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 NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff Clarice Feldman, by counsel, respectfully submits this notice of supplemental authority:

1. On March 18, 2016, the Superior Court of the District of Columbia in *Council of the District of Columbia v. Bowser*, No. 2014-CA-002371-B, ruled that the Budget Autonomy Act is lawful under D.C. law. The Superior Court's ruling is attached as Exhibit A.

2. Defendant DeWitt, Chief Financial Officer and the only defendant in the case before the Superior Court, is satisfied with the ruling and does not plan to appeal it. *See* Press Release, *Statement of Chief Financial Officer Jeffrey S. Dewitt on the Superior Court Decision on the Budget Autonomy Act* (Mar. 18, 2016, attached as Exhibit B) ("Now that we have received direction from the Superior Court, the city can develop its budget independently and not as a Federal agency."). This confirms Plaintiff's assertion that Defendant DeWitt is not adequately protecting her interests as a D.C. taxpayer.

3. The Superior Court did not address the question at issue here: whether Defendants have illegally 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. As this Court previously concluded, such a question "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 v. Gray*, 42 F. Supp. 3d 134, 144-145 (D.D.C. 2014).

Dated: March 21, 2016

Respectfully submitted,

/s/ Michael Bekesha

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Exhibit A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

COUNCIL OF THE DISTRICT OF COLUMBIA, **Plaintiff,** **and** **MURIEL E. BOWSER, in her official capacity as Mayor of the District of Columbia,** **Intervenor-Plaintiff,** **v.** **JEFFREY S. DEWITT, in his official capacity as Chief Financial Officer of the District of Columbia,** **Defendant.**	:	**Case No. 2014 CA 2371 B** **Calendar 12** **Judge Brian F. Holeman**

OMNIBUS ORDER

This matter comes before the Court upon consideration of the following: (1) the Motion for Judgment on the Pleadings, filed by Plaintiff Council of the District of Columbia on October 9, 2015; (2) the Motion for Judgment on the Pleadings, filed by Intervenor-Plaintiff Muriel E. Bowser, in her official capacity as Mayor of the District of Columbia, on October 30, 2015; and (3) the Cross-Motion for Judgment on the Pleadings, filed by Defendant Jeffrey S. Dewitt, in his official capacity as Chief Financial Officer of the District of Columbia, on November 20, 2015. The instant Cross-Motion also contains the papers in opposition to the Motions for Judgment on

the Pleadings. On December 7, 2015, the Council of the District of Columbia filed the Reply.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Local Budget Autonomy Act of 2012

The instant action asks the Court to determine whether or not the Local Budget Autonomy Act of 2012 (the "Budget Autonomy Act") is valid under the law. (Council's Mem. of P. & A. at 1, 9.) Council Chairperson Phil Mendelson, in his report on behalf of the Committee of the Whole, describes the Budget Autonomy Act as legislation that "would permit the Council to approve the District's annual budget in the same manner as it considers all other legislation: two readings and a 30-day Congressional review." Committee of the Whole Report on Bill 19-993, at 1 (Dec. 4, 2012).

Further, "[t]he District's budget would *no longer require adoption of an appropriation act by Congress*." *Id*. (emphasis added). Chairperson Mendelson asserts that "this limited autonomy would mean much more effective control over the District's financial management." *Id*. at 2. Colloquially, one of the significant effects of enacting the Budget Autonomy Act

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[1] The Court acknowledges the following Amici Curiae filings: (1) Memorandum of Points and Authorities for Former Members of Congress and Congressional Staffers (the Honorable Ronald Dellums, the Honorable Donald Fraser, the Honorable Fortney Pete Stark, Johnny Barnes, David Julyan, Dave MacIver, and Nelson Rimensynder); (2) Brief of Local Government Law Professors (Professors David Schleicher, David A. Super, and Sheryll Cashin); (3) Memorandum of Points and Authorities of Former D.C. Attorney General Peter J. Nickles; (4) Memorandum of Points and Authorities of the Center on Budget and Policy Priorities and Professors Kate Stith, Timothy M. Westmoreland, and David Kamin; (5) Brief of Concerned D.C. Legal Professionals (Andrea Ferster, Esquire, Marc Fleischaker, Esquire, Ronald C. Jessamy, Esquire, Carolyn B. Lamm, Esquire, Daniel Solomon, Bruce V. Spiva, Esquire, Melvin White, Esquire, and Thomas Williamson, Jr., Esquire); (6) Memorandum of Points and Authorities of D.C. Appleseed Center for Law & Justice, D.C. Vote, D.C. Fiscal Policy Institute, and League of Women Voters of the District of Columbia; (7) Memorandum of Points and Authorities of Dr. Alice M. Rivlin, the Honorable Thomas M. Davis, and the Honorable Anthony A. Williams; (8) Memorandum of Points and Authorities of Professor William N. Eskridge, Jr.; (9) Memorandum of Points and Authorities of the Bipartisan Legal Advisory Group of the U.S. House of Representatives (the Honorable Paul D. Ryan, Speaker of the House, the Honorable Kevin McCarthy, Majority Leader, the Honorable Steve Scalise, Majority Whip, the Honorable Nancy Pelosi, Minority Leader (under protest), and the Honorable Steny H. Hoyer, Minority Whip (under protest)); (10) Memorandum of Points and Authorities of Leonard H. Becker, Former General Counsel to the Mayor of the District of Columbia; Frederick D. Cooke, Jr., Former Corporation Counsel of the District of Columbia; and Wayne C. Witkowski, Former District of Columbia Deputy Attorney General; and (11) Corrected Brief of Jacques B. Depuy, Daniel M. Freeman, Jason I. Newman, and Linda L. Smith.

would be that the District would "have the right to spend its local tax and fee revenues *without* seeking an annual appropriation from Congress," thus enabling the District to spend its funds notwithstanding the absence of congressional legislation appropriating funds for the next fiscal year. *Council of the Dist. of Columbia v. Gray*, 42 F. Supp. 3d 134, 155 (D.D.C. 2014) (Sullivan, J.) (emphasis added), *vacated by Council of the Dist. of Columbia v. Bowser*, 2015 U.S. App. LEXIS 8881 (D.C. Cir. 2015) (per curiam); *see also* David M. Herszenhorn, *Spending Bill Passes, Averting a Shutdown*, N.Y. TIMES, Oct. 1, 2015, at A19 (stating that Congress averted a government shutdown "by approving a temporary spending measure to keep federal agencies operating").

The pertinent portions of the Budget Autonomy Act are as follows:

> **ENACTMENT OF LOCAL BUDGET BY COUNCIL**.
>
> **Sec. 446. (a) Adoption of Budgets and Supplements -** The Council, within 70 calendar days, or as otherwise provided by law, after receipt of the budget proposal from the Mayor, and after public hearing, and by a vote of a majority of the members present and voting, shall by act adopt the annual budget for the District of Columbia government. The federal portion of the annual budget shall be submitted by the Mayor to the President for transmission to Congress. The local portion of the annual budget shall be submitted by the Chairman of the Council to the Speaker of the Houseof Representatives pursuant to the procedure set forth in section 602(c). Any supplements to the annual budget shall also be adopted by act of the Council, after public hearing, by a vote of a majority of the members present and voting.
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> **(b) Transmission to President During Control Years -** In the case of a budget for a fiscal year which is a control year, the budget so adopted shall be submitted by the Mayor to the President for transmission by the President to the Congress; except, that the Mayor shall not transmit any such budget, or amendments or supplements to the budget, to the President until the completion of the budget procedures contained in this Act and the District of Columbia Financial Responsibility and Management Assistance Act of 1995.

> **(c) Prohibiting Obligations and Expenditures Not Authorized Under Budget** - Except as provided in section 445A(b), section 446B, section 467(d), section 471(c), section 472(d)(2), section 475(e)(2), section 483(d), and subsections (f), (g), (h)(3), and (i)(3) of section 490, no amount may be obligated or expended by any officer or employee of the District of Columbia government unless -- (1) such amount has been approved by an act of the Council (and then only in accordance with such authorization) and such act has been transmitted by the Chairman to the Congress and has completed the review process under section 602(c)(3); or (2) in the case of an amount obligated or expended during a control year, such amount has been approved by an Act of Congress (and then only in accordance with such authorization).
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> **(d) Restrictions on Reprogramming of Amounts** - After the adoption of the annual budget for a fiscal year (beginning with the annual budget for fiscal year 1995), no reprogramming of amounts in the budget may occur unless the Mayor submits to the Council a request for such reprogramming and the Council approves the request, but and only if any additional expenditures provided under such request for an activity are offset by reductions in expenditures for another activity.
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> **(e) Definition** - In this part, the term control year has the meaning given such term in section 305(4) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995.

District of Columbia Law 19-321, Title 60 of the District of Columbia Register Section 1724 (Feb. 15, 2013) (hereafter the "Budget Autonomy Act").

The instant action does not present a simple exercise in lawmaking for the Council. The District of Columbia is a unique entity within the United States of America: the District is not recognized as a "state," instead formed as a "municipal corporation" by Congress and, under the Constitution, subject to Congress' authority to "exercise exclusive legislation" over it. U.S. CONST., art. I, ¶ 8, cl. 17; *Barnes v. D.C.*, 91 U.S. 540, 547 (1875). As a result, citizens of the District are denied fundamental rights enjoyed by citizens of any State, such as representation in Congress and a corresponding say in how the United States Government spends tax dollars levied from citizens of the District. *See Banner v. United States*, 303 F. Supp. 2d 1, 3 (D.D.C.

2004) ("The unfairness of the District's situation is obvious and regrettable. Since the establishment of the District, courts have, however, understood that its unique constitutional position results in unfairness. As early as 1805, then Chief Justice Marshall recognized the inequities compelled by the Constitution as he concluded that the Supreme Court could not grant the District the same benefits enjoyed by the states.") (citing *Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 453 (1805)).

The inequities of the District's position and lack of statehood have been recognized and reiterated by its citizens, the President of the United States, and the courts since the dawn of this country's inception. *See Banner*, 303 F. Supp. 2d at 3; *see also* Tim Craig, *Obama to use D.C. "taxation without representation" license plates*, THE WASHINGTON POST, Jan. 15, 2013, https://www.washingtonpost.com/local/dc-politics/obama-to-use-dc-taxation-without-representation-license-plates/2013/01/15/f91b09ac-5f5b-11e2-9940-6fc488f3fecd_story.html (stating that President Obama announced that all presidential limousines would use license plates issued by the District that contain the slogan "taxation without representation").

The instant action presents "yet another chapter in the District of Columbia's longstanding struggle to achieve self-government." *Banner*, 303 F. Supp. 2d at 3. The District took a major step forward on the path to self-governance when Congress passed the District of Columbia Self-Government and Government Reorganization Act, commonly known as the Home Rule Act of 1973. Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (codified as amended at District of Columbia Code §§ 1-201.01-1207.71 (2006)).

B. The Home Rule Act of 1973 and Enactment of Home Rule

For much of the twentieth century, Congress wielded its authority under the Constitution to "exercise exclusive legislation" over the District and "confined" the District's municipal

government to "mere administration." (Council's Mem. of P. & A. at 4 (citing *Metro. R.R. v. District of Columbia*, 132 U.S. 1, 7 (1889)). As a result, Congress performed all legislative functions for the District. *See* U.S. CONST., art. I, ¶ 8, cl. 17. Then, in 1973, Congress decided to fundamentally change its management of and relationship with the District by passing the Home Rule Act.

Congress, through the Home Rule Act, relaxed its strict control of the District's affairs and granted much more autonomy to the District's municipal government; "the District resembles a full 'home rule' city with *general powers to govern local affairs* except for *express* limitations, in contrast with a [] municipal corporation to which a state has granted only enumerated powers." *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 903 (D.C. 1981) (emphasis added) (citation omitted). The lingering question from the Home Rule Act, presented to the courts numerous times since the Act's enactment and as presented in the instant action, is how much power does the District have to govern its own affairs vis-à-vis Congress?[2]

The Home Rule Act set forth the District of Columbia Charter (the "Charter"), which "establishes the organizational structure of the Government of the District of Columbia." *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 94-95 (D.C. 2010) (citing D.C. Code §§ 1-204.01-115 (2006)). The Charter is "[c]omparable to a state constitution." *Zukerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1072 (D.C. 2014); *accord Convention Ctr. Referendum*

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[2] Amici explain that the "default balance of power between the federal government and the District mirrors the baseline relationship between states and localities: states and Congress possess plenary power unless they choose to divest themselves of it." Brief of Local Government Law Professors *as Amici Curiae* 4. The District is uniquely positioned because it is neither a state nor a locality in a state existing "at the behest of states and . . . subject to states' plenary authority" such as the city of Portland, Oregon; the District is a "home rule" city subject solely to the will of Congress. *Id*. at 4, 14 (citations omitted).

Comm., 441 A.2d at 903. The Charter "became effective when ratified by the citizens of the District through a Charter referendum vote." *Jackson*, 999 A.2d at 95 (citation omitted).

The Charter created a tripartite form of government for the District that is parallel to the structure of state and federal governments: an executive branch, legislative branch, and judicial branch of the District, each recognized as a distinct sovereign from the States and the federal government. *Id*. (citations omitted). The Mayor of the District of Columbia is the District's executive, the Council of the District of Columbia is the District's legislature, and the Superior Court of the District of Columbia and District of Columbia Court of Appeals are the District's judiciary. *See* D.C. Code §§ 1-204.01 (Charter provisions for the Council), 1-204.21 (Charter provisions for the Mayor), 1-204.31 (Charter provisions for the District of Columbia Courts).

The fundamental dispute in the instant action centers on the powers purportedly granted, or not granted, to the Council in exercising legislative powers on behalf of the District. The District of Columbia Court of Appeals, reiterating provisions of the Home Rule Act, states:

> Except as provided in sections 601, 602, and 603 [of the Home Rule Act], the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

Jackson, 999 A.2d at 95 (citing D.C. Code § 1-203.02 (2006)). Under the Home Rule Act, the Council is "empowered to pass legislation by a majority vote after two readings, at least thirteen

days apart." *Id.* (citing D.C. Code § 1-204.12(a) (2006)).[3] If the Mayor does not veto legislation passed by the Council within ten (10) days, or if the Council overrides a mayoral veto by two-thirds vote, that legislation is subject to a "thirty-legislative-day layover" in Congress and then becomes effective, unless disapproved by concurrent resolution issued by Congress. *Id.* (citing

[3] D.C. Code § 1-204.12(a) reads:

> The Council, to discharge the powers and duties imposed herein, shall pass acts and adopt resolutions, upon a vote of a majority of the members of the Council present and voting, unless otherwise provided in this chapter or by the Council. Except as provided in the last sentence of this subsection, the Council shall use acts for all legislative purposes. Each proposed act shall be read twice in substantially the same form, with at least 13 days intervening between each reading. Upon final adoption by the Council each act shall be made immediately available to the public in a manner which the Council shall determine. If the Council determines, by a vote of two-thirds of the members, that emergency circumstances make it necessary that an act be passed after a single reading, or that it take effect immediately upon enactment, such act shall be effective for a period of not to exceed 90 days. Resolutions shall be used (1) to express simple determinations, decisions, or directions of the Council of a special or temporary character; and (2) to approve or disapprove proposed actions of a kind historically or traditionally transmitted by the Mayor, the Board of Elections, Public Service Commission, Armory Board, Board of Education, the Board of Trustees of the University of the District of Columbia, or the Convention Center Board of Directors to the Council pursuant to an act. Such resolutions must be specifically authorized by that act and must be designed to implement that act.

D.C. Code § 1-206.02(c)(1) (2006)).[4]

C. The District's Budgetary Process

Prior to the passage of the Home Rule Act, the Treasury of the United States (the "Treasury") "maintained a general fund for the benefit of the District. The District was treated like a federal agency; its fund could be spent once Congress appropriated money from the U.S. Treasury." (Council's Mem. of P. & A. at 6.); *see* U.S. CONST., art. I, ¶ 8, cl. 17. Under the Home Rule Act, the General Fund, composed of revenues obtained from citizens of the District that are paid into the Treasury, "belong[s] to the District government and shall be paid promptly to the Mayor for deposit in the appropriate fund." Home Rule Act § 450.

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[4] The current version of D.C. Code § 1-206.02(c)(1), substantively similar to the 2006 version cited in *Jackson*, reads:

> Except acts of the Council which are submitted to the President in accordance with Chapter 11 of Title 31, United States Code, any act which the Council determines, according to § 1-204.12(a), should take effect immediately because of emergency circumstances, and acts proposing amendments to subchapter IV of this chapter and except as provided in § 1-204.62(c) and § 1-204.72(d)(1) the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate, a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting, each act passed by the Council and allowed to become effective by the Mayor without his signature, and each initiated act and act subject to referendum which has been ratified by a majority of the registered qualified electors voting on the initiative or referendum. Except as provided in paragraph (2) of this subsection, such act shall take effect upon the expiration of the 30-calendar-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such 30-day period, there has been enacted into law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 30-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law, subsequent to the expiration of such 30-day period, shall be deemed to have repealed such act, as of the date such resolution becomes law. The provisions of § 1-206.04, except subsections (d), (e), and (f) of such section, shall apply with respect to any joint resolution disapproving any act pursuant to this paragraph.

However, Section 603(a) of the Home Rule Act states:

> Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

Historically, the Government of the District of Columbia, interpreting Section 603(a) of the Home Rule Act, has followed "the same process and awaited congressional approval of its budget spending before spending" any amount in the General Fund, a reserve of money that by express language of the statute "belong[s] to the District government." (Council's Mem. of P. & A. at 6-7.); Home Rule Act §§ 450, 603(a). Section 446 of the Home Rule Act reiterates the need for approval from Congress:

> The Council, within fifty [50] calendar days after receipt of the budget proposal from the Mayor, and after public hearing, shall by act adopt the annual budget for the District of Columbia government. Any supplements thereto shall also be adopted by act by the Council after public hearing. Such budget so adopted shall be submitted by the Mayor to the President for transmission by him to the Congress. *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. Notwithstanding any other provision of this Act, the Mayor shall not transmit any annual budget or amendments or supplements thereto, to the President of the United States until the completion of the budget procedures contained in this Act.

(emphasis added). Although the Mayor, as the District's executive, has the power to propose the budget and the Council, as the District's legislature, has the power to adopt the budget, the budget is not effective until approved by Congress. Home Rule Act § 446.

The 114th Congress explains that federal funds, and the funds of the District, are made available for "obligation and expenditure" only by "[a]ppropriations . . . which are accomplished

via congressional enactments – commonly referred to as appropriations acts[.]" Brief for Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* 3. Congress notes that "[a]ppropriations should not be confused with 'budgets.' Budgets do not provide any legal authority to obligate or expend funds; they are merely requests or recommendations for spending levels traditionally submitted to Congress by the heads of the other branches of government." *Id*. Rather, "[a]ppropriations" is "the process by which funds are made available . . . for obligation and expenditure." *Id*. at 2 (citing U.S. CONST., art. I, ¶ 9, cl. 7) (citation omitted). The process of "appropriations" is distinct from the act of *spending* funds; a public entity can only spend funds that are made available through appropriations. *See id*.

Currently, the District is reliant on congressional passage of an appropriations act *prior* to each fiscal year; the failure of Congress to pass such legislation prevents federal agencies *and* the District from spending *any* funds for the upcoming fiscal year. *See FY 2012 and FY 2013 Spending and Performance of the Office of Budget and Planning: Hearing before the Comm. Of the Whole, Council of D.C.* 9 (Mar. 14, 2013), http://cfo.dc.gov/sites/default/files /dc/sites/ocfo/release_content/attachments/Testimony%20--%20FY%202012%20and%202013 %20Spending%20Performance%20for%20OBP%20031413.pdf. District agencies are unable to maintain normal operations until the passage of funding legislation, leading to lower or no availability of public services and benefits such as police patrols, public school nurses, and prescription drug benefits. *Budget Autonomy for the District of Columbia, Hearing before the House Comm. on Gov't Reform*, 108th Cong. 10 (2003) (statement of then-Mayor Anthony Williams).

After Congress passes and the President signs an appropriations act, the Government of the District of Columbia is able to spend its funds. These funds are placed in the custody of the Chief Financial Officer of the District of Columbia. *See* District of Columbia Financial Responsibility and Management Assistance Act of 1995, 109 Stat. 142 (1995).

D. The Budget Process for Fiscal Year 2015

On July 25, 2013, after ratification by an overwhelming majority of voters of the District, the Budget Autonomy Act became law. *See* DISTRICT OF COLUMBIA BOARD OF ELECTIONS, SPECIAL ELECTION TO FILL A VACANCY IN THE OFFICE OF AT LARGE MEMBER OF THE COUNCIL OF THE DISTRICT OF COLUMBIA (2013) (official results from the special election held on April 23, 2013 that indicates that approximately 82% of voters voted in favor of adopting the Budget Autonomy Act). The Council began working with then-Mayor Vincent C. Gray to develop the budget for Fiscal Year 2015, the period October 1, 2014 to September 30, 2015. (Compl. ¶¶ 6-7.) However, on April 11, 2014, then-Mayor Gray and Chief Financial Officer ("CFO") Jeffrey S. DeWitt sent letters to Council Chairperson Phil Mendelson "advising [the Council] that they would refuse to enforce the Budget Autonomy Act." (*Id*. ¶ 52.)

In his letter of April 11, 2014, then-Mayor Gray, acting on an advisory opinion from the Attorney General of the District of Columbia, stated that "the opinion concludes [] the [Budget Autonomy Act] is a legal nullity . . . can have no effect on the formation of the District's budget" and that the District "must comply with federal law while [the District] continue[s] to push in Congress for budget autonomy." Letter from Vincent C. Gray, Mayor, Office of the Mayor of the District of Columbia, to Phil Mendelson, Chairman, Council of the District of Columbia (Apr. 11, 2014) (on file with the Council of the District of Columbia); (Compl. ¶ 53 (citing Op. of the D.C. Att'y Gen., *Whether the Local Budget Autonomy Act of 2012 is Legally Valid* (Apr.

8, 2014)).) The letter of CFO DeWitt states his similar position that "there is no legal validity to the [Budget Autonomy Act]." Letter from Jeffrey S. DeWitt, Chief Financial Officer, Office of the Chief Financial Officer of the District of Columbia, to Phil Mendelson, Chairman, Council of the District of Columbia (Apr. 11, 2014) (on file with the Council of the District of Columbia).

On April 17, 2014, less than one (1) week after receipt of these letters, the Council filed the instant action in the Superior Court of the District of Columbia (the "Superior Court"). (Compl. at 1.)

E. The Instant Litigation

In the Complaint, the Council asserts that then-Mayor Gray and CFO DeWitt's positions are "based on a wrongful belief that the Budget Autonomy Act is invalid. There is no constitutional or statutory basis for their decision to disregard the Act." (Compl. ¶ 8.) The Council seeks "a declaration that [the] Budget Autonomy Act is valid and an injunction compelling the CFO to comply with the law." (*Id*. ¶ 10.) On April 17, 2014, the instant action was removed to the United States District Court for the District of Columbia (the "District Court"). (Not. of Removal, Apr. 17, 2014.) Meanwhile, Muriel E. Bowser defeated then-Mayor Vincent C. Gray in the Democratic primary election for the office of Mayor of the District of Columbia. Mike DeBonis & Aaron C. Davis, *Muriel Bowser declares victory in D.C. mayoral primary*, THE WASHINGTON POST, Apr. 2, 2014, https://www.washingtonpost.com/local/dc-politics/muriel-bowser-declares-victory-in-dc-mayoral-primary/2014/04/02/7176390e-b5b8-11e3-b899-20667de76985_story.html.

On May 19, 2014, the District Court issued the Memorandum Opinion and Order that declared the Budget Autonomy Act invalid and permanently enjoined "Mayor Vincent C. Gray, CFO Jeffrey S. DeWitt, 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." *Council of the Dist. of Columbia*, 42 F. Supp. 3d at 155-56. The Council appealed the decision of the District Court to the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"). Meanwhile, Muriel E. Bowser prevailed in the general election of 2014 and assumed office as the Mayor of the District of Columbia. Mike DeBonis & Aaron C. Davis, *Bowser is elected D.C. mayor, defeating independents Catania and Schwartz*, THE WASHINGTON POST, Nov. 5, 2014, https://www.washingtonpost.com/local/dc-politics/dc-mayoral-candidates-bowser-catania-schwartz-await-voters decision/2014/11/04/494fe 0d6-533f-11e4-892e-602188e70e9c_story.html.

On May 27, 2015, the D.C. Circuit issued the Order ruling that:

> Upon consideration of Mayor Bowser's suggestion of mootness and motion to dismiss the appeal . . . it is **ORDERED** that the motion be granted. The judgment of the [District Court] is hereby vacated and the case is remanded to the district court with instructions to remand the case to the D.C. Superior Court.

Council of the Dist. of Columbia, 2015 U.S. App. LEXIS at 8881. On June 19, 2015, the parties filed the Joint Motion to Remand in the District Court. On June 23, 2015, the District Court entered the Order that granted the Joint Motion to Remand and ordered that the instant action be remanded to the Superior Court. Order, *Council of the Dist. of Columbia v. Bowser, et al.*, Civil Action No. 14-655 (D.D.C. June 23, 2015) (Sullivan, J.)

On November 13, 2015, this Court entered the Omnibus Order that ruled, *inter alia*, that Mayor Bowser is dismissed as a party-Defendant and is granted leave to intervene as a party-Plaintiff. (Omnibus Order, Nov. 13, 2015, at 2.)

II. ANALYSIS

A. The Applicable Standard

Under the Superior Court Rules of Civil Procedure, Rule 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The instant action presents a pure question of law, namely whether or not a piece of legislation enacted by the Council is valid. This type of question and the substantial record presented render this Court's rulings fully dispositive.

B. The Effect of the Decision of the District Court

The CFO asks that this Court "consider adopting [] Judge Sullivan's opinion" issued in the underlying District Court case, *Council of the Dist. of Columbia v. Gray*, 42 F. Supp. 3d 134 (D.D.C. 2014); (CFO Mem. of P. & A. at 2.) It is well-established that as of February 1, 1971, "[the] highest court of the District of Columbia is the *District of Columbia* Court of Appeals" and the courts of this jurisdiction are "*not bound* by the decisions of the United States Court of Appeals rendered after that date" nor decisions rendered by the District Court. *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (emphasis added). Precedent from the United States District Court and United States Court of Appeals are persuasive, not controlling, authority. *Id*.

Here, as a matter of procedure, the opinion issued by the District Court does not have precedential value; it was vacated by a higher court. *Council of the Dist. of Columbia*, 2015 U.S. App. LEXIS at 8881. While this Court finds the District Court's analysis persuasive, this Court

will not summarily adopt the opinion of the District Court nor treat it as controlling authority.[5]

C. Federal Preemption of the Budget Autonomy Act

The Supremacy Clause of the Constitution states that "this Constitution, and the laws of the United States . . . *shall be the supreme law of the land; and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2 (emphasis added). Interpreting the Supremacy Clause, the Supreme Court has held that:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum . . . but because the Constitution and law passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the Supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett v. Rose, 496 U.S. 356, 367 (1990). The result is the "default rule," that federal laws are enforceable and supersede state laws and the laws of the District of Columbia, unless there is "an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Portuguese Am. Leadership Council of the United States, Inc. v. Investors' Alert, Inc.*, 956 A.2d 671, 676 (D.C. 2008) (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).

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[5] The CFO's assertion that the District Court's analysis "[was] not questioned" by the D.C. Circuit is not without merit. In a one-page Order *per curiam*, the D.C. Circuit ruled that the Mayor's "motion [to dismiss the appeal] be granted" and the "judgment of the [District Court] is hereby vacated and the case is remanded . . . with instructions to remand the case to the D.C. Superior Court." *Council of the Dist. of Columbia*, 2015 U.S. App. LEXIS at 8881. There is not much guidance to be secured from the proceedings before the D.C. Circuit, although it is apparent that the D.C. Circuit did express an interest in the jurisdictional issue of standing. *See* Transcript of Oral Argument at 30-31, *Council of the Dist. of Columbia*, No. 14-7067 (D.C. Cir. 2014) ("JUDGE MILLETT: Can you start with standing for us, please . . . . So anytime, anywhere in this country a city council and a mayor are fighting about how a law is being implemented that city council can bring a lawsuit asking a federal court to tell the mayor how to implement the law?").)

It is undisputed the courts of this jurisdiction must enforce the Home Rule Act. The critical issue that must be resolved by this Court is whether the Budget Autonomy Act is *preempted* by the Home Rule Act or other federal law; "[i]t has been settled that state law that conflicts with federal law is 'without effect.'" *In re Estate of Couse*, 850 A.2d 304, 308 (D.C. 2004) (per curiam). Stated another way, if there is any conflict between federal law, such as the Home Rule Act, and the Budget Autonomy Act, the Budget Autonomy Act is invalid. *See id*.

The courts have identified three ways in which a federal statute can preempt state law: (1) "by express pre[]emption, where statutory language 'reveals an explicit congressional intent to pre-empt state law[;]" (2) "by field pre[]emption, in which 'federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it[;]" and (3) "by implied or conflict pre[]emption, which applies 'where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.'" *Id.* (citations omitted).

In the instant matter, where the Home Rule Act is the governing piece of federal legislation delineating the powers of the District vis-à-vis Congress, preemption analysis will largely center on whether the provisions of the Home Rule Act (1) expressly bar the enactment of the Budget Autonomy Act, (2) "left no room" for the District to enact the Budget Autonomy Act as an amendment to existing legislation or the Charter, or (3) can be read to imply that enactment of the Budget Autonomy Act is against the intent, "full purposes[,] and objections of Congress" when Congress passed the Home Rule Act. *Id.*; *Convention Ctr. Referendum Comm.*, 441 A.2d at 903 (citation omitted).

While much attention will be given to the Home Rule Act, there is a complication to this analysis occasioned by a second relevant piece of federal legislation. The Anti-Deficiency Act, codified at Title 31 United States Code § 1341, states that an officer or employee of the District may not, *inter alia*, "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."

The Budget Autonomy Act *amends* existing provisions of the Charter and the laws of the District of Columbia. *See* Budget Autonomy Act, at 1 ("The District of Columbia Home Rule Act . . . D.C. Official Code § 1201.01 *et seq*. [] is amended as follows: . . . ."). As a result, the Budget Autonomy Act faces two significant hurdles: (1) the overarching limits placed on the District in its ability to appropriate and spend funds in accordance with the Constitution and federal law, and (2) provisions of the Home Rule Act governing amendment of the Charter and corresponding limits on the ability of the District to effectuate such amendment.

Section 446 of the Home Rule Act states that "[n]o 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." Section 602(a)(3) of the Home Rule Act states that the Council "shall have no authority to . . . (3) enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." Section 603(a) of the Home Rule Act states that "[n]othing in [the Home Rule Act] shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review,

submission, examination, authorization, and appropriation of the total budget of the District of Columbia government."

The plain language of Section 446 requires an *affirmative* act by Congress before the District can spend any funds; no one in the Government of the District can spend a single cent of public funds "unless such amount has been approved by an Act of Congress, and then only according to such Act." Home Rule Act § 446. The Budget Autonomy Act seeks to amend Section 446 to remove the requirement that Congress pass an appropriations act prior to the expenditure of any funds by the District; the budget would automatically be effective and funds could be spent if Congress *does not affirmatively object*. (*See* Council's Mem. of P. & A. at 8 (stating that the proposed amendments require that "the budget for local funds must be approved by an act that is adopted by the Council after two readings . . . transmitted to Congress for a 30-day review period" and funds appropriated to the District if Congress does not adopt a "concurrent resolution" disapproving of the act adopted by the Council).); Budget Autonomy Act, at 2 (proposed Section 446(c), (e)); Home Rule Act § 602(c).

Stated another way, the status quo is that Congress must say yes before the District can spend its funds. The Budget Autonomy Act proposes that the District can spend its funds as long as Congress *doesn't say no*. *See* Brief of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* 12 (stating that the Budget Autonomy Act would "transform[] Congress's role in the District's budget process from one of active enactment to one of passive review").

Currently, the District's power to amend the Charter stems from a delegation of authority from Congress; Congress, in enacting the Home Rule Act, voluntarily gave powers to the District. *See INS v. Chadha*, 462 U.S. 919, 955 (1983) (holding that Congress "must abide by its

delegation of authority" until that "delegation is legislatively altered or revoked"). The issue at bar is whether the Home Rule Act prohibits the District from using the Budget Autonomy Act to amend its budgetary process.

1. Delegation of Authority from Congress to the District

Congress chose to delegate a significant portion of its authority over the affairs of the District to the Government of the District. The "Statement of Purposes" in the Home Rule Act explicitly provides that "the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia . . . grant to the inhabitants of the District of Columbia powers of local self-government." Home Rule Act § 102. Further, the Home Rule Act seeks "to *the greatest extent possible*, consistent with the constitutional mandate, [to] relieve Congress of the burden of legislating upon essentially local District matters." *Id*. (emphasis added).

Following upon this express statement of legislative intent, Amici's analysis of "Dillon's Rule" is probative. Dillon's Rule generally provides that localities, such as the District, "can exercise [some] powers and not others . . . [a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipal] corporation, and the power is denied." Brief of Local Government Law Professors as *Amici Curiae* 5 (citing 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911)). Prior to adoption of home-rule in the District, it would be correctly argued that Dillon's Rule is inapposite due to the unique status of the District; Dillon's Rule concerns the power of localities vis-à-vis state governments and not the circumstance of an entity subject to near-total control by Congress. *See id. at* 4 (citations omitted).

With the adoption of home rule, Congress intended to and did in fact "relieve [itself] of the burden of legislating . . . essentially local District matters." Home Rule Act § 102. As seen

in home-rule systems adopted in the States, Congress created a "legislative-style home[-]rule" structure where Congress "entrusted the District with the management of its own affairs, while retaining the power to veto the District's actions." Brief of Local Government Law Professors as *Amici Curiae* 8 (citing D.C. Code §§ 1-201.02(a), 1-206.01). Under D.C. Code § 1-206.02(c)(1), the Council and the Mayor have the power to enact amendments to the Charter subject to a review period by Congress; Congress can exercise its ultimate veto power by passing a joint resolution disapproving of such an act.

The modern approach is that "ambiguities in home-rule grants should be resolved in favor of the locality's ability to act." Brief of Local Government Law Professors as *Amici Curiae* 10 (citing provisions of several state constitutions) (footnote omitted). Application of the modern approach to Dillon's Rule is consistent with the stated purpose of Congress to "grant to the inhabitants of the District of Columbia powers of local self-government." Home Rule Act § 102. It is a canon of statutory interpretation that a court must strive to "effectuate the legislative purpose[.]" *In re M.M.D.*, 662 A.2d 837, 846 (D.C. 1995) (citation omitted); *see also* Brief of Local Government Law Professors as *Amici Curiae* 9 (citing S. Rep. No. 93-219, at 4 (1973) (explaining that the Home Rule Act would "relieve" Congress of legislating on local District matters while still ensuring that Congress can protect any federal interests in the capital)).

There is ambiguity in the Home Rule Act as constructed. For example, Section 450 states:

> The General Fund of the District shall be composed of those District revenues which on the effective date of this title [December 24, 1973] are paid into the Treasury of the United States and credited either to the General Fund of the District or its miscellaneous receipts, but shall not include any revenues which are applied by law to any special fund existing on the date of enactment of this title [December 24, 1973]. The Council may from time to time establish such additional special funds as may be

> necessary for the efficient operation of the government of the District. All money received by any agency, officer, or employee of the District in its or his official capacity shall belong to the District government and shall be paid promptly to the Mayor for deposit in the appropriate fund, except that all money received by the District of Columbia Courts shall be deposited in the Treasury of the United States or the Crime Victims Fund.

As acknowledged by the CFO, this provision "separates the District's General Fund from the [United States] Treasury[.]" (CFO's Mem. of P. & A. at 35.) Dillon's Rule advocates would argue that this ambiguity regarding control of the General Fund be resolved against the District. Nevertheless, under the modern approach, the statute may be reasonably construed as an act of Congress that hands control of the General Fund, financial resources derived from local revenues and independent of the Federal payment, to the District.

As to the Budget Autonomy Act, it is of profound significance that Congress *did not exercise its ultimate authority of veto*. *See* D.C. Code § 1-206.02(c)(1) (granting Congress the authority to veto any legislation passed by the Council). It is undisputed that the Council and the Mayor followed the required procedures to bring the Budget Autonomy Act to a referendum before the citizens of the District. (Council's Mem. of P. & A. at 1, 9.) It is undisputed that the citizens of the District overwhelmingly demonstrated their support for the Budget Autonomy Act, voting to adopt it by an 82-to-18 percent margin. (*See Id.*) It is undisputed that the Budget Autonomy Act was subject to the review period under statute. Finally, it is undisputed that Congress *did not pass* a joint resolution voicing its disapproval. (*Id.*); *see* D.C. Code § 1-206.02(c)(1).

Congress "must abide by its delegation of authority" until that "delegation is legislatively altered or revoked." *Chadha*, 462 U.S. at 955. Absent an express prohibition, the Court must view the Home Rule Act as a measure undertaken by Congress to delegate its authority over the

District to the Government of the District. That delegated authority includes the power to enact legislation amending the Charter and govern local affairs, subject to the discretionary exercise of veto power by Congress. D.C. Code § 1-206.02(c)(1).

Application of the delegation doctrine establishes that the District generally has the power to amend the Charter and the ability to address ambiguities by passing legislation, subject to veto power retained by Congress. *Id*. Absent the exercise of that veto, the Budget Autonomy Act must be viewed, provisionally, as valid. *Id*.; *see Chadha*, 462 U.S. at 955. The remaining impediment to full judicial affirmation of the Budget Autonomy Act's validity is the consideration of federal preemption, *i.e.* whether existing federal legislation expressly prohibits the District from exercising its authority delegated by Congress. *See In re Estate of Couse*, 850 A.2d at 308 (discussing federal preemption).

2. Statutory Interpretation

The CFO contends that there are three independent statutory provisions that prohibit the District from amending Section 446 of the Home Rule Act: (1) Section 602(a)(3); (2) Section 603(a); and (3) the Anti-Deficiency Act, specifically 31 U.S.C. § 1341(a)(1)(A). Each is addressed in turn.

It has been settled that "state law that conflicts with federal law is 'without effect.'" *In re Estate of Couse*, 850 A.2d at 308 (citations omitted). Preemption analysis "starts with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id*. (citations omitted). The governing document of the District, the Charter, is "[c]omparable to a state constitution." *Zukerberg*, 97 A.3d at 1072; *accord Convention Ctr. Referendum Comm.*, 399 A.2d at 552. Further, the Home Rule Act created an independent municipal government in the District that is

considered a separate and distinct sovereign from the federal government. *See, e.g.*, D.C. Code § 1-204.31 (creating the District of Columbia Courts, which are separate and distinct from the federal courts).

"'[T]he purpose of Congress is the ultimate touchstone' in every preemption case . . . any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of congressional purpose,' as discerned from the statutory language, the statutory framework, and the structure and the purpose of the statute as a whole." *In re Estate of Couse*, 850 A.2d at 308 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)).

The Court of Appeals has prescribed a comprehensive approach to statutory interpretation:

> Initially, the court must 'look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning,' since the 'primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he [or she] has used.' We added, however, that this 'plain language' or 'plain meaning' rule is the first, but 'not always the last or the most illuminating step' in statutory analysis. We then outlined situations in which courts properly 'look beyond the plain meaning of statutory language.'
>
> First, even where the words of a statute have a superficial clarity, a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve. . . .
>
> Second, the literal meaning of a statute will not be followed when it produces absurd results. . . .
>
> Third, whenever possible, the words of a statute are to be construed to avoid obvious injustice.
>
> Finally, a court may refuse to adhere strictly to the plain wording of a statute in order to effectuate the legislative purpose, . . . as determined by a reading of the legislative history or by an examination of the statute as a whole. . . .

> We concluded by warning that these four exceptions to the plain meaning rule should not be understood 'to swallow the rule completely,' since there are strong policy reasons why everyone should be able to rely on what the statutory language, as commonly understood, appears to say. Accordingly, we said, 'a court should look beyond the ordinary meaning of the words of a statute only where there are persuasive reasons for doing so.'

In re M.M.D., 662 A.2d at 846 (citations omitted).

a. Home Rule Act Section 602(a)(3)

Section 602(a)(3) of the Home Rule Act states that the Council "shall have no authority to . . . (3) enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District[.]"

The federal government, as the nation's capital, retains a large presence in the District. Consequently, a large portion of real property in the District "is owned by the federal government and, therefore, exempt from District taxation." Newman & DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U. L. REV. 537, 600 (1975). To compensate for lower local revenues, Congress instituted the practice of paying an "annual lump sum to the District," a practice that has continued to this day. *Id.*; Home Rule Act § 501. This lump sum is referred to as the "Federal payment." Home Rule Act § 501.

The public funds of the District fall into two (2) distinct categories: (1) funds raised locally through taxes and fees levied against real property, goods, and services within the jurisdiction of the District and not the federal government, and (2) the Federal payment, a direct payment from the federal government to the District. Newman & DePuy, *supra*, at 591-95 (citing Home Rule Act § 302). The Budget Autonomy Act does not seek to amend or otherwise

affect the funding process involving the Federal payment. *See* Budget Autonomy Act § 446(a) ("The federal portion of the annual budget shall be submitted by the Mayor to the President for transmission to Congress."); Home Rule Act § 501; (Council's Mem. of P. & A. at 8 ("The Budget Autonomy Act . . . permits the District to spend locally raised funds using the same legislative procedure that applies to all other District legislation.")).

The brute reality is that prior to passage of the Home Rule Act, the District was treated like a federal agency. It follows that the funds of the District were "property belonging to the United States" and under the unquestioned control of the federal government. Newman & DePuy, *supra* at 539 ("[T]he Congress . . . for the last century has exercised virtually complete legislative and fiscal control over the three-quarters of a million citizens who reside in the nation's capital.") (footnote omitted); (Council's Mem. of P. & A. at 4 (citing *Metro. R.R. v. District of Columbia*, 132 U.S. 1,7 (1889)). It is undisputed that as regards fiscal matters, the status of the District changed after implementation of the Home Rule Act.

In *District of Columbia v. Greater Washington Cent. Labor Council*, 442 A.2d 110, 116 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983), the Court of Appeals considered and interpreted the language of Section 602(a)(3) of the Home Rule Act. The Court of Appeals noted that "[a]lthough the [Home Rule Act] does not define the term 'functions of the United States[,]'" it "reasonably may be surmised" that Congress "intended . . . to withhold from local officials the authority to affect or to control decisions made by federal officials in administering federal laws that are national in scope *as opposed to laws that relate solely to the District of Columbia*." *Id*. (emphasis added) (citing D.C. Code § 1-233(a)(3) (adopted from Home Rule Act § 602(a)(3)). The plain meaning of the language used establishes that the expenditure of the District's "local

funds are a local concern," arising from laws relating solely to the District. (Council's Mem. of P. & A. at 14, 19); *see* Home Rule Act § 602(a)(3).

Following review of the statute as a whole, the Court of Appeals noted no absurd result or obvious injustice in this interpretation, stating that "[w]e are not persuaded that Congress intended that performance of a local function by federal officials prior to the [Home Rule Act] would transform the function into a 'function of the United States' for the purposes of [D.C. Code] § 1-233(a)(3) [and Home Rule Act § 602(a)(3)]." *Greater Washington*, 442 A.2d at 116.

Finally, looking to the legislative history of the statute, the Court of Appeals further explained the absence of any federal impediment to the District's use of funds raised locally. Citing congressional records of proceedings while the Home Rule Act was in committee, the Court of Appeals concluded that "[t]he legislative history further suggests that the language was inserted to *safeguard the operations of the federal government on the national level*:"

> The functions reserved to the federal level would be those related to federal operations in the District and to property held and used by the Federal Government for conduct of its administrative, judicial, and legislative operations; and for the monuments pertaining to the nation's past. The functions would include physical planning of these federal areas, construction and maintenance of federal buildings, and administration of federal park areas[.]

Id. (citing H. COMM. ON THE DISTRICT OF COLUMBIA, 93D CONG., 2d SESS., D.C. EXECUTIVE BRANCH PROPOSAL FOR HOME RULE ORGANIC ACT 182 (Comm. Print 1973)) (emphasis added).

Utilizing the principles explained in *In re M.M.D.* and *Greater Washington*, federal authorities appeared to have been performing the *local* function of spending the General Fund prior to the Home Rule Act. Congress did not intend that performance of a local function by federal officials after its passage would transform that function into a "function of the United States." *See Greater Washington*, 442 A.2d at 116. It is also clear that the General Fund, which

is at issue under the Budget Autonomy Act, is not the "property of the United States." *See* Home Rule Act §§ 450, 602(a)(3). There is neither an "absurd" result, "obvious injustice," nor inconsistency with legislative purpose occasioned by this interpretation. *See In re M.M.D.*, 662 A.2d at 846 (citations omitted).

Here, the CFO's contention that the District's "local budget affects national affairs" is not at all persuasive. (*See* CFO's Mem. of P. & A. at 39.) The proposition that "in financing the District, Congress necessarily faces a choice between using revenues from local taxation and general revenues, *i.e.*, revenues largely derived from the states," at most demonstrates that Congress, in making *the Federal payment*, considers the use of funds derived from the fifty States and other territories. (*See id*. (citing *Banner v. United States*, 428 F.3d 303, 311 (2005) (per curiam) (citation omitted)).) This analysis has no probative bearing on the intent of Congress as regards the spending of the *local* General Fund.

This Court has received statements from former members of Congress who held office in the House of Representatives at the time of drafting and adoption of the Home Rule Act. Brief of Former Members of Congress and Congressional Staffers as *Amici Curiae* ix. This Amicus filing is particularly helpful because it gives this Court the rare opportunity for direct insight into legislative intent.

Amici state that the Charter "was meant to 'contain within it all the governmental functions necessary for operating the City Government.'" *Id*. at 9 (citing *District of Columbia Self-Government and Governmental Reorganization: Markup by H. Comm. on D.C. of H.R. 9056*, 93d Cong. 1st Sess. (July 18, 1973) (statement of Chairman Adams)) (internal citation omitted). The District "was authorized to propose amendments to the Charter, creating an 'ongoing process' with a 'facility whereby [the people of the District] could continue to

implement and update their charter.'" *Id*. at 10 (citations omitted). Amici explain that "[a]midst a fractured political environment, Congress needed to appease hardline opponents of home rule concerned both about the amount that the District received as a federal payment and the District's ability to manage its financial affairs. It did so by *divorcing* these two issues in the Home Rule Act, addressing the *federal payment completely outside* the Charter[.]" *Id*. at 27 (emphasis added); Home Rule Act § 501.

Taking *Greater Washington*, the plain language of the Home Rule Act, and the legislative history of the Home Rule Act together, it is apparent that Congress separated the Federal payment from the District's local revenues, the latter of which were placed in the General Fund. The statute plainly states that the General Fund "shall belong to the District government[.]" Home Rule Act § 450. Records of proceedings convened in Congress and the text of the statute itself indicate that the legislative purpose of the Home Rule Act is to "entrust[] the District with the management of its own affairs, while retaining the power to veto the District's actions." *See District of Columbia Self-Government and Governmental Reorganization: Markup by H. Comm. On D.C. of H.R. 9056*, 93d Cong. 1st Sess. (July 18, 1973) (statement of Chairman Adams); *see also* Home Rule Act § 102; D.C. Code § 1-206.02(c)(1).

It follows that management of the General Fund is neither a federal function nor does it involve federal property. Rather, management of the General Fund, including spending the moneys contained therein, is a "local function" that is performed by local officials. *See* Home Rule Act § 450; *Greater Washington*, 442 A.2d at 116; *In re Estate of Couse*, 850 A.2d at 308; Newman & Depuy, *supra*, at 562 ("[T]he District was viewed in many instances as a state or perhaps as some unique entity with broad legislative powers.").

b. Home Rule Act Section 603(a)

Section 603(a) reads:

> Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

Accepting, *arguendo*, the premise that the District lacked the authority to control the General Fund prior to enactment of the Home Rule Act, the CFO's contention that the language of the statute does "[exclude] budget matters from the Charter-amendment process" is facially appealing. (CFO's Mem. of P. & A. at 13.)

The CFO's argument loses luster when considering the language of the statute "as a whole" and an alternative construct that reveals an ambiguity. *See In re M.M.D.*, 662 A.2d at 846. A closer look indicates that the statute states "[n]othing in this Act shall be construed as making any change in *existing* law, regulation, or basic procedure and practice[.]" Home Rule Act § 603(a) (emphasis added). The use of the word "existing" suggests that Section 603(a) "speaks in the present tense about the effect (or lack thereof) of 'this Act'" on the law as presented *at the time of the enactment* of Home Rule Act § 603(a) and, by implication, does not preclude *future* efforts to amend the District's budgetary process. (Council's Mem. of P. & A. at 22.) Stated differently, interpretative resolve of Section 603(a) commands a hard choice between (1) mere preservation of the federal role in approving the District's budget at the time Congress passed the Home Rule Act in 1973, or (2) future operation of a permanent prohibition against any change to the process by which the District spends any funds appropriated for its budget.

The CFO cites the Court of Appeal's analysis in *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3 (D.C. 1991). The facts underlying *Hessey* were that citizens of the District were attempting to place two voter initiatives on the ballot that "would impose fees or tax surcharges to be deposited in trust funds devoted to low and moderate income housing purposes." *Hessey*, 601 A.2d at 5. The Court of Appeals stated that the issue presented was "who is to be in charge of the District government's local financial management, the District's elected officials or the electorate by initiative." *Id*.

Hessey is facially inapposite. Here, the Government of the District of Columbia and the local electorate are pitted against Congress and the federal government; the Budget Autonomy Act, an Act viewed by critics as expanding the powers of the Government of the District at the expense of the federal government, was placed on the ballot by the Council and adopted by the electorate by an overwhelming margin. (Council's Mem. of P. & A. at 1, 9.); *cf*. *Hessey*, 601 A.2d at 5 (focusing solely on whether the District's elected officials or its citizens had ultimate control over local financial management).

Nevertheless, the historical background on Home Rule, as detailed by the Court in *Hessey*, is instructive. The Court of Appeals explained that Congress has the power to engage in "line-by-line review of the District's budget request by the Congressional Appropriations Subcommittees on the District of Columbia." *Hessey*, 601 A.2d at 17 (citing H. COMM. ON THE DISTRICT OF COLUMBIA, 93D CONG., 2D SESS., HOME RULE FOR THE DISTRICT OF COLUMBIA, 1973-1974, BACKGROUND AND LEGISLATIVE HISTORY OF H.R. 9056, H.R. 9682, AND RELATED BILLS 3060 (Comm. Print 1974) (hereafter the "Home Rule History")). The Chairman of the House Appropriations Committee Subcommittee on the District of Columbia maintained that Congress retains "the right to review and to appropriate the entire District budget, approving of

the necessary *Federal payment* and passing upon all reprogramming requests." Home Rule History, at 3060 (remarks of Congressman William Huston Natcher, Chairman of the House Appropriations Committee Subcommittee on the District of Columbia, to the House of Representatives on the Conference Report) (emphasis added).

At the time that *Hessey* was decided, approximately twenty-five (25) years ago, the Federal payment constituted 40-50% of the District's total budget. *See* Newman & Depuy, *supra*, at 600-601 (explaining that the purpose of the Federal payment is to compensate the District for lost property tax revenues due to the substantial federal presence in the District and that federal property constituted 41.3% of the total value of assessed property in the District in 1973). Today, however, the Federal payment is estimated to constitute only *1%* of the District's total budget, with an overwhelming source of its funding now derived from local taxes and other revenues. *See* September 2015 Revenue Estimates, GOVERNMENT OF THE DISTRICT OF COLUMBIA OFFICE OF THE CHIEF FINANCIAL OFFICER, Sept. 30, 2015 (estimating that the District raised approximately 6.8 billion dollars in local revenues for fiscal year 2015), *available at* http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/September%202015%20Revenue%20Estimates_09302015.pdf.

The Court in *Hessey*, in interpreting the Home Rule Act, noted Congress' contemplation that the District would eventually not be dependent on the Federal payment: "Congress, while retaining in the [Home Rule Act] the pre-home rule procedures for presidential review and submission for approval to Congress of the District's budget . . . also contemplated that the financial management system for the District government would be improved with self-government." *Hessey*, 601 A.2d at 18-19 (citing Home Rule History at 3056-57) (footnote omitted). It follows that Section 603(a) was intended as a 1973 "present tense" limitation on the

District's ability to spend its own funds, as evidenced by "the Home Rule Act's complete legislative history [which] reveals a compromise[:] rather than deny the District budget autonomy for all time, Congress left open the possibility of budget autonomy in the future, subject to a congressional veto right." Brief of Former Members of Congress and Congressional Staffers as *Amici Curiae* 29.

Otherwise, *Hessey* provides no conclusive analysis on the question at bar. *Hessey* essentially reiterates the principle that citizens of the District, by initiative, could create a new office, but "could not also fund it." *Hessey*, 601 A.2d at 29. That principle has no bearing on the current dispute between the Council, the Mayor, and the CFO vis-à-vis the federal government. *See generally Council of the Dist. of Columbia*, 42 F. Supp. 3d 134.

In turning to the legislative history of the Home Rule Act Section 603 and application of the canons of statutory interpretation, this Court's analysis is similar to that of the District Court. For example, the District Court states:

> As Congressman Thomas Rees explained during the floor debate on the bill, the budget process in the Committee Substitute Bill would not change the existing budget process for the District:
>
> Really the relationship, if this legislation is passed, will be the same relationship that Congress now has with the District of Columbia budget, that no money can be spent by the District of Columbia. . . . This was the major compromise . . . so that we have no change at all on budgetary control when we are discussing who will run the budget of the District of Columbia.

Id. at 148-49 (citing 119 CONG. REC. 33390 (Oct. 9, 1973)). Congressman Rees stated that the Home Rule Act will maintain "the same relationship that Congress *now* has with the District of Columbia budget[.]" 119 CONG. REC. 33390 (Oct. 9, 1973) (emphasis added). The use of the qualifier "now" is consistent with the use of the term "existing" in the text of the Home Rule Act

itself; Congress intended to maintain the status quo *for the time being*, but did not permanently foreclose the possibility of budget autonomy in the future. *See* Home Rule Act § 603(a).

Of further significance is the fact that the Home Rule Act does enumerate *specific prohibitions* on the powers of the Council to enact legislation, such as matters concerning the National Zoo, *but does not include* among those restrictions "budget autonomy" or specific language prohibiting the Council from enacting legislation such as the Budget Autonomy Act. *See id*. § 602(b). The closest language that could be viewed as a specific prohibition is Section 602(a)(3), previously discussed. *See supra* Part II(C)(2)(a) at 25-29; Home Rule Act § 602(a)(3).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted). Congress was presented with the opportunity to enact a permanent prohibition in 1973. The Nelsen Substitute, proposed by Republican Congressman Ancher Nelsen in 1973, states:

> Notwithstanding any other provision of law, unless specifically authorized or directed by the Congress, there shall be no change made in existing laws, regulations, or basic procedures and practices as they relate to the respective roles of the Congress, the President, the Federal Office of Management and Budget . . . the District of Columbia Council, and the Commissioner in the preparation, review, submission . . . and appropriation of the total budget for the District of Columbia.

H.R. 10692, 93d Cong. § 416 (LH2024). It could be reasonably argued that if the foregoing proposal had been adopted as law, the language "there shall be no change made in existing laws . . . " would operate both in the present *and* future tense. In fact, the House of Representatives did *not* adopt the Nelsen substitute. (*See* Council Mem. of P. & A. at 29 (citing H.R. 10692, 93d

Cong. § 416 (LH2451-52) (stating that Rep. Nelsen's substitute bill was defeated by a vote of 273-144)).)

This Court agrees with the District Court that Section 603(a) operates as a "limitation" on the Council. *See Council of the Dist. of Columbia*, 42 F. Supp. 3d at 150. The apparent disparity in the respective judicial analyses is occasioned by this Court's rejection of the CFO's contention, accepted by the District Court, that Section 603(a) operates as a *permanent* prohibition on the District's budget autonomy. This argument is at once inconsistent with the legislative purpose and exposes ambiguity in statutory language that the court must resolve. In the view of this Court, the plain language of Section 603(a), specifically the insertion of the term "existing," strongly suggests that Section 603(a) merely operated as a limitation at the time the Home Rule Act passed in 1973. Home Rule Act § 603(a); *see* WEBSTER'S NEW WORLD DICTIONARY 476 (3rd ed. 1988) (defining existing as "to occur or be present"); *see also In re M.M.D.*, 662 A.2d at 845 (articulating the canons of statutory construction).

Review of the language of the statute as a whole and the legislative history, specifically the debate over the Nelsen Substitute, indicates that Section 603(a) "clarified that the bill would not itself change *then-existing* budgetary practice, but . . . stopped short of saying that 'there [would] be no change made' at some point in the future." H.R. 10692, 93d Cong. § 416 (LH2451-52) (emphasis added); Home Rule Act § 602(b); Brief of Former Members of Congress and Congressional Staffers as *Amici Curiae* 20. What Congress contemplated in 1973 is consistent with the instant factual presentation, namely that (1) the District's "financial system has matured substantially in the forty years since passage of the Home Rule Act," (2) the Council used the procedures articulated in the Home Rule Act to pass an amendment to the Charter to grant local control over local funds, (3) with the tacit approval of Congress and (4) consistent

with Congress' intent to "grant to the inhabitants of the District of Columbia powers of local self-government." Home Rule Act § 102(a); (Council's Mem. of P. & A. at 8.)

c. The Anti-Deficiency Act and Home Rule Act Section 603(e)

The Anti-Deficiency Act, codified at 31 U.S.C. § 1341, bars any officer or employee of the Government of the District from making or authorizing "an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." The Home Rule Act contains a provision that states that "[n]othing in this Act shall be construed as affecting the applicability . . . of the provisions [of the Anti-Deficiency Act]." Home Rule Act § 603(e). The CFO contends that the Budget Autonomy Act is "inconsistent with the Anti-Deficiency Act because it would permit the local portion of the District's budget to be appropriated, and funds to be obligated and expended, pursuant to an act of the Council rather than an Act of Congress." (CFO's Mem. of P. & A. at 33-34.)

This contention relies on the premise that the Government of the District lacked the authority to enact budget autonomy and amend the Charter to remove the need for Congress to pass an appropriations act prior to spending local funds. *See* Home Rule Act § 446. Insofar as this Court finds that Congress has delegated authority to the Council and the Government of the District generally and that the Home Rule Act does not provide for an express or implied permanent prohibition on the District's budget autonomy, the CFO's contention must fail. *See supra* Part II(C) at 16-36. Further, the plain language of the Anti-Deficiency Act does not preclude budget autonomy; this statute merely prohibits an expenditure or obligation "available in an appropriation or fund," without a qualifier such as "an appropriation or fund from Congress." *See* 31 U.S.C. § 1341(a)(1)(A). As the General Fund merely contains financial

resources derived from local revenues, the Government of the District of Columbia is able to spend its local revenues held in the General Fund without triggering the Anti-Deficiency Act.

III. CONCLUSION

Congress made clear that the purpose of the Home Rule Act is to grant the citizens of the District the institutions and powers of self-governance. As was anticipated, control of the District's funds was a contentious issue and the subject of intense negotiations amongst members of Congress. The core issue was whether and to what extent the local government would be able to exercise control over local funds. Congress was presented with the opportunity to pass a version of the Home Rule Act that contained language foreclosing future budget autonomy to the District. That version, the Nelsen Substitute, was resoundly defeated in the House of Representatives.

In 1973, Congress recognized and articulated two distinct sources of funding for the District: (1) the Federal payment, effectively a grant from the federal government, and (2) the General Fund, endowed by local taxes and other local revenue sources. By enacting the Home Rule Act, Congress chose to maintain the status quo, reserving its then-present authority in 1973 but prescribing a method for the District to amend its Charter to obtain budget autonomy in the future. Congress reserved the power to have a final say over any such amendment. Forty (40) years later, the Council, the Mayor, and their constituents lawfully exercised their collective power to enact such an amendment: the Budget Autonomy Act. The Budget Autonomy Act only concerns the spending of the General Fund, the District's financial reserve sourced solely from local means. Congress was empowered to exercise its veto, but declined to do so.

The Supreme Court has recognized that it is not appropriate for the judiciary to interfere with the legislature when the latter chooses to delegate its authority and responsibilities that

come with that exercise of authority. Congress has chosen to delegate its authority and responsibility over the District's affairs to a distinct local government. This Court is unable to interfere with that lawful delegation of authority and exercise of that delegated authority by the Council, the Mayor, and the citizens of the District of Columbia.

WHEREFORE, it is this 18th day of March 2016, hereby

ORDERED, that the Motion for Judgment on the Pleadings, filed by Plaintiff Council of the District of Columbia, is **GRANTED**; and it is further

ORDERED, that the Motion for Judgment on the Pleadings, filed by Intervenor-Plaintiff Muriel E. Bowser, in her official capacity as Mayor of the District of Columbia, is **GRANTED**; and it is further

ORDERED, that the Cross-Motion for Judgment on the Pleadings, filed by Defendant Jeffrey S. Dewitt, in his official capacity as Chief Financial Officer of the District of Columbia, is **DENIED**; and it is further

ORDERED, that Judgment shall be entered in favor of Plaintiff Council of the District of Columbia and Intervenor-Plaintiff Muriel E. Bowser, in her official capacity as Mayor of the District of Columbia, in the Order of Judgment issued concurrently herewith; and it is further

ORDERED, that the Status Hearing currently set for March 23, 2016 is **VACATED**.

BRIAN F. HOLEMAN
JUDGE

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Exhibit B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

FOR IMMEDIATE RELEASE

March 18, 2016

CONTACT: David Umansky

(202) 641-6024 or (202) 255-9895

STATEMENT of CHIEF FINANCIAL OFFICER JEFFREY S. DEWITT on the SUPERIOR COURT DECISION on the BUDGET AUTONOMY ACT

There have been considerable differences of opinion about budget autonomy for the District. Judges, District officials, lawyers advocating for every point of view, community organizations and individual citizens all had different positions on the legality of the Budget Autonomy Act.

As the District's Chief Financial Officer, I require clarity on all financial matters in order to protect the District's financial integrity. For this reason, I needed a definitive ruling from the court on this matter.

Now that we have received direction from Superior Court, the city can develop its budget independently and not as a Federal agency.

This ruling will benefit the District in many ways, including eliminating the rating agencies' concerns about the impact of Federal shutdowns and the historical delays in the Federal budget process.

I look forward to working with the Mayor and Council to make this new process efficient and effective.