voters, including about any changes in how people vote resulting from Initiative 83, *see, e.g.*, Rec. at 170, 350; and (3) the willingness

Similarly, Plaintiffs raise for the first time in their opposition wholly new First Amendment claims challenging Initiative 83's ranked-choice-voting provision. These new arguments assert that ranked choice voting: (1) impermissibly compels political expression by voters, *see* Pls.' Opp'n at 30-33; *see also id.* at 33-34; and (2) raises constitutional concerns regarding vote dilution, *id.* at 34. These assertions are categorically wrong on the facts and the law.[2] But in any event, they are to be found nowhere in Plaintiffs' Complaint. Instead, the First Amendment claim in the Complaint focuses exclusively on Initiative 83's distinct *semi-open primary provision*, *see* Compl. ¶¶ 30-37 (Aug. 31, 2023), and does not allege that Initiative 83's ranked-choice-voting provisions are also unconstitutional, *see, e.g.*, Intervenors' Mot. to Dismiss at 17-18 (June 11, 2025) (noting that "Plaintiffs do not challenge the constitutionality of Initiative 83's ranked choice voting provisions"). For Plaintiffs to attempt now to use their brief to effectively amend their Complaint is wholly inappropriate and the Court should disregard or strike these improper new claims.

Worse still, this is not Plaintiffs' first attempt to do this. In its September 3 Order, this Court rebuffed Plaintiffs for this exact same tactic at the motion to dismiss stage. *See* Sept. 3 Order

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of community groups to assist with voter education around Initiative 83, *see* Rec. at 161. Likewise, the only discussion in the administrative record of the administrability of Initiative 83 focused on the issue of funding needed to effectuate administrative and procedural changes in voting. *See, e.g.*, Rec. at 172-73, 175, 231, 351.

[2] Plaintiffs egregiously distort how Initiative 83's ranked choice voting operates, *see* Pls.' Opp'n at 31-32, to advance their improper new claims. But Courts across the country have rejected similar distortions and claims against ranked-choice voting, while uniformly recognizing its constitutionality. *See, e.g.*, *Dudum v. Arntz*, 640 F.3d 1098, 1112-14 (9th Cir. 2011) (rejecting vote dilution claims); *Baber v. Dunlap*, 349 F. Supp. 3d 68, 78 (D. Me. 2018) (noting that ranked choice voting "actually encourages First Amendment expression, without discriminating against any given voter"); *Kohlhaas v. State*, 518 P.3d 1095, 1124 (Alaska 2022) ("The State's interests in allowing voters to express more nuanced preferences through their votes and to elect candidates with strong plurality support are important and legitimate regulatory interests."); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 689-93 (Minn. 2009) (rejecting vote dilution claims); *cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) ("[W]e have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.") (citation omitted).

at 15. In their response to Defendants' motions to dismiss, Plaintiffs improperly attempted to introduce new claims and facts outside their Complaint and the administrative record. This Court rightly recognized that Plaintiffs opposition brief "raise[d] several new claims," but "[b]ecause these claims were not raised in the Complaint, the Court lacks authority to address them." Sept. 3 Order at 15. So too here the Court should reject Plaintiffs' belated and improper attempt to introduce new arguments related to their First Amendment claims and issues of voter education and administrability of Initiative 83.

Second, Plaintiffs also improperly attempt to revive three distinct arguments already dismissed by this Court. Plaintiffs attempt first to dispute Intervenor-Defendants' standing. *See* Pls.' Opp'n at 48-49. But Article III standing is an "indispensable part of the *plaintiff's* case." *D.C. Appleseed Ctr. for L. & Just., Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1205 (D.C. 2012) (emphasis added), and Plaintiffs make no attempt to show that District law requires Article III standing for an *intervenor-defendant*, nor could they. In any event, this Court already recognized that Intervenor-Defendants have a sufficiently concrete interest in this case when it granted the motion for intervention—a motion which Plaintiffs did not oppose, *see* Notice of Conceded Mot. to Intervene (May 30, 2025). The Court specifically recognized that "Lisa D. T. Rice and Grow Democracy D.C. have a right to intervene in this action because they have claimed an interest relating to the subject matter of this action and Lisa D. T. Rice and Grow Democracy D.C.'s interests may be impaired or impeded by the outcome of this litigation pursuant to Rule 24(a)." Order at 1 (June 9, 2025); *see also* Mot. to Intervene at 5-11 (Apr. 22, 2025) (establishing Intervenors' cognizable and particularized interests in this matter and the potential harms thereto). Intervenor-Defendants' Motion to Intervene and the Court's subsequent Order granting it make clear their particularized and concrete interests in this matter.

Plaintiffs further ignore this Court's orders by attempting, for a second time, to impugn Intervenors' credibility by objecting to Initiative 83's signature gathering process. *See* Pls.' Opp'n at 49-50. This Court, however, has already rejected Plaintiffs' previous attempt to raise this identical issue because it was not alleged in the Complaint and would be time barred in any event. *See* Sept. 3 Order at 16. As the Court explained, allegations regarding the signature collection process: (1) were never raised by Plaintiffs in their Complaint; and (2) were further time barred, as "the D.C. Code lays out a specific process for challenging the Board's decisions," and the deadline to bring any such challenge—August 12, 2024—had come and gone. *Id.*; *see also Brown v. D.C. Bd. of Elections*, 336 A.3d 174 (D.C. 2025) (dismissing separate challenge related to Initiative 83 signature gathering).[3]

Plaintiffs nevertheless flagrantly disregard this Court's ruling by raising this improper and irrelevant credibility argument yet again, even going so far as to again introduce extra-record materials allegedly related to the claim. *See* Pls.' Opp'n at Ex. 1. Making their cavalier indifference to this Court's Orders even more bewildering is that Plaintiffs rightly acknowledge that a ruling on summary judgment must "'refrain from making credibility determinations.'" Pls.' Opp'n at 49 (quoting *Jones v. Bernanke*, 557 F.3d 670, 681 (D.C. Cir. 2009)). For the same reasons the Court already struck this issue and other related extra-record materials, and for the additional reasons explicated *infra* pp. 12-13 why extra-record materials are categorically improper when reviewing an agency action, the Court should disregard this argument and strike the related extra-record exhibit, *see* Pls.' Opp'n at Ex. 1.

[3] Furthermore, these allegations—which have been already adjudicated in at least two other separate fora—relate to conduct that occurred long after the Board decision under review in this case such that it would have been impossible for the Board to have considered them at the time of its proper-subject determination.

Plaintiffs disregard this Court's rulings in yet another manner. The Court's September 3 Order struck Plaintiffs' jury demand. *See* Sept. 3 Order at 14. Undeterred, Plaintiffs nevertheless insist that "Plaintiffs preserve their right to a jury trial on any discrete, triable issues of fact that may arise." Pls.' Opp'n at 50. But the September 3 Order explains that the D.C. Court of Appeals has made clear that "'where the issue in dispute is legal in nature a constitutional right to trial by jury attaches; where the issue, however, is equitable in nature there is no constitutional right to a jury trial.'" Sept. 3 Order at 14 (quoting *E.R.B. v. J.H.F.*, 496 A.2d 607, 611 (D.C. 1985)). Accordingly, "[b]ecause Plaintiffs solely seek equitable relief, a jury right does not attach." *Id.* Plaintiffs provide no reason for their apparent belief that the September 3 Order no longer applies to this case.[4]

Lastly, Plaintiffs have attached seven exhibits to their opposition, all of which should be disregarded given that this matter involves review of agency action limited to the administrative record alone.[5] Plaintiffs attach these extra-record materials in blatant disregard of this Court's prior orders making that point abundantly clear. As early as September 3, 2025—after Plaintiffs attempted to introduce extra-record materials by attaching them to their opposition to the Board's

[4] On one other issue, Plaintiffs walk a fine line with respect to disregard of this Court's prior orders. Plaintiffs say that they are not attempting to relitigate Count IV of the Complaint regarding appropriations, which the Court already dismissed. *See* Pls.' Opp'n at 39, 48; *see also* Sept. 3 Order at 7-8. But Plaintiffs undermine this assertion at every turn: (1) insisting that the claim was "[i]ncorrectly [d]ismissed," Pls.' Opp'n at 48; (2) continuing to argue that "the initiative impermissibly assumed Council funding," *id.* at 6; and (3) raising as issues of disputed material facts whether "the Initiative called for an impermissible allocation of Council funding," *id.* at 16, and whether "I-83 Mandates Unfunded Governmental Action," alleging that the "parties dispute whether I-83 effectively mandates significant expenditures without identifying funding sources, in contravention of Home Rule Act constraints," *id.* at 17. As Count IV of Plaintiffs' Complaint has long since been dismissed, the Court should disregard discussion of it in Plaintiffs' current briefing.

[5] Confusingly, two of Plaintiffs' exhibits—Pls.' Opp'n at Exs. 2 and 4—are already included in the administrative record so, in addition to being improper to submit as exhibits now, there is no need for them to be provided as separate attachments for the Court.

motion to dismiss, *see* Pls.' Opp'n to Board Mot. to Dismiss, Exs. 1-5 (June 5, 2025)—the Court ordered that those materials be stricken because "the Superior Court must review the administrative record alone and not duplicate agency proceedings or hear additional evidence." Sept. 3 Order at 14 (citing *Kegley*, 440 A.2d at 1018). Accordingly, "[b]ecause DC BOE could not properly consider the information raised in the exhibits, considering them now would be improper," especially when "the exhibits submitted by Plaintiffs go far beyond the concerns raised before DC BOE and in the complaint." *Id.* at 16. The Court further pointed out that D.C. Superior Court Rules for Agency Orders or Decisions confirm that the record on review consists only of: "(A) the order involved; (B) any findings or report on which it is based; (C) the original papers and exhibits filed with the agency, or a legible certified copy of the papers and exhibits; and (D) a certified copy of the transcript of any testimony before the agency, or, if no transcript is available, a certified narrative statement of relevant proceedings and evidence." *Id.* at 14-15 (citing D.C. Super. Ct. Agency Rev. R. 1).

Subsequently, after Plaintiffs attempted to seek discovery in this case, the Court reaffirmed that "[t]he Superior Court's role is limited to evaluating the agency's decision based solely on the administrative record that was before the agency at the time Initiative Measure No. 83 was implemented," meaning that "the Court's review is confined strictly to the agency record." Nov. 17 Order at 3-4. Plaintiffs nevertheless seek yet again to introduce extra-record materials in this matter. For the same reasons the Court has explained previously, and because certain of the exhibits are already contained in the administrative record, *see* Pls.' Opp'n at Exs. 2 and 4, the Court should strike these materials.

III. Plaintiffs Have Failed to Refute Intervenor-Defendants' Showing That Their Claims Must Fail

A. Plaintiffs Have Failed to Show That the DCAPA Provides Them a Cause of Action

Plaintiffs' claims under the DCAPA fail at the outset, and Plaintiffs do not meaningfully contend otherwise. As explained in Intervenor-Defendants' motion, the DCAPA does not provide a cause of action to challenge the Board's initiative decisions. *See* Intervenors' MSJ at 17-18. The DCAPA provides only an avenue for review of "contested case[s]" before the D.C. Court of Appeals. *See id.* (citing D.C. Code § 2-510(a); *Davies v. District of Columbia Bd. of Elections and Ethics*, 596 A.2d 992, 996 (D.C. 1991)). This case is neither "contested" as that phrase is described in *Davies*, nor before the Court of Appeals, and Plaintiffs do not contend otherwise.

In denying Intervenor-Defendants' Motion to Dismiss Claims V and VI, this Court invited the parties to brief the impact, if any, of *Loper Bright* on claims brought under the DCAPA. Intervenor-Defendants have already addressed this question at length, *see* Intervenors' MSJ at 14-17, and Plaintiffs have neglected to do so. Because Plaintiffs have failed to meaningfully defend or press their DCAPA claims, this Court should grant summary judgment on Counts V and VI.

B. Plaintiffs Have Failed to Carry Their Burden of Showing that the Board's Decision Is Unsupported by Substantial Evidence

On the three remaining claims that survived the motion to dismiss stage, Plaintiffs fail to meet their burden to show that the Board's proper-subject determination was unsupported by substantial evidence. *See Hearns v. District of Columbia of Consumer & Regulatory Affairs*, 704 A.2d 1181, 1182 (D.C. 1997) ("[T]he agency decision is presumed to be correct and the [challenger] bears the burden of demonstrating error."). In opposing summary judgment on each claim, Plaintiffs' characterization of the record is, at best, wrong, and, at worst, an affirmative attempt to mislead the Court. Plaintiffs claim that Initiative 83's "*proponents* offered nothing" to

the Board to support the initiative, and yet in the very next sentence, admit that the Board observed that "the record contained 'zero evidence in support of the *opponents'* claims'" against Initiative 83. Pls.' Opp'n at 36 (emphasis added); *see also* BOE Mot. for Judgment on the Pleadings at 10 (Sept. 23, 2025). Indeed, as the Board's motion for judgment on the pleadings correctly details:

> At the end of the day, the record contained zero evidence in support of the opponents' claims that the Measure would authorize unlawful discrimination, and was contrary to the Home Rule's provision for partisan elections and to the constitutional right of freedom of association. No studies, expert testimony, or statistical impact of discrimination from the Measure's form of ranked choice voting were offered. No legislative history showing the supposed intent of the Home Rule's provision of partisan elections was submitted. No evidence was offered that tended to show that relaxing primary participation requirements would alter the outcome of primary elections one wit, much less that the change would be so significant that it would arise to improper interference with associational interests that outweighed the state's legitimate election administration interest in the Measure. Indeed, opponents tacitly acknowledged the types of evidence they needed to produce to show unconstitutional interference with associational interests by citing Supreme Court precedent that described the very type of evidence (surveys and expert testimony) needed, and yet they produced nothing.

BOE Mot. for Judgment on the Pleadings at 10.

Left without evidence in the administrative record to support their claims, Plaintiffs resort to blatant fabrication to attempt to carry their burden. *See* Pls.' Opp'n at 36, 40. The Court should reject such attempts and grant summary judgment in favor of Intervenor-Defendants on each claim.

1. The Board's Decision that Initiative 83 Does Not Violate the D.C. Human Rights Act Is Supported by Substantial Evidence

As Intervenor-Defendants' motion demonstrates, the Board properly concluded, based on the record before it, that Initiative 83 does not authorize discrimination in either impact or intent. *See* Intervenors' MSJ at 19-23 (citing Rec. at 277-78 (Proper-Subject Order at 9-10)). The D.C. Human Rights Act protects against any measure that "authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2," D.C. Code § 1-1001.16(b). The Board correctly determined that Initiative 83 does not authorize any such discrimination, and

Plaintiffs have failed to carry their burden of showing that the Board's determination was unsupported.

The Board had before it only vague and speculative assertions about Initiative 83's purported discrimination, which the Board properly considered and weighed against robust testimony on the other side of the ledger. *See* Intervenors' MSJ at 20-23. As Plaintiffs concede, the Board "receiv[ed] and review[ed] extensive public testimony and written submissions" on Initiative 83's compliance with the D.C. Human Rights Act. Pls.' Opp'n at 41. And the Board properly based its decision on that record. Plaintiffs fail to point to any specific testimony in the record to the contrary. Indeed, the portions of the record Plaintiffs cite are simply general comments from Board members thanking the public for the broad range of testimony the Board received and considered. *See* Pls.' Opp'n at 42.

The only specific record evidence Plaintiffs cite is a portion of written testimony from Plaintiffs themselves that argues that higher under- and over-votes in certain Wards for the at-large council race suggests that ranked choice voting will negatively impact voters in those Wards. *See* Pls.' Opp'n at 40. But the referenced at-large council race—in which voters can vote for and elect multiple candidates from a single list—operates fundamentally differently from Initiative 83's ranked choice voting, D.C. Code § 1-1001.08(k)(2). Plaintiffs' lone speculative and unsupported concern thus does nothing to establish that Initiative 83 authorizes discrimination in violation of the D.C. Human Rights Act.[6]

[6] In fact, given the inherently more confusing nature of having the at-large race be the only race on the ballot where voters can vote for two rather than one candidate, a larger number of undervotes is not surprising in this scenario. In contrast, under the new Initiative 83 system, voters will vote for only one candidate in each column, making undervotes *less* likely under Initiative 83. The number of undervotes in the at-large race under the old system says nothing about how voters will experience the new system.

Plaintiffs nevertheless attempt to fault the Board for not conducting an extensive "analysis of the potential discriminatory effect." Pls.' Opp'n at 42. But this gets the burden exactly backward. As Chair Thompson noted, is not the job of the Board to determine whether the Initiative is "wise or unwise," as that is a question for "the voters to decide." Rec. at 248-49. Rather, the Board must simply determine that, based on the record before it, the Initiative does not authorize discrimination—which the Board did. While Plaintiffs repeatedly claim there is "unrebutted" testimony and data in the record pointing to alleged discrimination, Plaintiffs fail to identify what that evidence is. The record contains no such conclusive evidence, and the handful of speculative comments are carefully rebutted. *See* Intervenors' MSJ at 20-22 (citing agency record). The Board's proper-subject determination was thus properly supported.

2. The Board's Decision that Initiative 83 Does Not Violate the D.C. Home Rule Act Is Supported by Substantial Evidence

As Intervenor-Defendants' motion also shows, the Board properly determined, based on the record before it, that Initiative 83 does not violate the Home Rule Act's partisan election requirement. *See* Intervenors' MSJ at 23-24. The Home Rule Act requires that elections for certain offices be conducted "on a partisan basis," D.C. Code §§ 1-204.01(b)(1), 1-204.21(b)(1), 1-204.35(a), and Initiative 83 comports with that requirement. The initiative changes the timing requirement of when voters must affiliate with a party, but it does nothing to change the fact that D.C. will retain separate party primaries, and a general election with "only one nominee per political party, maintaining its essential 'partisan' election nature." Rec. at 278 (Proper-Subject Order at 10); *see also* Intervenors' MSJ at 23-24.

Plaintiffs have failed to show otherwise. They contend that in reaching its determination, the Board improperly relied on the opinion of the Attorney General and that allowing unaffiliated voters to affiliate with a party on the day of the primary election changes the elections' partisan

nature. *See* Pls.' Opp'n at 45-46. These contentions are wrong, as Intervenor-Defendants' motion explains. *See* Intervenors' MSJ at 23-24. But more fundamentally, Plaintiffs fail to even attempt to refute the central reasoning on which the Board's proper-subject determination was based. As the Board explained, prior to Initiative 83, voters had to choose to affiliate with a party at least 21 days prior to voting in that party's primary. Under Initiative 83, voters can make the choice to affiliate with a party "through the act of participating in a party primary election." Rec. at 278 (Proper-Subject Order at 10). Either way, the same partisan election process remains—the initiative only changes the time by which voters must choose to affiliate with a party. Plaintiffs have no answer to this dispositive point, and their retreat to questions of deference under *Loper Bright* is of no avail: Plaintiffs fail to show the Board's determination was unsupported under any standard. *See* Intervenors' MSJ at 14-17, 23-24.

3. The Board's Decision that Initiative 83 Does Not Violate First Amendment Associational Rights Is Supported by Substantial Evidence

Finally, the Board properly determined that Initiative 83 does not violate associational rights protected by the First Amendment, as Intervenor-Defendants have demonstrated. *See* Intervenors' MSJ at 24-29. The Board conducted a careful analysis of the relevant caselaw and applied it to the record before it, reaching a well-supported determination that Initiative 83 does not infringe associational rights because it "does nothing to change the organization of primary ballots by party and does not allow nonparty members to vote for party officials." Rec. at 279 (Proper-Subject Order at 11). Rather, Initiative 83 "simply allows voters who have not affiliated themselves with a party to vote on the ballot for *one* party's primary for government officials." *Id.* (emphasis added). As the Board correctly determined, this is exactly the sort of act of affiliation that caselaw indicates is necessary to render the initiative constitutional. *Id.* (citing *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (upholding a semi-closed primary system where "[i]n general,

anyone can join a political party merely by asking for the appropriate ballot at the appropriate time . . .") (internal quotation marks omitted)).

As the Board further pointed out, even *California Democratic Party v. Jones*—the case on which Plaintiffs primarily rely—specifically distinguished the blanket party primary system struck down there from semi-open primary systems like Initiative 83. *Id.* at 278-79 (citing *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000)). Plaintiffs utterly fail, however, to acknowledge the central ground on which the Board distinguished Initiative 83 from the law at issue in *Jones*: a distinct partisan primary in which voters must choose to participate to the exclusion of any other partisan primary is fundamentally distinct from a blanket party primary, in which all voters and candidates of any affiliation may participate. By choosing to participate in *only one* party's primary—as Initiative 83 requires—voters must make the act of affiliation that *Jones*, *Clingman*, and other cases demand. 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." *Clingman*, 544 U.S. 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).

Instead, Plaintiffs ignore this on-point precedent that contradicts their arguments and supports the Board's proper-subject determination. The Board stated clearly that Initiative 83 "is unlike *Jones* and more like *Clingman* and other open primaries approved by courts." Rec. at 279 (Proper-Subject Order at 11). Tellingly, Plaintiffs do not even mention *Clingman* in their brief, despite extensive discussion of it in the Board's opinion, and in the briefs to which Plaintiffs should be responding. Plaintiffs also fail to mention *Democratic Party of Hawaii v. Nago*, another case on which the Board relied, and which Intervenor-Defendants discussed in detail. In *Nago*, a case

upheld by the Ninth Circuit, the federal district court rejected claims that a semi-open primary infringed a party's associational rights when voters who "'affiliate[d]' with a party on the day of the primary" were then "limited to one party's ballot." *Democratic Party of Haw. v. Nago*, 982 F. Supp. 2d 1166, 1178 (D. Haw. 2013). So too here, Initiative 83 is constitutional because, as the Board correctly determined, it requires exactly the sort of affiliation by independent voters that satisfies constitutional scrutiny.

Rather than deal with relevant precedent, Plaintiffs cite two new cases in their opposition. The text of Initiative 83 explicitly renders both inapplicable. *Eu v. San Francisco County Democratic Central Committee* held that restrictions on political party governance structure violated the party's associational rights, 489 U.S. 214, 230 (1989), and *Democratic Party of U. S. v. Wisconsin ex rel. La Follette* rejected Wisconsin's state laws governing how delegates to the national Democratic convention must vote, 450 U.S. 107 (1981). But Initiative 83 explicitly "does not allow nonparty members to vote for party officials," Rec. at 279 (Proper-Subject Order at 11), making *Eu* totally inapposite, *see also* D.C. Code § 1-1001.09(g)(1A)(D). And Initiative 83 has nothing to say about how national party delegates must vote, rendering *La Folette* irrelevant. Finally, *Tashjian v. Republican Party of Connecticut*—which Plaintiffs further insist supports their arguments—actually supports the constitutionality of Initiative 83, as that case invalidated a closed partisan primary which banned parties from allowing independent voters to participate. 479 U.S. at 220. *Tashjian* and the Attorney General Opinion on which the Board relied both recognized that there are no concerns about party raiding and thus no infringement on a party's associational rights where "independents, who otherwise cannot vote in any primary . . . participat[e] in [a party] primary"—not members of other parties. *Tashjian*, 479 U.S. at 219 (citation omitted); *see also*

Rec. at 44 (A.G. Advisory Op. at 8). Plaintiffs' cited cases do nothing to undermine the substantial evidence on which the Board's proper-subject determination was based.

In sum, Plaintiffs fail to show based on the record before the Board that Initiative 83 creates any burden on Plaintiffs' associational rights—much less a severe one. In the absence of evidence of any such burden, the Board had no reason to reach the question of narrow tailoring. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451-52, 458 (2008). But even if it were to consider that question, Initiative 83 is properly tailored to further the interests of involving further voters in the political process, without any undue burden on political parties. The Board's proper-subject determination was thus properly supported.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants' Motion for Summary Judgment should be granted.

Oral Hearing Requested

Dated: January 16, 2026

Respectfully submitted,

/s/ *Kevin P. Hancock*

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CERTIFICATE OF SERVICE

I certify that on January 16, 2026, this motion was served through this Court's electronic filing system to:

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