IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARICE FELDMAN, Plaintiff, v. MURIEL E. BOWSER, in her official capacity as Mayor of the District of Columbia, and JEFFREY S. DeWITT, in his official capacity as Chief Financial Officer for the District of Columbia, Defendants.	)	Civil Action No. 15-cv-01967-EGS

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Clarice Feldman, by counsel, respectfully submits this memorandum of points and authorities in opposition to Defendant Muriel E. Bowser's Motion to Dismiss and Defendant Jeffrey S. DeWitt's Motion to Dismiss. In addition, pursuant to LCvR 7(f), Plaintiff requests an oral hearing on Defendants' motions. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

Regardless of whether it is sound policy for the District of Columbia ("District" or "D.C.") to have budget autonomy, Defendant Muriel E. Bowser ("Defendant Bowser"), Mayor of the District of Columbia ("Mayor"), and Defendant Jeffrey S. DeWitt ("Defendant DeWitt"), Chief Financial Officer of the District of Columbia ("CFO"), cannot ignore the law. Yet, they do. Since October 1, 2015, Defendants have been illegally incurring obligations and expending local

taxpayer funds pursuant to the Fiscal Year 2016 Budget Request Act of 2015 ("FY16 Budget Request") that have not been appropriated by Congress and presented to the President for signing. As a District taxpayer since 1979, Plaintiff challenges Defendants' lawlessness.

This case is properly before the Court. Pursuant to the well-established doctrine of taxpayer standing, Plaintiff challenges the illegal expenditure of taxpayer funds. Plaintiff also unequivocally raises a federal question. The funds are being spent purportedly pursuant to the process established by the Local Budget Autonomy Amendment Act of 2012 ("Budget Autonomy Act"), which fundamentally altered the roles of the President and Congress with respect to the local portion of the District's budget. In addition, every dollar currently being spent is in violation of the Antideficiency Act, a federal statute. This Court therefore is the most appropriate court to resolve these issues of federal law. Defendants' motions to dismiss are baseless. The Court should deny them.

I. Legal and Factual Background.

A. The District's budget process.

The Constitution vests Congress with the power "to exercise exclusive legislation" over the District. *See* U.S. Const. art. I, § 8, cl. 17. Pursuant to this authority, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act ("the Home Rule Act"), later codified as D.C. Code §§ 1-201.01, *et seq*. The Home Rule Act constitutes a limited delegation of Congress' authority over the District to its residents. *Id.* at § 1-201.02.

Among the provisions of the Home Rule Act is the Charter of the District of Columbia ("the Charter"), which "establish[es] the means of governance of the District" and sets forth the basic organizational structure of the District's government. D.C. Code § 1-203.01. The Charter

is codified at D.C. Code §§ 1-204.1 through 1-204.115. The Charter mandates that each year the Mayor prepare and submit a proposed budget to the Council of the District of Columbia ("Council"). *Id*. at § 1-204.42. For purposes of both the Charter and the Home Rule Act, the term "budget" is defined as "the entire request for appropriations and loan or spending authority for all activities of all agencies of the District financed from all existing or proposed resources and shall include both operating and capital expenditures." *Id*. at § 1-201.03(15).

The Charter also mandates that the Council adopt a budget for the District, by majority vote or, if the Mayor disapproved the budget adopted by the Council, by a two-thirds majority vote, within a certain period of time after receipt of the Mayor's budget proposal. *See, e.g.*, *id*. at § 1-204.46(a). The Charter further mandates that the Mayor submit the District's adopted budget to the President for transmission to Congress. Congress, in turn, considers the District's budget as part of the annual federal appropriations process. In other words, enactment of the District's annual budget requires not only approval by majority or two-thirds vote of the Council, but also an affirmative appropriation passed by both Houses of Congress and presented to the President for signing. Congress has full authority to amend, adopt, or ignore the budget adopted by the District, on an open-ended timeframe, with or without consulting with the District.

In addition, the Charter expressly provides that "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act." *Id*. at § 1-204.46(c). Federal law also prohibits the Mayor and CFO from spending monies that have not been appropriated by Congress and presented to the President for signing. *See* 31 U.S.C. § 1341(a) ("An officer or employee of the District of Columbia government may not make or authorize an

expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.").

B. The Budget Autonomy Act.

On December 18, 2012, the Council passed the Budget Autonomy Act, which was signed by then-Mayor Vincent C. Gray on January 18, 2013. Because the Budget Autonomy Act purported to amend the Charter, it was required to be ratified by the District's voters in a referendum in order to become law. The District's voters ratified the Budge Autonomy Act in an April 23, 2013 referendum.

The Budget Autonomy Act purports to make two significant changes to the Charter. First, it divides the District's budget into two components – a "local portion" and a "federal portion" – and changes the process by which the budget becomes law. Although the terms "local portion" and "federal portion" are not defined in either the Budget Autonomy Act or the Home Rule Act, it appears that "local portion" refers to that segment of the District's budget derived from local sources, including District of Columbia income, sales, and property tax revenues and fees. Approximately two-thirds of the District's budget stems from such local revenues and fees.

Instead of the Mayor submitting the entire budget to the President for transmission to Congress and both Houses of Congress passing an appropriation for presentment to the President, the Budget Autonomy Act purports to authorize the Council Chairman to submit the "local portion" of the budget to the Speaker of the House of Representatives. If Congress does not pass a joint resolution disapproving the "local portion" of the budget within 30 days, it becomes law. Only the "federal portion" of the budget is submitted to the President – by the Mayor – for transmission to Congress. The "federal portion" only becomes law when both Houses of

Congress pass an appropriation that is presented to the President for signing.

Second, pursuant to this revised process, the Budget Autonomy Act purportedly grants the District with the authority to incur obligations and expend local tax and fee revenue without an appropriation passed by both Houses of Congress and presented to the President for signing. Of relevance to this lawsuit, the Mayor is "responsible for all financial transactions[,]" for having "custody of all public funds belonging to or under the control of the District[,]" and for apportioning "all appropriations and funds made available during the fiscal year for obligation." D.C. Code § 1–204.48(a)(1), (7). The Mayor is also required to apportion "all appropriations and funds made available during the fiscal year for obligation." *Id.* at § 1–204.48(a)(9). Similarly, the CFO is required to certify and approve payment "of all bills, invoices, payrolls, and other evidences of claims, demands, or charges against the District government, and determin[e] the regularity, legality, and correctness of such bills, invoices, payrolls, claims, demands, or charges." *Id*. at § 1–204.24d(16). Consequently, the Budget Autonomy Act purportedly authorizes the Mayor and the CFO to spend taxpayer monies without an appropriation passed by both Houses of Congress and presented to the President for signing.

C. *Council of the District of Columbia v. Gray*.

After the Budget Autonomy Act took effect, the District's Attorney General issued a formal opinion advising then-Mayor Gray that he should not enforce the law because it violated the Home Rule Act and therefore was unlawful. On the advice of the Attorney General and on their own accord, then-Mayor Gray and Defendant DeWitt notified the Council that they believed the Budget Autonomy Act to be unlawful and would not enforce it. On April 17, 2014, the Council filed suit, seeking declaratory and injunctive relief against then-Mayor Gray and

Defendant DeWitt in their official capacities. Specifically, the Council sought a declaration that the Budget Autonomy Act is valid and an injunction compelling the enforcement of the law.

The parties subsequently cross-moved for summary judgment, and, on May 19, 2014, this Court found the Budget Autonomy Act to be unlawful and permanently enjoined all parties from complying with it. *Council of the District of Columbia v. Gray*, 42 F. Supp. 3d 134 (D.D.C. 2014). The Council immediately appealed the Court's ruling to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). After briefing and oral argument, but prior to an opinion being issued by the D.C. Circuit, Defendant Bowser was elected Mayor of the District, sworn into office, and substituted in as an appellee in place of Mayor Gray.

Upon being substituted in, on February 23, 2015, Defendant Bowser advised the D.C. Circuit that, contrary to this Court's ruling, she believed the Budget Autonomy Act to be valid, and, absent a judgment restraining her actions, intended to comply with its requirements. On March 24, 2015, Defendant Bowser filed a motion to dismiss the appeal for mootness and requested that the appellate court vacate the Court's judgment so that she could adhere to the Budget Autonomy Act. On May 27, 2015, the D.C. Circuit dismissed the appeal and vacated this Court's judgment on mootness grounds. *Council of the District of Columbia v. Bowser*, 2015 U.S. App. LEXIS 8881 (D.C. Cir. May 27, 2015) ("Upon consideration of Mayor Bowser's suggestion of mootness and motion to dismiss the appeal, the responses thereto, and the reply, it is ORDERED that the motion be granted.").

D. The FY16 Budget Request.

Although this Court – the only court to rule on the merits of the Budget Autonomy Act – found the law to be unlawful, the District enacted its Fiscal Year 2016 Budget through the process

established in the Budget Autonomy Act. The FY16 Budget Request, which includes both the federal and local portions of the District's budget, was introduced on April 2, 2015. *See* Bill History (available at *http://lims.dccouncil.us/Legislation/B21-0157?FromSearchResults=true*). The first reading occurred on May 27, 2015. *Id*. The final reading occurred on June 10, 2015. *Id*. The FY16 Budget Request was subsequently submitted to the Mayor on July 9, 2015 and approved by her that day. *Id*.

Defendant Bowser subsequently submitted the federal portion of the FY16 Budget Request to President Barack Obama. In the transmittal letter, Defendant Bowser stated, "This is the first time we have passed a budget under the provisions of our Budget Autonomy Act. Unlike previous Budget Request Acts, this year's act has been reviewed and voted on twice by our Council." Letter from Muriel Bowser to Barack H. Obama (Jul 9, 2015, available at http://lims.dccouncil.us/Download/33642/B21-0157-Mayor-s-transmittal-letter-to-the-President14.pdf). In addition, Defendant Bowser wrote, "We recognize the continued need for an appropriation of the federal payment portions of our budget but believe that the provisions relating to the local portion of our budget will go into effect without a separate appropriation following a 30 legislative-day period of passive Congressional review." *Id.*

Similarly, the Council Chairman transmitted the local portion of the FY16 Budget Request to the Speaker of the House of Representatives and the President of the Senate. Letter from Phil Mendelson to John Boehner and Joseph Biden, Jr. (Jul. 17, 2015, available at http://lims.dccouncil.us/Download/33642/B21-0157-Chairman-s-transmittal-letter-to-Congress13.pdf). In the transmittal letter, the Council Chairman stated, "On behalf of the government and residents of the District of Columbia, I submit to you the local portion of the Fiscal Year 2016 Budget Request Act

of 2015, D.C. Act 21-99, Div. A, tit. II-III, tit. IV, §§101-104, 106, in accordance with section 602(c)(l) of the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198." *Id*.

Congress subsequently did not pass within 30 days a joint resolution disapproving of the local portion of the FY16 Budget Request. Therefore, the local portion of the FY16 Budget Request purportedly became effective on September 29, 2015. *See* Notice, D.C. Law 21-27 (Sept. 29, 2015, available at http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?NoticeID=5684702). The Notice, in its entirety, states:

> As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 21-157 on first and second readings May 27, 2015, and June l0, 2015, respectively. Following the signature of the Mayor on July 9, 2015, as required by Section 404(e) of the Charter, the bill became Act 21-99 and was published in the July 17, 2015 edition of the D.C. Register (Vol. 62, page 9658). Act 21-99 was transmitted to Congress on July 17, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act. The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 2l-99 is now D.C. Law 21-27, effective September 29, 2015.

Since Fiscal Year 2016 began on October 1, 2015, the District has been incurring obligations and expending taxpayer funds that have not been appropriated by Congress and presented to the President for signing.

III. Standard of Review.

Defendants move to dismiss purportedly pursuant to both Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim upon which relief may be granted) of the Federal Rules of Civil Procedure. However, their motions solely raise the issue of whether this Court has jurisdiction to hear this case and, if so, whether the Court should do so.

There are two types of motions to dismiss under Rule 12(b)(1): a facial attack and a factual

attack. *Kursar v. Transportation Security Administration*, 581 F. Supp. 2d 7, 13-14 (D.D.C. 2008). A facial attack challenges "the factual allegations of the complaint that are contained on the face of the complaint." *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20 (D.D.C. 2003). When such an attack is made, "the court must accept as true the allegations in the complaint and consider the factual allegations of the complaint in the light most favorable to the non-moving party." *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). A factual attack, on the other hand, challenges "the underlying facts contained in the complaint." *Al-Owhali*, 279 F. Supp. 2d at 20. In such an instance, the court "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (citations omitted). The court must allow the nonmoving party "an ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Prakash v. American University*, 727 F.2d 1174, 1180 (D.C. Cir. 1984). This includes the opportunity for discovery, as plaintiffs must "be given an opportunity for discovery of facts necessary to establish jurisdiction." *Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001).

Defendants challenge Plaintiff's standing as well as this Court's jurisdiction through facial attacks under Rule 12(b)(1). Defendants challenge whether a live controversy remains through a factual attack, however.

IV. Argument.

A. Plaintiff plainly has standing.

To have standing under Article III of the Constitution, a plaintiff must demonstrate three familiar requirements: (1) injury-in-fact; (2) a causal connection between the asserted

injury-in-fact and the challenged action of the defendant; and (3) that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). To satisfy the injury requirement in a municipal taxpayer case, a plaintiff must show a "'good-faith pocketbook action.'" *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988) ("*Common Cause*") (citing *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952)). Specifically, the *Common Cause* court stated that, because of the sufficiently close relationship to the municipality, a municipal taxpayer satisfies the injury requirement of standing by establishing "that the challenged activity involves a measurable appropriation or loss of revenue." 858 F.3d at 5. The municipal taxpayer does not need to show that her "taxes will be reduced as a result of a favorable judgment." *Id*. With respect to causation and redressability, a municipal taxpayer only needs to show that a court order enjoining the challenged activity will stop the illegal expenditure of taxpayer funds. *Id*. ("The injury – misuse of public funds – is redressed by an order prohibiting the expenditure.").

In her Complaint, Plaintiff asserted that since Fiscal Year 2016 began on October 1, 2015, the District has been illegally incurring obligations and expending taxpayer monies pursuant to the local portion of the FY16 Budget Request. Complaint at ¶ 39. Because the entire local portion is at issue, the obligations being incurred and the taxpayer monies being expended are obviously "measurable." *Common Cause*, 858 F.2d at 5. The local portion of the budget is approximately seven billion dollars. *See* FY2016 Budget Request at 5. In addition, Plaintiff, in part, requests that the Court "declare the local potion of the FY16 Budget Request to be unlawful" and to "enjoin Defendants from incurring further illegal, unlawful, and *ultra vires* obligations . . . or making further illegal, unlawful, and *ultra vires* expenditures" as required by the local portion of the FY16

Budget Request. Complaint at p. 9. Plaintiff plainly has standing.

Defendants make three arguments as to why Plaintiff does not have standing. First, Defendant DeWitt argues that Plaintiff lacks a personalized injury.[1] Second, both Defendants argue that Plaintiff has not asserted the illegal expenditure of taxpayer monies. Third, Defendant DeWitt argues that the doctrine of municipal taxpayer standing is no longer good law. Each argument fails.

As the *Common Cause* court clearly concluded, a municipal taxpayer has a sufficiently close relationship to the municipality to suffer an injury-in-fact if municipal taxpayer monies are spent illegally. If a municipal taxpayer shows that "the challenged program involves a measurable appropriation of public funds, the Court will recognize standing." *Common Cause*, 858 F.2d at 5. Plaintiff has therefore satisfied the injury element of standing by sufficiently pleading that Defendants are making a measurable appropriation of taxpayer monies. Defendant DeWitt's first argument is simply without merit.

Plaintiff also has sufficiently challenged the expenditure of taxpayer funds. *See* Complaint at ¶ 39. Plaintiff sued Defendant Bowser because she is "responsible for all financial transactions[,]" has "custody of all public funds belonging to or under the control of the District[,]" and is required to apportion "all appropriations and funds made available during the fiscal year for obligation." D.C. Code § 1–204.48(a)(1), (7), (9). Plaintiff also sued Defendant DeWitt because he is required to certify and approve payment "of all bills, invoices, payrolls, and other evidences of claims, demands, or charges against the District government, and determin[e] the regularity, legality, and correctness of such bills, invoices, payrolls, claims, demands, or charges."

[1] Defendants do not assert that Plaintiff has not satisfied the causation and redressability requirements of standing.

Id. at § 1–204.24d(16). Plaintiff is challenging each obligation being incurred and every taxpayer dollar being expended by Defendants. Because the local portion of the FY16 Budget Request has not been appropriated by Congress and presented to the President for signing, Defendants are spending approximately seven billion dollars of local taxpayer funds in violation of the Antideficiency Act. 31 U.S.C. § 1341(a) ("An officer or employee of the District of Columbia government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."). By arguing that Plaintiff is not challenging specific expenditures, Defendants misconstrue Plaintiff's lawsuit, which clearly challenges all expenditures being made and all obligations being incurred pursuant to the process established by the Budget Autonomy Act.

Because those two arguments fail, Defendant DeWitt suggests that "it is not even clear that the doctrine of municipal taxpayer standing remains valid" because no D.C. court has ruled on the issue since 1988. DeWitt Mem. at 13. Binding precedent does not have an expiration date, however. Nor does it lose its validity over time. Neither the D.C. Circuit sitting *en banc* nor the Supreme Court has expressly or impliedly overruled *Common Cause*. It remains good law.

In fact, less than 10 years ago, the Supreme Court reaffirmed the doctrine of municipal taxpayer standing. *See DaimlerChrysler Corporation v. Cuno*, 547 U.S. 332, 349 (2006) ("The *Frothingham* Court noted with approval the standing of municipal residents to enjoin the illegal use of the moneys of a municipal corporation, relying on the peculiar relation of the corporate taxpayer to the corporation to distinguish such a case from the general bar on taxpayer suits." (internal quotations and citation omitted)). Numerous other federal courts of appeal have reaffirmed the doctrine as well. *See e.g., Ehm v. San Antonio City Council*, 269 Fed. Appx. 375,

377 (5th Cir. 2008); *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 262-263 (3rd Cir. 2001); and *Cammack v. Waihee*, 932 F.2d 765, 769-771 (9th Cir. 1991). The doctrine of municipal taxpayer standing is still valid, and Plaintiff plainly has satisfied its elements.

B. This Court has federal question jurisdiction and should exercise it.

Contrary to Defendant Bowser's assertion, this case does not concern an exclusively local question. At issue in this case is whether Defendants illegally have incurred obligations and expended taxpayer monies pursuant to the FY16 Budget Request because such obligations and expenditures have not been appropriated by Congress and presented to the President for signing. This case, like the case before it, "unequivocally presents a federal question – whether the Council can unilaterally amend the District Charter to fundamentally alter the roles of the President and Congress with respect to the locally funded portion of the District's budget." *Council of the District of Columbia*, 42 F. Supp. 3d at 144-145. In addition, "the budget process for the District necessarily includes federal entities, namely the President and Congress, the latter of which has an active role in appropriating the District budget. The Budget Autonomy Act is thus far from the type of purely local legislation that the D.C. Circuit has found does not confer federal jurisdiction." *Id*. at 145.[2]

Because this Court has federal question jurisdiction to hear the case, it should do so. The mere fact that the Superior Court of the District of Columbia ("Superior Court") may rule on the legality of the Budget Autonomy Act is inconsequential. "The pendency of an action in the state court is no bar to proceedings concerning the ***same matter*** in the Federal court having

[2] The D.C. Circuit dismissed the appeal in *Council of the District of Columbia* on mootness grounds. It did not explicitly or implicitly decide whether the case presented a federal question.

jurisdiction." *Reiman v. Smith*, 12 F.3d 222, 223 (D.C. Cir. 1993) (emphasis added) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).[3] The subject matter of the two cases is not the same. In this case, Plaintiff is challenging Defendants' action of illegally incurring obligations and expending taxpayer monies pursuant to the FY16 Budget Request that have not been appropriated by Congress and presented to the President for signing. In the Superior Court, the Council – and now the Mayor – seeks a declaration that the Budget Autonomy Act is valid and an injunction compelling the CFO to comply with the law. Simply put, that case is not about whether the Mayor and CFO are illegally incurring obligations and expending monies. In addition, Plaintiff has not sued the Council. Abstention is not proper. *See Sheehan v. Koonz*, 102 F. Supp. 2d 1, 3 (D.D.C. 1999) (Abstention may be appropriate "where resolution of a similar action pending ***between the parties*** in state court may effectively resolve the dispute between the parties." (emphasis added)).

Nonetheless, to the extent it finds the two cases to be the same, the Court may "exercise its discretion to decline jurisdiction for the purpose of judicial economy only in [a] truly 'exceptional circumstance[].'" *Handy*, 325 F.3d at 352 (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 14 (1983)); *see also Phillips v. Mabus*, 894 F. Supp. 2d 71, 94 (D.D.C. 2012) ("Federal district courts have a 'virtually unflagging obligation ... to exercise the jurisdiction given them.'") (quoting *Colorado River Water Conservation District v. United States*,

[3] Congress created the D.C. courts and "unequivocally distributed the judicial power in the [District] between the federal courts and the [D.C.] courts, allotting to each its own sphere and making neither subservient to the other." *M.A.P. v. Ryan*, 285 A.2d 310, 313 (D.C. 1971). Because of this distribution of power, "the standard applicable to parallel state court proceeding[s]" applies. *Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 351 (D.C. Cir. 2003).

424 U.S. 800, 817 (1976). To exercise such discretion, the Court must conduct a "deliberative balancing" of the following factors: (1) the inconvenience of the federal forum; (2) the order in which the courts assumed jurisdiction; (3) the desirability of avoiding piecemeal litigation; (4) whether federal or state law controls; and (5) whether the state forum will adequately protect the interests of the parties. *Handy*, 325 F.3d at 353-354. In addition, the Court cannot "rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16; *see also Handy*, 325 F.3d at 453 (stating that "no one factor is necessarily determinative"); *Reiman*, 12 F.3d at 224; *Sheehan*, 102 F. Supp. 2d at 3.

The application of these five factors does not result in a "truly exceptional circumstance" that warrants abstention. It favors this Court hearing the case before it. First, this forum is convenient for all parties. This factor is neutral and does not favor either party. Second, although the Superior Court proceeding was filed first, it is not at all clear if and when the court will reach a determination on the merits. The status hearing previously set for March 4, 2016 was rescheduled for March 23, 2016, and an oral argument date has not yet been set. In addition, any ruling will most likely be appealed. This factor is inconclusive. Third, as noted above, the cases seek different relief and involve different parties. Unlike the Council and the Mayor in the Superior Court case, Plaintiff challenges the ongoing expenditure of taxpayer monies and seeks an injunction preventing Defendants from continuing to spend the funds illegally. Similarly, Plaintiff is not a party in the Superior Court case, and the Council is not a party in this case. Because the claims and parties are different there is no piecemeal litigation. In addition, Defendants have not demonstrated that the two cases will "severely prejudice one of the parties."

Sheehan, 102 F. Supp. 2d at 4.

Fourth, whether Defendants are illegally expending District monies implicates D.C.'s budget process, which necessarily includes the President and Congress. Because the ultimate question is one that involves the proper role of the federal government in the affairs of the District as prescribed by the U.S. Constitution, federal law controls. Similarly, Defendants are currently violating the Antideficiency Act, a federal statute. *See* 31 U.S.C. § 1341(a). This factor therefore favors the Court exercising its jurisdiction. *Moses H. Cone Memorial Hospital*, 460 U.S. at 26 ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender.").

Fifth, the Superior Court case will not adequately protect Plaintiff's interests. Plaintiff is not a party below. Nor is there a party fully representing her interests. When this Court heard the original case, Plaintiff's interests were adequately represented by Mayor Gray's defense of the lawsuit and his assertion of counterclaims against the Council. Similarly, Plaintiff's interests were adequately represented during briefing and at oral argument of the appeal as Mayor Gray defended this Court's injunction. However, because Defendant Bowser decided not to defend the Court's injunction and joined with the Council in the current proceedings before the Superior Court, Plaintiff's interests in preventing the unlawful expenditure of taxpayer monies are no longer being adequately represented. As CFO, Defendant DeWitt is not and cannot represent the interest of all taxpayers. He must prepare the budget "under the direction of the Mayor." D.C. Code §1-204.24d(26). It therefore is not entirely clear that the case is properly before the Superior Court or that Defendant DeWitt can, in fact, take a position contrary to that of the Mayor. Importantly, if Defendant DeWitt truly believed that the Budget Autonomy Act is unlawful and all

obligations incurred and all monies expended pursuant to the FY16 Budget Request are illegal, he would refuse to pay all "bills, invoices, payrolls, and other evidences of claims, demands, or charges against the District government." D.C. Code § 1–204.24d(16). He also would not be moving to dismiss Plaintiff's case.

C. A live controversy remains.

Whether Plaintiff's claims have been mooted by intervening events is fact intensive. Defendant Bowser argues that this case is moot because, in addition to passing the FY16 Budget Request pursuant to the process established by the Budget Autonomy Act, the District also complied with the process required by the Home Rule Act. In addition, Defendant Bowser argues that Congress passed and the President signed legislation approving the District's FY16 Budget Request. The limited, admissible evidence available suggests otherwise. As demonstrated above, both the Mayor and the Council acted pursuant to the process established by the Budget Autonomy Act when enacting the local portion of the FY16 Budget Request. Defendant Bowser explicitly stated that "[t]his is the first time we have passed a budget under the provisions of our Budget Autonomy Act," and that "the provisions relating to the local portion of our budget will go into effect without a separate appropriation following a 30 legislative-day period of passive Congressional review." The Council submitted the local portion of the FY16 Budget Request directly to Congress, and, after 30 days, declared that the budget "was transmitted to Congress on July 17, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act. The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended" and the FY16 Budget Request became D.C. law, "effective September 29, 2015." Just because circumstances allegedly made it difficult for the Mayor to submit just the

federal portion of the FY16 Budget Request to the President does not mean that the local portion was properly submitted to the President and Congress for review. Similarly, just because Congress enacted legislation that suggests an appropriation of the District's budget occurred does not mean that it actually did so. Defendant Bowser and the Council asserted and acted as though the FY16 Budget Request was enacted pursuant to the process established in the Budget Autonomy Act. Defendants cannot now disavow their previous statements and actions merely because it is convenient. They cannot have it both ways. At a minimum, there is a factual dispute that cannot be resolved on this motion or without jurisdictional discovery.

In any event, this Court retains jurisdiction because the issue before this Court is "capable of repetition, yet evading review." For a case to fall within the "capable of repetition, yet evading review" doctrine, the challenged action must be "too short in duration to be fully litigated before cessation or expiration." *Federal Election Commission v. Wisc. Right to Life*, 551 U.S. 449, 462 (2007). There also must be a "reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*

With respect to the first prong, the D.C. Circuit has held "that agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical of the challenged action." *Del Monte Fresh Produce Company v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). In addition, the *Del Monte* court concluded that the important consideration is not whether the precise facts underlying the case will recur, but "whether the legal wrong complained of by the plaintiff is reasonably likely to recur." *Id.* at 324. Plaintiff's claim clearly satisfies this first prong. Plaintiff challenges the obligations being incurred and the monies being expended pursuant to the FY16 Budget Request, which is only valid

for one year. Because Defendants can only incur obligations and expend monies pursuant to a yearly budget, the challenged action will conclude before Plaintiff has an opportunity to fully litigate the issue within a two year period.

With respect to the second prong, the challenged action will occur every year. The Council fully intends to continue enacting its yearly budgets pursuant to the process established by the Budget Autonomy Act. All future obligations incurred and monies expended pursuant to the local portion of the District's yearly budgets will be done without being appropriated by Congress and presented to the President for signing.

Importantly, the Council has already indicated that it intends to enact the Fiscal Year 2017 budget pursuant to the process established by the Budget Autonomy Act. *See* dccouncil.us/budget/2017. In addition, the process has already begun. Defendant Bowser is required to submit the proposed budget for Fiscal Year 2017 by March 24, 2016**.** *See* Council of District of Columbia Notice of Public Hearings (available at http://dccouncil.us/files/user_uploads/event_testimony/(1-19-16)%20FY2017%20Budget%20Oversight%20Schedule(final)%20(3).pdf). Once the budget process is completed, on October 1, 2016, Defendants will once again be illegally spending taxpayer funds. A live controversy clearly remains.

Similarly, although Defendants did not *voluntarily* cease the illegal expenditure of taxpayer funds, the basic reasoning behind the doctrine of voluntary cessation provides a persuasive rationale as to why this case is not moot. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Supreme Court reaffirmed that it is "well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice.'" 528 U.S. 167, 189 (2000) (quoting *City of*

Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). In addition, a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *City of Erie v. Pap's A. M.*, 529 U.S. 277, 287 (2000). Moreover, "a defendant claiming that its voluntary compliance moots a case bears a formidable burden of showing that it is ***absolutely clear*** the alleged wrongful behavior could not reasonably be expected to recur." 528 U.S. at 189 (emphasis added) (citing *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968)). As noted above, without a court order preventing them from doing so, starting October 1, 2016 and for every year subsequent, Defendants will once again begin incurring obligations and expending taxpayer monies without the local portion of the budget being appropriated by Congress and presented to the President for signing. This Court should not dismiss this case only to have it return shortly thereafter.[4]

V. Conclusion.

For the foregoing reasons, Plaintiff respectfully requests that Defendant Muriel E. Bowser's Motion to Dismiss and Defendant Jeffrey S. DeWitt's Motion to Dismiss be denied.

Dated: March 9, 2016

Respectfully submitted,

/s/ Michael Bekesha

Michael Bekesha
D.C. Bar No. 995749
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
Phone: (202) 646-5172

Counsel for Plaintiff Clarice Feldman

[4] To the extent that the Court believes that this case is moot, Plaintiff requests the opportunity to amend the Complaint to allege the forthcoming illegal expenditure of taxpayer funds pursuant to the local portion of the Fiscal Year 2017 budget.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARICE FELDMAN, Plaintiff, v. MURIEL E. BOWSER, in her official capacity as Mayor of the District of Columbia, and JEFFREY S. DeWITT, in his official capacity as Chief Financial Officer for the District of Columbia, Defendants.	)	Civil Action No. 15-cv-01967-EGS

[PROPOSED] ORDER

Upon consideration of Plaintiff's Opposition to Defendants' Motions to Dismiss and the entire record herein, it is hereby ORDERED that:

1. Defendant Muriel E. Bowser's Motion to Dismiss is **DENIED**; and

2. Defendant Jeffrey S. DeWitt's Motion to Dismiss is **DENIED.**

SO ORDERED.

DATE:_____

_____
The Hon. Emmet G. Sullivan, U.S.D.J.