GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Brian Schwalb
Attorney General

July 12, 2023

ADVISORY OPINION OF THE ATTORNEY GENERAL

Re: Proposed Initiative, "The Make All Votes Count Act of 2024"

Ms. Terri Stroud
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Board of Elections
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Dear Ms. Stroud:

This memorandum responds to your June 20, 2023, request, on behalf of the Board of Elections ("Board"), that the Office of the Attorney General (the "Office") provide an advisory opinion on whether the proposed initiative, "The Make All Votes Count Act of 2024" ("Proposed Initiative"), is a proper subject of initiative in the District of Columbia, pursuant to D.C. Official Code § 1-1001.16(b)(1A)(B)(i). For the reasons set forth in this letter, the Proposed Initiative is a proper subject of initiative. Accordingly, as you requested, we have attached recommended technical changes to ensure that it is in the proper legislative form.[1]

STATUTORY BACKGROUND

The District Charter ("Charter") establishes the right of initiative, which is the ability of District electors to "propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval."[2] In establishing this right, the Charter requires the Council to adopt implementing legislation detailing the initiative process.[3] This legislation allows any registered qualified elector to begin the initiative process by filing the full text of the proposed measure, a summary statement of not more than 100 words, and a short title with the Board.[4] After receiving a proposed initiative, the Board must refuse to accept it if it determines that it is not a "proper subject" of initiative.[5]

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[1] If the Board accepts the Proposed Initiative, in accordance with D.C. Official Code § 1-1001.16(c)(3), this Office may provide further recommendations for ensuring that it is prepared in the proper legislative form.
[2] D.C. Official Code § 1-204.101(a).
[3] *Id.* § 1-204.107.
[4] *Id.* § 1-1001.16(a)(1).
[5] *Id.* § 1-1001.16(b)(1).

A measure is not a proper subject for initiative if it is not in the proper form, or if it would:

- Appropriate funds;
- Violate or seek to amend the Home Rule Act;
- Violate the U.S. Constitution;
- Authorize or have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977; or
- Negate or limit an act of the Council enacted pursuant to section 446 of the Home Rule Act.[6]

If the Board determines that a proposed initiative is a proper subject of initiative, it must accept the measure and, within 20 calendar days, prepare and adopt a true and impartial summary statement, prepare a short title, prepare the proposed initiative in the proper legislative form, and request a fiscal impact statement from the Office of the Chief Financial Officer ("OCFO").[7] The Board must then adopt the summary statement, short title, and legislative form at a public meeting.[8] Within 24 hours after adoption, the Board must publish its formulation and the fiscal impact statement.[9] If no registered qualified elector objects to the Board's formulation by seeking review in Superior Court within 10 days after adoption, the Board must certify the measure and provide the proposer with a petition form for use in securing the required signatures to place the proposed initiative on the ballot at an election.[10]

FACTUAL BACKGROUND

The Proposed Initiative would amend the District of Columbia Election Code of 1955[11] to provide for ranked-choice voting for elections in the District for President of the United States and all District elected officials with three or more candidates on the ballot, beginning with the June 2026 primary election. It would also replace the District's closed primary system, in which only voters registered as affiliated with a party may vote in the party's primary election, to a semi-closed primary system, in which unaffiliated voters may choose to vote in one party's primary election.

Specifically, sections 2 and 3 of the Proposed Initiative would establish ranked-choice voting, in which a ballot must allow voters to rank up to five candidates, including a write-in candidate. Each ballot is considered one vote for the highest-ranked active candidate on the ballot. Tabulation of ballots proceeds in rounds. If a candidate receives a majority of votes in a round, that candidate is the winner of the election. If no candidate receives a majority, the candidate with the fewest votes is defeated, and that candidate's votes are transferred to the ballot's next-ranked active candidate. Then, a new round of tabulation begins. The rounds continue until a candidate receives a majority of votes. The Proposed Initiative also provides for specific tabulation procedures to allow for the election of the top two candidates for at-large member of the Council in a general election.

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[6] *Id.* §§ 1-204.101(a); 1-1001.16(b)(1); 3 DCMR § 1000.5.
[7] D.C. Official Code § 1-1001.16(c). Because the statute gives the Board 20 days to prepare the legislative form, and the OCFO 15 business days to respond to the Board's request, the Board effectively must request a fiscal impact statement immediately upon accepting an initiative, so that the Board has the fiscal impact statement when it later adopts the legislative form. *See id.* This is necessary so that the Board can comply with its obligation to publish both the adopted legislative form *and* the fiscal impact statement within 24 hours after adoption, which triggers the 10-day judicial challenge period. *Id.* § 1-1001.16(d)(2).
[8] *Id.* § 1-1001.16(d)(1).
[9] *Id.* § 1-1001.16(d)(2).
[10] *Id.* § 1-1001.16(e)–(i); *see also id.* § 1-204.102(a) (requiring, under the District Charter, for an initiative petition to be signed by 5 percent of the registered electors in the District, including 5 percent of registered electors in each of five or more wards).
[11] Approved August 12, 1955 (69 Stat. 699; D.C. Official Code § 1-1001.01 *et seq.*).

Additionally, section 4 would establish a semi-closed primary in place of the District's current closed primary. It would eliminate the prohibition against a person voting in a primary election held by a political party other than the person's own party. Instead, a voter who is not affiliated with any party must be permitted to vote in a primary held by a party of the voter's choice. However, this would not apply to elections for national committeemen and committeewomen and alternates, delegates to political party conventions and alternates, and members and officials of local political party committees.

Finally, section 5 would provide for the Proposed Initiative to apply upon the date of its inclusion in an approved budget and financial plan.

ANALYSIS

The right of initiative "is a power of direct legislation by the electorate."[12] The D.C. Court of Appeals construes this right liberally, and "only those limitations expressed in the law or clear[ly] and compelling[ly] implied" may be imposed on that right.[13] "[A]bsent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the [Council] to adopt legislative measures."[14]

The "proper subject" provision most implicated by the Proposed Initiative is the prohibition against initiatives that appropriate funds.[15] It otherwise satisfies the technical requirements to be in the form of legislative text and include a short title and summary statement of no more than 100 words.[16] It also does not draw any distinctions on the basis of any protected characteristic, either by its express terms or in effect, and it therefore does not authorize discrimination prohibited by the Human Rights Act. Although political affiliation is a protected characteristic, the Proposed Initiative extends to unaffiliated voters "the ability to participate fully in an important aspect of life in the District"—participating in primary elections.[17] The Proposed Initiative's implications for the other limitations—particularly the prohibition against proposing a law appropriating funds—warrant more detailed discussion.

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[12] *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 897 (D.C. 1981) (internal citations and quotations omitted).

[13] *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990) (quoting *Convention Ctr. Referendum Comm.*, 441 A.2d at 913 (internal citations and quotations omitted).

[14] *Convention Ctr. Referendum Comm.*, 441 A.2d at 897.

[15] *See D.C. Bd. of Elections & Ethics v. District of Columbia*, 866 A.2d 788 (D.C. 2005) ("*Campaign for Treatment*").

[16] While an initiative proponent must initially file "legislative text" with the Board, if the Board accepts an initiative, it must "[p]repare, in the proper legislative form, the proposed initiative . . . measure, . . . which shall conform to the legislative drafting style of acts of the Council, and consult experts in legislative drafting, including the Attorney General and the General Counsel of the Council." D.C. Official Code § 1-1001.16(c)(3). This allows the Board to correct any technical deficiencies in a proposed initiative that is otherwise a proper subject.

As a further technical matter, because we were not provided with the proposer's filing with the Board, we cannot opine on whether the Proposed Initiative was filed in accordance with other administrative requirements. *See id.* § 1-1001.16(a) (requiring a proposed initiative to include the name and address of the proposer, an affidavit that the proposer is a registered qualified elector of the District, and a copy of the verified statement of contributions that the proposer has filed with the Director of Campaign Finance).

[17] *See Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 119 (D.C. 2010); *see also* D.C. Official Code § 2-1401.01 (stating the intent of the Human Rights Act as being to end discrimination by reason of political affiliation, among other characteristics).

I. The Proposed Initiative Does Not Propose A Law Appropriating Funds.

Although the right of initiative must be construed broadly, the D.C. Court of Appeals has stated that "the exclusion from initiatives of laws appropriating funds is 'very broad[] . . . extend[ing] to the full measure of the Council's role in the District's budget process.'"[18] The D.C. Court of Appeals has construed this limitation to prohibit initiatives doing any of the following:

1. Blocking the expenditure of funds requested or appropriated;[19]
2. Directly appropriating funds;[20]
3. Requiring the allocation of revenues to new or existing purposes;[21]
4. Establishing a special fund;[22]
5. Creating an entitlement, enforceable by private right of action;[23]
6. Directly addressing and eliminating any revenue source;[24] or
7. Compelling the allocation of funds to carry out mandatory provisions.[25]

The Proposed Initiative does not implicate the first six scenarios because it does not contain any express terms related to funds. However, it does include various mandatory provisions obligating the Board to take specific actions, which may implicate the seventh restriction.

The D.C. Court of Appeals expounded on this restriction in *District of Columbia Board of Elections & Ethics v. District of Columbia* ("*Campaign for Treatment*").[26] There, the initiative at issue required that certain offenders charged with drug offenses be permitted to seek substance abuse treatment as an alternative to incarceration.[27] After an individual completed the treatment program, the criminal charges would be dismissed and expunged.[28]

The court noted that this initiative "impose[d] numerous mandatorily-phrased obligations upon trial courts to effectuate its goals."[29] "The initiative's repeated use of the word 'shall' create[d] mandatory provisions, with which the trial court would be obliged to comply."[30] Further, "the initiative establishe[d] strict time constraints within which these obligations must be satisfied."[31] Thus, according to the court, "[t]his mandatory language means, once in effect, the Superior Court would be obliged to comply with the initiative's provisions."[32]

Having established that the initiative included mandatory provisions, the court then concluded that "the courts would be unable to comply with these mandatory duties in the absence of funding to establish and

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[18] *Campaign for Treatment*, 866 A.2d at 795 (quoting *Dorsey v. District of Columbia*, 648 A.2d 675, 677 (D.C. 1994) (internal citations and quotations omitted)).
[19] *Convention Ctr. Referendum Comm.*, 441 A.2d at 913–914.
[20] *D.C. Bd. of Elections & Ethics v. Jones*, 481 A.2d 456, 460 (D.C. 1984).
[21] *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 18–19 (D.C. 1991) (en banc) ("*Hessey II*").
[22] *Id.* at 19–20.
[23] *Id.* at 20 n.34.
[24] *Campaign for Treatment*, 866 A.2d at 794–795 (citing cases); *Dorsey*, 648 A.2d at 677.
[25] *Campaign for Treatment*, 866 A.2d at 795–796.
[26] *Id.*
[27] *Id.* at 792.
[28] *Id.*
[29] *Id.* at 796.
[30] *Id.*
[31] *Id.*
[32] *Id.*

operate the treatment programs contemplated by, and indeed at the very heart of, the initiative."[33] The court further noted that the initiative did "not in any way condition the court's compliance with its dictates upon funding by the Council."[34] Although the initiative provided that one provision was subject to funding, the court declined to read such language into the rest of the initiative.[35] The court's reliance on the lack of an express subject-to-appropriations clause was central to, and necessary to explain, its holding that the initiative compelled the allocation of funds.[36] The implication of this holding is that an initiative that *did* "condition . . . compliance with its dictates upon funding by the Council" by being subject to appropriations would render it a proper subject. It is also worth noting that, consistent with this holding, when the court considered whether it could sever the invalid provisions from the valid provisions, it assumed that the section that included a subject-to-appropriations provision—section 6—was valid.[37] At a minimum, then, we read *Campaign for Treatment* to allow an initiative to be a proper subject if it includes an express subject-to-appropriations clause.

Turning to the Proposed Initiative, similar to the *Campaign for Treatment* initiative, it imposes "mandatorily-phrased obligations" on the Board and the District government. Under section 2, "ranked choice voting shall be used" for specified elections; the ballot "shall" be designed to provide instructions to voters and allow voters to rank candidates; ballots "shall" be tabulated using ranked-choice procedures; and the Board "shall" establish automated tiebreaking procedures and issue regulations as necessary. Section 3 requires the Board to arrange the ballot for a presidential preference primary in a particular manner to facilitate ranked-choice voting. Finally, section 4 requires the Board to prepare additional ballots for unaffiliated voters who opt to participate in a party's primary election, except for the election of certain party offices.

A threshold question is whether these requirements require additional funding. Because the Board is already charged with administering the underlying elections, it is possible that the Proposed Initiative would not impose any additional costs. It is, however, also possible that the Proposed Initiative would impose additional costs. The Proposed Initiative would require the Board to run multiple tabulations of votes for each election, as opposed to one tabulation. This may require additional staff time, which could increase costs. Additional equipment and technology may be required to run the required multiple tabulations, which also could increase costs. Further, preparing ballots specifically for unaffiliated voters may require additional costs compared with preparing ballots only for voters affiliated with one party. A recent survey by the National Conference of State Legislatures also found that that there was at least a one-time cost to switching to ranked-choice voting.[38] Even still, on the current record, it is not clear that the Proposed

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[33] *Id.*

[34] *Id.* at 797.

[35] *Id.*

[36] *See Diamond v. Hogan Lovells US LLP*, 224 A.3d 1007, 1019 (D.C. 2020) ("It is a fundamental principle of appellate review that, 'for purposes of binding precedent, a holding is a narrow concept, a statement of the outcome accompanied by one or more legal steps or conclusions along the way that . . . are "necessary" to explain the outcome; other observations are dicta.'" (quoting *Parker v. K&L Gates, LLP*, 76 A.3d 859, 873 (D.C. 2013) (Ferren, J., concurring))).

[37] Section 6(d), then codified at D.C. Official Code § 24-7501.06(d), provided that "[s]ubject to proper appropriation and allocation by the District of Columbia Council and Congress, any offender not eligible for treatment under the terms of this act . . . shall be provided with narcotic replacement therapy[] . . . ." Section 6(d) of the Treatment Instead of Jail for Certain Non-Violent Drug Offenders Initiative of 2002, effective June 5, 2003 (D.C. Law 14-308; 50 DCR 186). In *Campaign for Treatment*, the court noted that "after severing invalid provisions," the remaining provisions would be D.C. Official Code "§§ 24–751.01–.04, .05(a)–(d), .05(f), .06, .11, .12." 866 A.2d at 799.

[38] Nat'l Conference of State Legislatures, *Ranked Choice Voting in Practice: Implementation Consideration for Policymakers* (Sept. 28, 2022), https://www.ncsl.org/elections-and-campaigns/ranked-choice-voting-in-practice-implementation-considerations-for-policymakers.

Initiative would unquestionably require additional funds to accomplish its terms.[39] These additional costs might be offset by savings in other areas. This Office therefore cannot say as a matter of law whether the Proposed Initiative would have a negative fiscal impact. This question may be best answered by a fiscal impact statement by the OCFO, which is required under a recent amendment to the initiative procedures statute.[40] However, the statute only requires the OCFO to provide a fiscal impact statement *after* the Board accepts the Proposed Initiative,[41] so it will not be available to the Board when it makes its proper subject determination.

However, even if the Proposed Initiative would have a negative fiscal impact, under *Campaign for Treatment*, it is nonetheless a proper subject because it "condition[s] . . . compliance" on Council funding by being subject to appropriations. Section 5 expressly provides that the Proposed Initiative "shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan." Accordingly, to the extent the Proposed Initiative has unbudgeted costs, by its express terms, it will not apply unless and until the Council chooses to fund it. Due to section 5, the Proposed Initiative cannot by itself force the implementation of ranked-choice voting and semi-closed primaries, if implementation would have a fiscal impact. It instead *authorizes* the Council to fund these changes to the law, if it so chooses. In other words, "the final decision about allocating funds [remains] the Council's," in keeping with the fundamental purpose of the appropriations limitation on the initiative right.[42]

II. The Proposed Initiative Satisfies The Other Proper Subject Criteria.

1. The Proposed Initiative Does Not Violate or Seek to Amend the Home Rule Act.

The Proposed Initiative would not violate or amend the Home Rule Act. The Home Rule Act requires the Mayor, members of the Council, and Attorney General to be elected on a partisan basis.[43] It also requires there to be two at-large members elected in each election cycle, and limits a political party to not more than one nominee for at-large member in one election cycle.[44] The Home Rule Act does not require first-past-the-post, as opposed to ranked-choice, voting. It also does not require closed primaries. The law establishing the District's Delegate to the House of Representatives also does not impose such election requirements for that office.[45]

The Proposed Initiative makes no change to the partisan elections required by the Home Rule Act, but simply provides for the votes in these elections to be tabulated under a ranked-choice system, rather than a first-past-the-post system, and allows unaffiliated voters to choose to participate in one party's primary election.

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[39] *See Campaign for Treatment*, 866 A.2d at 795 (concluding that initiative proposed a law that would "compel the allocation of funds"); *cf. Hessey II*, 601 A.2d at 19–21 (determining that initiative proposed a law appropriating funds because it would have "*forc[ed]* the Council to use . . . funds in accordance with the initiative," and the other would have left the Council with "*no discretion* about the allocation of the new revenues raised by the initiative" (emphases added)); *Jones*, 481 A.2d at 460 (determining that initiative proposed a law appropriating funds because it "would *force* the District government into making interest payments and seeking additional appropriations" (emphasis added)).

[40] Section 2(l)(3)(D) of the Initiative and Referendum Process Improvement Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-192; 68 DCR 1073) (codified at D.C. Official Code § 1-1001.16(c)(4)).

[41] D.C. Official Code § 1-1001.16(c)(4).

[42] *See Hessey II*, 601 A.2d at 13.

[43] D.C. Official Code § 1-204.01(b); *id.* § 1-204.21(b); *id.* § 1-204.35(a).

[44] *Id.* § 1-204.01(b)(2), (4).

[45] *See id.* § 1-401 (establishing the Delegate).

2. The Proposed Initiative Does Not Violate the Constitution.

The Proposed Initiative also does not violate the Constitution because it does not impose a severe burden on First Amendment or due process rights. Voting regulations that impose a severe burden on these rights "must be narrowly tailored and advance a compelling state interest."[46] If a regulation "imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures."[47]

Ranked-choice voting has been upheld by federal courts against constitutional challenges. In *Dudum v. Arntz*, the U.S. Court of Appeals for the Ninth Circuit rejected arguments that San Francisco's instant-runoff system violated the First Amendment and Equal Protection and Due Process clauses of the Fourteenth Amendment.[48] It rejected claims that the multiple rounds of tabulation provided disparate opportunities to vote, effectively discarded votes, and diluted votes, thereby placing a severe burden on voting rights.[49] Instead, the "extremely limited burdens—if any—" were far outweighed by important governmental interests.[50] Subsequently, in *Baber v. Dunlap*, the U.S. District Court of the District of Maine upheld Maine's ranked-choice voting law against a similar challenge.[51]

Additionally, the semi-closed primary system contemplated by section 4 does not appear to present constitutional concerns. Laws governing who may participate in a party's selection of nominees for candidates for public office may implicate associational rights under the First Amendment. The Supreme Court has observed that there is "no heavier burden on a political party's associational freedom" than opening up its candidate-selection process "to persons wholly unaffiliated with the party."[52] Thus, it struck down California's blanket primary system that allowed every voter to vote for a candidate from a ballot listing every candidate regardless of party affiliation and provided that the candidate of each party with the greatest number of votes was the party's nominee.[53] However, the Court distinguished this system from a primary in which, "even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'crossover,'" and to vote in another party's primary, "at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party."[54] A Court plurality subsequently upheld a semi-closed primary system in which, "[i]n general, 'anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election.'"[55]

Under that test, section 4 does not appear to impose a severe burden on associational rights. Unaffiliated voters are limited to voting in only one party's primary election. By requesting a primary ballot for one

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[46] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).
[47] *Wash State. Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).
[48] *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011).
[49] *Id.* at 1112–1113.
[50] *Id.* at 1117.
[51] *Baber v. Dunlap*, 376 F. Supp. 3d 125 (2018) (D. Me. 2018); *see also Minn. Voter Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (holding that city's instant runoff voting system did not violate the United States or state constitutions).
[52] *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82 (2000).
[53] *Id.* at 570.
[54] *Id.* at 577 (emphasis in original).
[55] *Clingman v. Beaver*, 544 U.S. 581, 590 (plurality op.) (internal citation omitted); *see also Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1125 (9th Cir. 2016) (noting that, under certain circumstances, "choosing to vote in only one party's party may constitute a valid form of party affiliation").

party, to the exclusion of any other, they formally affiliate with that party. Further, District law prohibits a voter from changing their party affiliation fewer than 21 days prior to the election.[56] This presents another barrier to voters from one party "crossing over" to affect the message of another party. Thus, within the framework of current District election law, it is unlikely that it could be shown that the Proposed Initiative creates "a 'clear and present danger' that a party's nominee would be 'determined by adherents of an opposing party.'"[57]

III. If The Board Determines That Any One Provision Of The Proposed Initiative Is Not A Proper Subject, It Must Reject The Proposed Initiative In Its Entirety.

Because the Proposed Initiative includes two distinct subjects, we also address the question of severability. Severability is typically an inquiry for a court. The Supreme Court observed long ago that it is "well settled" that "[i]f different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced."[58]

The Board, however, is not a court and must act within the bounds of its statutory authority. Its statutory obligation is to "refuse to accept *the measure* if the Board finds that it is not a proper subject of initiative."[59] Thus, if the Board finds any single provision of the Proposed Initiative to not be a proper subject, it must reject the measure in its entirety. In this case, of course, the proposer may redraft and resubmit the measure, if they so choose.

CONCLUSION

It is the opinion of this Office that the *Make All Votes Count Act of 2024* is a proper subject of initiative. The only proper subject limitation that is implicated is the prohibition against initiatives proposing laws appropriating funds. Whether the substantive provisions of the Proposed Initiative would have a negative fiscal impact and would therefore require additional funds to implement is a factual question that cannot be resolved by this Office at this stage of the initiative process and on the record available. Instead, the question may be answered only by the OCFO's required fiscal impact statement. In the event of a negative fiscal impact statement, however, the Proposed Initiative's applicability is subject to appropriations, pursuant to section 5. As a result, the Proposed Initiative does not actually compel the allocation of funds and the Proposed Initiative is not a law appropriating funds.

Sincerely,

Brian L. Schwalb
Attorney General for the District of Columbia

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[56] D.C. Official Code § 1-1001.07(g)(4), (5).
[57] *See Democratic Party of Haw.*, 833 F.3d at 1123 (quoting *Cal. Democratic Party*, 530 U.S. at 578).
[58] *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902).
[59] D.C. Official Code § 1-1001.16(b)(1) (emphasis added).