[ORAL ARGUMENT HELD ON OCTOBER 17, 2014]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff-Appellant, v. MURIEL BOWSER, *et al.*, Defendants-Appellees.	No. 14-7067

CLARICE FELDMAN'S MOTION FOR
LEAVE TO INTERVENE AS APPELLEE

Clarice Feldman, a longtime taxpayer and resident of the District of Columbia ("the District"), by counsel, respectfully moves for leave to intervene as an appellee in this matter. Because of the recent, startling change in position by one of the Appellees, intervention is necessary to protect Feldman's interest in preventing the unlawful expenditure of taxpayer money. As grounds thereof, Feldman states as follows:[1]

[1] In the event that the Court grants this motion, a proposed response to Muriel Bowser's Suggestion of Mootness and Motion to Dismiss (filed on Mar. 23, 2015) ("Bowser's Motion to Dismiss") is attached hereto as Exhibit A.

I. The Local Budget Autonomy Act of 2012 Has Been Declared Unlawful and Has Been Enjoined From Enforcement.

The Local Budget Autonomy Act of 2012 ("Budget Autonomy Act") was enacted by the Council of the District of Columbia ("Council"), signed by the District's Mayor Vincent C. Gray and ratified by District voters in an April 2013 referendum. *Council of the District of Columbia v. Gray*, 42 F. Supp. 3d 134, 2014 U.S. Dist. LEXIS 68055, *2 (D.D.C. 2014). The Budget Autonomy Act purportedly granted the District the right to spend its local tax and fee revenue without seeking an appropriation from Congress. *Id*. After the Budget Autonomy Act took effect, the District's Attorney General issued a formal opinion advising Mayor Gray that he should not enforce the law because it violated the District's Home Rule Charter and therefore was unlawful. *Id*. at *19. On the advice of the Attorney General and on their own accord, Mayor Gray and the District's Chief Financial Officer ("CFO") Jeffrey S. DeWitt[2] notified the Council that they believed the Budget Autonomy Act to be unlawful and that they would not enforce it. *Id*. at *19-20.

The Council filed suit, seeking declaratory and injunctive relief against the Mayor and the CFO in their official capacities. *Id*. at *3. Specifically, the Council sought a declaration that the Budget Autonomy Act is valid and an injunction

[2] At all relevant times, DeWitt has been and continues to be the District's CFO.

compelling the Mayor and the CFO to enforce the law. *Id*. In addition, the Mayor and CFO asserted counterclaims against the Council, seeking a declaration that the Budget Autonomy Act is unlawful and an injunction preventing the Council from enforcing the law. Defendants' Answer to Complaint, Affirmative Defenses, and Counterclaims at 39-40 (Joint Appendix 114-115). Subsequently, the parties cross-moved for summary judgment, and the U.S. District Court for the District of Columbia ("District Court") found the Budget Autonomy Act to be unlawful and permanently enjoined all parties from enforcing the law. *Council of the District of Columbia*, 42 F. Supp. 3d 134, 2014 U.S. Dist. LEXIS 68055 at *59. The Council immediately appealed the District Court's ruling. Briefing concluded on October 15, 2014, and oral argument was held on October 17, 2014.

Subsequently, Muriel E. Bowser was elected as the District's Mayor, was sworn into office, and was substituted in as an appellee in place of Mayor Gray. *See* Unopposed Motion to Hold Appeal in Abeyance for 30 Days, and Notice of Withdrawal of Attorneys from Representation of Mayor Muriel Bowser (filed on Feb. 12, 2015) at 1. Upon being substituted in, Mayor Bowser "request[ed] that this Court hold the proceedings in abeyance for 30 days to give her an opportunity to consider her views on the issues presented in this litigation, including the possibility that she may take a position and course of action different from the prior Mayor." *Id*. at 1-2. The Court granted Mayor Bowser's request and ordered

her "to advise the [C]ourt, no later than March 16, 2015, whether her position in this case differs from that of her predecessor." Per Curiam Order (filed on Feb. 20, 2015) at 1. In response to the Court's order, Mayor Bowser advised the Court that she "believes the Budget Autonomy Act is valid, and absent a judgment restraining her actions, intends to comply with its requirements." Muriel Bowser's Response to the Court's February 20, 2015 Order and Unopposed Motion for Leave to File a Suggestion of Mootness and Motion to Dimiss (filed Mar. 16, 2015) at 1. Mayor Bowser also requested that the Court permit her to file a motion to dismiss this appeal. *Id*. at 2. On March 23, 2015, Mayor Bowser filed a motion to dismiss this appeal for mootness. *See generally* Bowser's Motion to Dismiss.

In her motion, Mayor Bowser seeks to avoid the District Court's injunction. Specifically, Mayor Bowser argues that the case is moot and therefore should be dismissed and that the mootness is a result of happenstance and therefore the District Court's judgment should be vacated. In support of her argument that the case is moot, Mayor Bowser states that she agrees with the Council's position that the Budget Autonomy Act is lawful. She therefore argues that no actual controversy exists and that both the claims against the Mayor as well as the counterclaims asserted by the Mayor are now moot. *See* Bowser's Motion to Dismiss at 1, 6. In addition, because the CFO is statutorily required to prepare the District's budget "under the direction of the Mayor," (D.C. Code § 1–

204.24d(26)), the claims against the CFO and the counterclaims asserted by the CFO are also rendered moot by Mayor Bowser's actions. With respect to vacatur, Mayor Bowser argues that the District Court's determination must be voided because happenstance mooted the Council's claim against the Mayor.[3] Bowser's Motion to Dismiss at 11. The Council and the CFO have not yet filed responses, which are due on April 6, 2015.

Simply put, Mayor Bowser disagrees with Mayor Gray and the District Court about the legality of the Budget Autonomy Act. The only way for Mayor Bowser to avoid the District Court's injunction is for this Court to vacate the lower court's ruling. She therefore asks the Court to do so.

II. Feldman Seeks to Intervene to Defend the District Court's Injunction.

Feldman has been a taxpayer and resident of the District since 1969. As a taxpayer, she has an indisputable interest in preventing the unlawful expenditure of taxpayer money. *See Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 799 (D.C. 1975); *see also District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988); *Ehm v. San Antonio City Council*, 269 Fed. Appx. 375 (5th Cir. 2008). As the District Court concluded, "the Budget Autonomy Act is unlawful" and "Mayor Vincent C. Gray, CFO Jeffrey S. DeWitt,

[3] Feldman does not agree that the change of legal position by the Mayor's office is in fact "happenstance." However, if this Court were to grant Feldman's motion to intervene, a live controversy would remain. The Court therefore would not need to decide whether mootness was a result of happenstance.

the Council of the District of Columbia, its officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, are hereby permanently ENJOINED from enforcing the [law] pending further order of this Court." *Council of the District of Columbia*, 42 F. Supp. 3d 134, 2014 U.S. Dist. LEXIS at *58-59. Until this Court rules otherwise, all money spent to enforce the Budget Autonomy Act will be done so unlawfully. All money appropriated under the Budget Autonomy Act will also be done so unlawfully. Therefore, Feldman seeks to defend the District Court's injunction prohibiting the District from enforcing the Budget Autonomy Act and, thereby, from expending taxpayer money unlawfully.

III. Feldman Should Be Permitted to Intervene.[4]

This Court looks to the standards applicable to the district courts when deciding whether to grant intervention at the appellate stage. *Building and*

[4] Although the Federal Rules of Appellate Procedure do not provide for intervention on appeal except in proceedings to review agency action, the rules also do not expressly preclude intervention in appeals from the district court. *Building and Construction Trades Department v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). This Court has held that intervention in appeals from the district court is appropriate in some circumstances. *See id*.; *see also Public Citizen v. U.S. District Court for the District of Columbia*, 2007 U.S. App. LEXIS 327, No. 06-5232 (D.C. Cir. Jan. 5, 2007); *Pitts v. Thornburgh*, 2003 U.S. App. LEXIS 18345, No. 88-5058 (D.C. Cir. May 28, 2003); *Aerovias de Mexico v. National Mediation Board*, 2002 U.S. App. LEXIS 14842, No. 02-5143 (D.C. Cir. Jul. 23, 2002); *Washington Properties Limited Partnership v. Resolution Trust Corporation*, 1993 U.S. App. LEXIS 35576, No. 92-5230 (D.C. Cir. Sept. 29, 1993); *Amalgamated Transit Union International v. Donovan*, 771 F.2d 1551 (D.C. Cir. 1985).

Construction Trades Department, 40 F.3d at 1282 ("We see no reason to relax the standards for intervention applicable in the district court."). Therefore, an intervenor must satisfy the requirements of either Fed. R. Civ. P. 24(a) for intervention of right or Fed. R. Civ. P. 24(b) for permissive intervention. *Public Citizen*, 2007 U.S. App. LEXIS 327 at *2. In addition, if the intervenor did not seek to intervene at the district court, the intervenor must also demonstrate that it is an exceptional case and that imperative reasons exist to support intervention. *Id*. Feldman satisfies the requirements for intervention of right and permissive intervention. In addition, this is an exceptional case and imperative reasons exist to support her intervention.

A. Intervention is warranted under Fed. R. Civ. P. 24(a).

"A motion to intervene of right turns on four factors: (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 24(a)(2)).

In this case, factors one and four are closely related and easily satisfied. Feldman's interest was adequately represented until March 23, 2015, when Mayor

Bowser moved to dismiss the appeal and sought vacatur of the District Court's ruling. Feldman's interest was adequately represented in the District Court by Mayor Gray's defense of the lawsuit and his assertion of counterclaims against the Council. Similarly, Feldman's interest was adequately represented during briefing and at oral argument of the appeal as Mayor Gray defended the District Court's injunction. If this Court grants intervention, Feldman will not request the merits of the case to be re-briefed or re-argued. However, because Mayor Bowser will not defend the District Court's ruling and seeks to avoid the court's injunction, Feldman's interest in preventing the unlawful expenditure of taxpayer money is no longer being adequately represented. In addition, because the CFO must prepare the budget "under the direction of the Mayor" (D.C. Code §1-204.24d(26)), he cannot defend the District Court's ruling because doing so is contrary to the position of the Mayor.

For the same reasons, Feldman's motion is timely. It was not until March 23, 2015 that Mayor Bowser confirmed her position in this case. Until then, Feldman had no need to intervene. Feldman files this motion within the time permitted for all parties to submit their responses to Mayor Bowser's motion.

Feldman also has an "interest relating to the property or transaction which is the subject of the action." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (internal citation omitted). She has a significant, legally protected

interest in preventing the unlawful expenditure of taxpayer money. Until this Court says otherwise, the Budget Autonomy Act has been declared unlawful and the District has been enjoined from enforcing it. Any expenditure to enforce the law and any money appropriated under it, therefore, will be unlawful.

There is no dispute that taxpayers of the District have an interest in preventing the unlawful expenditure of taxpayer money. In *Calvin-Humphrey*, the D.C. Court of Appeals permitted the intervention of individual taxpayers even though the issue before it involved the assessment and collection of taxes from commercial property owners. 340 A.2d at 799. Although the government action at issue did not directly affect individual taxpayers, the court concluded "[t]here can be no doubt but that the instant litigation 'concerns' the [individual taxpayers]: [they have] an economic interest of some magnitude in the outcome of the suit, since we perceive a distinct and substantial possibility that [they] will incur higher taxes or suffer a diminution of municipal services" if the commercial property owners paid less taxes. *Id*. Feldman's interest is clear.

Importantly, not only does Feldman have a legally recognized interest in this case, she also has a well-established cause of action. *See District of Columbia Common Cause*, 858 F.2d at 10 (holding that a District taxpayer has the right to initiate a suit to prevent the unlawful expenditure of taxpayer funds); *see also Ehm*, 269 Fed. Appx. at 375. Feldman is no different from Mayor Gray, who asserted a

counterclaim to prevent the Council from enforcing the Budget Autonomy Act. She also can defend the District Court's injunction. Feldman therefore also satisfies the second factor for intervention of as right.

An order by this Court granting Mayor Bowser's motion to dismiss and vacating the District Court's ruling would impair or impede Feldman's ability to protect her interest in ensuring the lawful expenditure of taxpayer money. *Fund for Animals, Inc.*, 322 F.3d at 735 (Courts should look at "practical consequences of denying intervention, even where the possibility of future challenge to the regulation remains available."). Mayor Bowser has explicitly stated that she intends to spend the District's local tax and fee revenue without seeking an appropriation from Congress. Bowser's Motion to Dismiss at 1. Unless this Court says otherwise, taxpayer money unequivocally will be expended unlawfully. At that point, to prevent the unlawful expenditure of taxpayer money, Feldman will be required to initiate a new proceeding in the District Court against the District. Regardless of how the District Court rules, the losing party will most likely appeal the ruling. Therefore, in due time, the identical legal issue will be back before this Court. To require additional litigation when this case has been briefed and argued would be inefficient. In addition, the mere fact that Feldman could bring a separate lawsuit is not a reason to deny intervention. *Fund for Animals, Inc.*, 322 F.3d at 735. Feldman satisfies the four factors for intervention of as right.

B. Intervention is appropriate under Fed. R. Civ. P. 24(b).

Alternatively, Feldman seeks this Court's permission to intervene pursuant to Fed. R. Civ. P. 24(b)(2). Under this rule, the Court has discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that the "applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2).

For all of the reasons supporting Feldman's intervention of right, permissive intervention is appropriate. Feldman has a significant, legally protected interest in preventing the unlawful expenditure of taxpayer money. Unless this Court says otherwise, the Budget Autonomy Act has been declared unlawful, and the District has been enjoined from enforcing it. Any expenditure spent to enforce the law or any money appropriated under the law, therefore, will be unlawful.

There is no dispute that taxpayers of the District have an interest in preventing the unlawful expenditure of taxpayer money. *See Calvin-Humphrey*, 340 A.2d at 799. They also have a right to initiate a suit to prevent the unlawful expenditure of taxpayer money. *See District of Columbia Common Cause*, 858 F.2d at 10; *see also Ehm*, 269 Fed. Appx. at 375. Plainly, whether the Budget Autonomy Act is lawful is a question of law common to this case as well as any potential future litigation against the District seeking to prevent the unlawful expenditure of taxpayer money. In addition, Feldman's motion is timely because it

was not until March 23, 2015 that Mayor Bowser confirmed that she seeks to avoid the District Court's injunction. Intervention also will not unduly delay or prejudice Mayor Bowser, the CFO, or the Council because briefing and argument on the merits has already concluded. Nothing is left to be done by the parties. The Court is positioned to rule.

Additionally, this Court should grant intervention because it would enable the Court to resolve a "substantial unsettled question of law." *Associated Builders and Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 391 (6th Cir. 1997). If the Court were to dismiss the appeal and vacate the District Court's ruling, Feldman will be required to initiate new proceedings, and this Court will again be called upon to decide whether the Budget Autonomy Act is lawful. Because that precise legal question has already been briefed and argued in this case, the interest of justice and judicial efficiency strongly favor permissive intervention.

C. This is an exceptional case and imperative reasons support intervention.

This Court permits "intervention at the appellate stage where none was sought in the district court 'only in an exceptional case for imperative reasons.'" *Amalgamated Transit Union International*, 771 F.2d at 1551 (*quoting Landreth Timber Company v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984)). This is such a case.

Until March 23, 2015, Feldman's interest was adequately represented. On

that date, Mayor Bowser notified the Court that she believes the Budget Autonomy Act to be lawful and seeks to avoid the District Court's injunction.

Until this Court rules otherwise, the Budget Autonomy Act is unlawful, and the District has been enjoined from enforcing it. To prevent the unlawful expenditure of taxpayer money, this Court must rule on the merits of this appeal. It should not dismiss this case and vacate the District Court's ruling. By permitting Feldman to intervene as an appellee, the Court will have the jurisdiction to resolve whether the Budget Autonomy Act is lawful. If this case does not satisfy the "exceptional case for imperative reasons" standard, no case would.

IV. Conclusion.

For the reasons set forth above, Feldman should be granted intervention as an appellee in this matter.

Dated: April 3, 2015

Respectfully submitted,

/s/ Michael Bekesha
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Counsel for Proposed Intervenor-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April 2015, I filed via the CM/ECF system the foregoing **CLARICE FELDMAN'S MOTION FOR LEAVE TO INTERVENE AS APPELLEE** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused the original and four (4) copies to be delivered to the Clerk of Court via hand delivery.

/s/ Michael Bekesha

ADDENDUM

CERTIFICATE OF PARTIES AND AMICI CURIAE

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Defendants-Appellees:

- Clarice Feldman, *Proposed Intervenor-Appellee*

Dated: April 3, 2015

Respectfully submitted,

/s/ Michael Bekesha
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Exhibit A

[ORAL ARGUMENT HELD ON OCTOBER 17, 2014]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff-Appellant, v. MURIEL BOWSER, *et al.*, Defendants-Appellees	No. 14-7067

INTERVENOR-APPELLEE CLARICE FELDMAN'S RESPONSE TO MURIEL BOWSER'S SUGGESTION OF MOOTNESS AND MOTION TO DISMISS

Intervenor-Appellee Clarice Feldman, a taxpayer and resident of the District of Columbia ("the District") since 1969, by counsel, respectfully submits this response to Mayor Muriel E. Bowser's Suggestion of Mootness and Motion to Dismiss ("Bowser's Motion to Dismiss"). As grounds thereof, Feldman states as follows:

ARGUMENT

An actual controversy still exists. Mayor Bowser's entire argument hinges on the simple fact that she "shares the Council's view that the Act is valid." Bowser's Motion to Dismiss at 1. She therefore argues that this Court no longer has jurisdiction because an actual controversy does not exist. *Id*. at 2-3, 7.

Although her argument may have been correct before Feldman was permitted to intervene – Feldman does not concede that point – the argument no longer holds water.

There is an indisputable, actual controversy between Feldman and all parties in this case. The U.S. District Court for the District of Columbia ("District Court") found the Local Budget Autonomy Act of 2012 ("Budget Autonomy Act") to be unlawful and enjoined the Mayor and the Chief Financial Officer ("CFO") in their official capacities, the Council of the District of Columbia ("Council"), its officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction from enforcing it. *Council of the District of Columbia v. Gray*, 42 F. Supp. 3d 134, 2014 U.S. Dist. LEXIS 68055, *7 (D.D.C. 2014). . The Mayor and the Council seek to avoid the injunction and enforce the law. Because the CFO must prepare the budget "under the direction of the Mayor" (D.C. Code §1-204.24d(26)), he cannot defend the District Court's ruling and injunction because doing so is contrary to the position of the Mayor. Feldman, on the other hand, seeks to defend the District Court's ruling and the injunction. Feldman's position is clearly at odds with those of the parties.

To be clear, Feldman has a significant, legally protected interest in preventing the unlawful expenditure of taxpayer money. In *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 799 (D.C. 1975), the D.C. Court of Appeals

permitted the intervention of individual taxpayers even though the issue before it involved the assessment and collection of taxes from commercial property owners. Although the government action at issue did not directly affect individual taxpayers, the court concluded "[t]here can be no doubt but that the instant litigation 'concerns' the [individual taxpayers]: [they have] an economic interest of some magnitude in the outcome of the suit, since we perceive a distinct and substantial possibility that [they] will incur higher taxes or suffer a diminution of municipal services" if the commercial property owners paid less taxes. *Id*. Because the District Court found the Budget Autonomy Act to be unlawful, until this Court rules otherwise, any expenditure to enforce the law and any money appropriated under it will be unlawful.

Importantly, not only does Feldman have a legally recognized interest in this case, she also has a well-established cause of action. *See District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988) (holding that a District taxpayer has the right to initiate a suit to prevent the unlawful expenditure of taxpayer money); *see also Ehm v. San Antonio City Council*, 269 Fed. Appx. 375 (5th Cir. 2008). Feldman is no different from Mayor Gray, who asserted a counterclaim to prevent the Council from enforcing the Budget Autonomy Act. She also can defend the District Court's injunction. This Court therefore has jurisdiction to decide this case because there is an actual controversy

between the parties and Intervenor-Appellee Feldman.

CONCLUSION

For the reasons set forth above, Mayor Muriel E. Bowser's motion to dismiss should be denied.

Dated: April 3, 2015

Respectfully submitted,

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Counsel for Intervenor-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April 2015, I filed via the CM/ECF system the foregoing **INTERVENOR-APPELLEE CLARICE FELDMAN'S RESPONSE TO MURIEL BOWSER'S SUGGESTION OF MOOTNESS AND MOTION TO DISMISS** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused the original and four (4) copies to be delivered to the Clerk of Court via hand delivery.

/s/ Michael Bekesha