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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 "Vermelle Paid Maternity Leave Act"

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 "Vermelle Paid Maternity Leave Act" ("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" 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 allow:

1. Pregnant women working in DC to receive one year of full paid maternity leave, once they start their third trimester;
2. Pregnant women working in DC to receive nine months of full paid leave after giving birth; and
3. Significant other/spouse of pregnant women who work in DC to receive full pay while working only half-days during the third trimester, to care for their spouse.

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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)).
[4] *Convention Center Referendum Committee v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 913-14 (D.C. 1981).
[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 v. District of Columbia Bd. of Elections & Ethics*, 648 A.2d at 677.

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

The Proposed Initiative is an impermissible "law appropriating funds" because it would require the provision of additional employment benefits to all employees in the District, including District government employees. As the Court 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 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] Based on the foregoing, the Proposed Initiative is an impermissible "law appropriating funds" because it would require the District government to provide additional employment benefits to District employees.[14]

In addition, the Proposed Initiative would violate section 602(a)(3) of the Home Rule Act, which prohibits the Council from passing any act that "concerns the functions or property of the United States".[15] The Proposed Initiative purports to apply to all employees in the District without exception, which would include federal government employees. Just as the Council lacks the authority to legislate with respect to the level of employment benefits provided to federal government

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[10] *Hessey*, 601 A.2d at 19.
[11] *Id.*
[12] *Id.* at 20.
[13] *Jones*, 481 A.2d at 460.
[14] Should the Board conclude that the Proposed Initiative is not an impermissible "law appropriating funds", the Board should, at a minimum, require the Proposed Initiative to include a subject-to-appropriations clause to the extent the Chief Financial Officers determines the Proposed Initiative would require additional funds for the District government to implement.
[15] D.C. Official Code § 1-206.02(a)(3).

employees, use of the initiative process for the same purpose would be impermissible.

Accordingly, the Board should find that the Proposed Initiative is not the 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