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July 11, 2023

Terri D. Stroud
General Counsel
District of Columbia Board of Elections
1015 Half Street, S.E., Suite 750
Washington, D.C. 20003

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

Dear Ms. Stroud:

D.C. Official Code § 1-1001.16(b)(1A) requires that the General Counsel of the Council of the District of Columbia provide an advisory opinion to the District of Columbia Board of Elections ("Board") as to whether a proposed initiative is a proper subject of initiative. On June 9, 2023, I opined that the original "Make All Votes Count Act of 2024" ("Proposed Initiative") was not a proper subject of initiative. Since then, the proposer added a subject-to-appropriations clause to the Proposed Initiative and resubmitted it to the Board. Given that the opinion I submitted on June 9, 2023, addressed the question of whether a proposed initiative can be passed subject-to-appropriations, I am resubmitting that opinion (attached), as I still believe that the Proposed Initiative is not a proper subject of initiative.

I am available if you have any questions.

Sincerely,

*Nicole L. Streeter*

Nicole L. Streeter
General Counsel, Council of the District of Columbia

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June 9, 2023

Terri D. Stroud
General Counsel
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1015 Half Street, S.E., Suite 750
Washington, D.C. 20003

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

Dear Ms. Stroud:

D.C. Official Code § 1-1001.16(b)(1A) requires that the General Counsel of the Council of the District of Columbia provide an advisory opinion to the District of Columbia Board of Elections ("Board") as to whether a proposed initiative is a proper subject of initiative. I have reviewed the "Make All Votes Count Act of 2024" ("Proposed Initiative") for compliance with the requirements of District law, and based on my review, it is my opinion that the Proposed Initiative is not a proper subject of initiative.

## I. Applicable Law

The term "initiative" means "the process by which the electors of the District of Columbia may 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."[1] The Board may not accept a proposed initiative if it finds that the measure is not a proper subject of initiative under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:

- The verified statement of contributions has not been filed pursuant to D.C. Official Code §§ 1-1163.07 and 1-1163.09;
- The petition is not in the proper form established in D.C. Official Code § 1-1001.16(a);

[1] D.C. Official Code § 1-204.101(a) (emphasis added).

- The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2 of the D.C. Official Code; or
- The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to D.C. Official Code § 1-204.46.[2]

The District of Columbia Court of Appeals ("Court") has interpreted the prohibition on the use of the initiative process to propose "laws appropriating funds" very broadly, holding that it "extend[s] . . . to the full measure of the Council's role in the District's budget process . . ."[3] Accordingly, the Court has deemed unlawful any initiative that (1) blocks the expenditure of funds requested or appropriated,[4] (2) directly appropriates funds,[5] (3) requires the allocation of revenues to new or existing purposes,[6] (4) establishes a special fund,[7] (5) creates an entitlement, enforceable by private right of action,[8] or (6) directly addresses and eliminates a source of revenue.[9]

## II. The Proposed Initiative

The Proposed Initiative would amend the District of Columbia Election Code of 1955 to provide that, beginning with the June 2026 primary election and for all elections thereafter, ranked choice voting shall be used for all elections involving three or more qualified candidates for electors for President and Vice President of the United States, Mayor, Attorney General, Charmain of the Council, Delegate to the U.S. House of Representatives, members of the Council, members of the State Board of Education, U.S. Senator, U.S. Representative, Advisory Neighborhood Commissioner, or any other elected official as defined in D.C. Official Code § 1-1001.02(13). Specifically, the Proposed Initiative would allow voters to rank up to five candidates, including write-in candidates, after which, if no candidate receives more than half of the first-choice votes, then the candidate with the fewest votes is eliminated, and the voters who selected that candidate as their first

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[2] D.C. Official Code § 1-1001.16(b)(1).
[3] *Dorsey v. District of Columbia Bd. of Elections & Ethics*, 648 A.2d 675, 677 (D.C. 1994) (quoting *Hessey v. District of Columbia Bd. of Elections & Ethics* ("*Hessey*"), 601 A.2d 3, 20 (D.C. 1991)(*en banc*)).
[4] *Convention Center Referendum Committee v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 913-14 (D.C. 1981)(*en banc*).
[5] *District of Columbia Bd. of Elections & Ethics v. Jones* ("*Jones*"), 481 A.2d 456, 460 (D.C. 1984).
[6] *Hessey*, 601 A.2d at 19-20.
[7] *Id.*
[8] *Id.* at 20 n. 34.
[9] *Dorsey*, 648 A.2d at 677.

choice would have their votes added to the total of the candidate who was their next highest-ranked choice. The process would continue until one candidate has more than half of the votes, and that person would be declared the winner.

The Proposed Initiative would also provide that a duly registered voter who is not registered as affiliated with any political party may vote in a primary election held by a single political party of the voter's choice, for all offices other than national committeemen and committeewomen, delegates to conventions and conferences of political parties other than delegates to nominate candidates for the Presidency and Vice Presidency of the United States, alternates to such officials when permitted by political party rules, and such members and officials of local committees of political parties as may be designated by the duly authorized local committees of such parties for elections at large or by ward in the District.

## III. The Proposed Initiative is Not a Proper Subject of Initiative

In 2021, the Board testified at the public hearing on Bill 24-372, the Voter Ownership, Integrity, Choice, and Equity Amendment Act of 2021, which would have provided for ranked choice voting in the District. At that hearing, the Board testified that it would need additional funding to implement the bill, specifically that the Board would need to modify its ballot design and voting equipment and to procure compatible software from a third-party vendor to accurately tabulate the results. To the extent that the Board would require such additional funding to accommodate ranked choice voting in the District, the Proposed Initiative is an impermissible "law appropriating funds" because it would require new expenditures to implement.

As the Court has explained, "the word 'appropriations,' when used in connection with the functions of the Mayor and the Council in the District's budget process, refers to the discretionary process by which revenues are identified and allocated among competing programs and activities."[10] Thus, "a measure which would intrude upon the discretion of the Council to allocate District government revenues in the budget process is not a proper subject for initiative".[11]

For example, the Court held in *Hessey* that the initiative power could not be used to create a new trust fund that must be used to increase

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[10] *Hessey*, 601 A.2d at 19.
[11] *Id.*

the supply of housing for low and moderate income families because "[t]he effect of the initiative would be to delay or condition the Council's allocation authority, forcing the Council to use those funds in accordance with the initiative rather than in the discretion of the Council to meet government needs."[12] Similarly, the Court held in *Jones* that the initiative power could not be used to authorize an increase in the level of benefits to former D.C. government employees because that would "compel a prohibited interference with the management of the financial affairs of the District."[13]

The Proposed Initiative is an impermissible "law appropriating funds" because it would require the Board to allocate additional funds to implement ranked choice voting in the District. Accordingly, the Proposed Initiative is not a proper subject of initiative.[14]

I am available if you have any questions.

Sincerely,

*Nicole L. Streeter*

Nicole L. Streeter
General Counsel, Council of the District of Columbia

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[12] *Id.* at 20.

[13] *Jones*, 481 A.2d at 460.

[14] We understand that the Office of the Attorney General's ("OAG") advisory opinion on the Proposed Initiative suggests that the Proposed Initiative would be a proper subject of initiative if the proposer or the Board itself were to add a subject-to-appropriations clause to the Proposed Initiative. We disagree. First, if the Board were to adopt OAG's position, then every initiative that requires the allocation of additional funds to implement would be a proper subject of initiative, rendering the Home Rule Act's prohibition on initiatives that are "laws appropriating funds" a nullity. Second, OAG's position is contrary to past practice. In 2021, for example, the Board refused to accept the Elizabeth David Education Equity Pathway Policy Act of 2022 as a proper subject of initiative because its implementation would have required the allocation of additional funds. Board Memorandum Opinion and Order, "Elizabeth David Education Equity Pathway Policy Act", 21-002 (September 28, 2021). Neither OAG's advisory opinion nor the Board's decision in that case mentioned the possibility of making the initiative subject to appropriations, and there has been no change in the law following that decision that arguably would warrant a different result here.