

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ELECTIONS

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SPECIAL BOARD MEETING

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MONDAY

DECEMBER 12, 2022

+ + + + +

The District of Columbia Board of
Elections convened via Videoconference, pursuant
to notice at 9:43 a.m. EST, Gary Thompson, Chair,
presiding.

BOARD OF ELECTIONS MEMBERS PRESENT:

GARY THOMPSON, Chair
MIKE GILL, Member
KARYN GREENFIELD, Member

BOARD OF ELECTIONS STAFF PRESENT:

MONICA HOLMAN EVANS, Director
TERRI STROUD, General Counsel
WILLIAM SANFORD, General Counsel

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P-R-O-C-E-E-D-I-N-G-S

9:43 a.m.

CHAIR THOMPSON: Good morning,
everybody. Thank you for attending. This is a
Special Meeting of the Board of Elections.

My name is Gary Thompson. I'm the
Chair of the Board, and present here today are
Board Members Karyn Greenfield and Michael Gill.
It's actually the first time we've all been
together I think in person this year, in light of
the pandemic, but it's great to all be together
here in the Board Room, along with General
Counsel Terri Stroud and Executive Director
Monica Holman Evans.

So, obviously, we have a quorum and
can proceed. Our agenda has been distributed and
made public. We've all had a chance to review
it. There's only two issues on the agenda,
breaking some ties in ANC races, and then the
matter of Elissa for D.C.

So, at the time, I'll move we adopt
the agenda. Second?

1 MEMBER GILL: Second.

2 CHAIR THOMPSON: All in favor?

3 (Chorus of ayes.)

4 CHAIR THOMPSON: All right. Okay. So
5 the first item on our agenda is to resolve some
6 tie votes in two Advisory Neighborhood
7 Commissioner races. We had some write-ins in two
8 single-member districts, SMD 3E07 and SMD 6E02,
9 and those write-ins were ties.

10 And so our regulations direct us to
11 flip a coin when that happens. So I think I'll
12 turn it over to Director Evans maybe to comment
13 on this?

14 MS. HOLMAN EVANS: Absolutely. Good
15 morning, everyone. Thank you, Mr. Chair.

16 As you mentioned, in the case of a tie
17 vote, the resolution of which will affect the
18 outcome of any election, the candidates receiving
19 the tie vote shall cast lots before the Board.

20 This date shall be set no sooner than
21 two days following determination by the Board of
22 the results of the election which resulted in a

1 tie. The candidate to whom the lot shall fall
2 shall be declared the winner.

3 If the candidate or candidates fail to
4 appear, the Board shall cast lots for the
5 candidate or candidates. For purposes of casting
6 lots, any candidate may appear in person or by
7 proxy appointed in writing. And all candidates
8 were contacted and agree to the earlier time.
9 Statutorily, it's listed as 12:00 noon, but they
10 did agree to this time this morning.

11 We had tie votes in two ANC contests,
12 Single-Member District 3E07 and Single-Member
13 District 6E02. And we will cast lots by flipping
14 a coin.

15 And so, first, I will call for the
16 casting lots for the SMD 3E07 contest, Diego
17 Carney versus Michael Rogers. And are those
18 candidates on the line?

19 CHAIR THOMPSON: Bear with us while we
20 find -- amidst a lot of attendees by Zoom --
21 Diego Carney and Michael Rogers.

22 MS. STROUD: Good morning, everyone.

1 It's Michael.

2 MS. HOLMAN EVANS: Yes, I'm sorry.

3 Micah.

4 MS. STROUD: M-I-C-A-H, Micah Rogers.

5 CHAIR THOMPSON: And as you're each
6 unmuted, if you can please identify yourself by
7 audio, so we know you're there.

8 MR. ROGERS: Hi. Micah Rogers. I'm
9 here. Is that -- is that coming through? Am I
10 coming through to you guys?

11 MS. HOLMAN EVANS: If we have Diego
12 Carney or Micah Rogers on the line, are you able
13 to raise your hand?

14 MR. ROGERS: Yeah. I'm here. I don't
15 think I -- you guys can hear me for some reason.

16 CHAIR THOMPSON: All right. We see
17 Micah Rogers, who has raised his hand. We know
18 he's present. And we're just looking for Diego
19 Carney.

20 MS. STROUD: He's present. He said he
21 was present.

22 (Audio interference.)

1 CHAIR THOMPSON: There we are. We
2 have Diego Carney. Okay. Both candidates are
3 present and witnessing the casting of lots.
4 We're not sure what that means, but we think it
5 means flip a coin, some sort of ancient phrase,
6 casting of lots.

7 So for the coin flip, I wasn't sure,
8 you know, what kind of coin to grab, but I --
9 then it occurred to me the appropriate coin is a
10 Susan B. Anthony dollar. So Susan B. Anthony, of
11 course, being a pioneer in the voting rights
12 movement for women and an abolitionist in the
13 late 1800s, lived to a ripe old age of 86. Did
14 not live long enough to see the 19th Amendment
15 pass, but was quite pivotal in that -- in that
16 pursuit.

17 So I'm going to do this in
18 alphabetical order. Heads is Diego Carney and
19 tails is Micah Rogers. Heads being Susan B.
20 Anthony and tails being the eagle on the back.

21 So if it's heads, Diego Carney
22 prevails. If it's tails, Micah Rogers prevails.

1 Before I flip the coin, I want to
2 thank you both for doing this.

3 So without further ado -- plug that.
4 hold on. All right. It is --

5 MS. STROUD: Heads.

6 CHAIR THOMPSON: It's heads. Diego
7 Carney has been elected to ANC 3E07.

8 MS. HOLMAN EVANS: Thank you, Mr.
9 Chair.

10 Next I will call for the casting of
11 lots for the SMD 6E02 contest, Charles Panfil
12 versus George Viedma. Can we find those
13 candidates?

14 MR. VIEDMA: I'm here. Thank you.

15 MS. HOLMAN EVANS: And if you have the
16 ability to raise your hand --

17 MR. VIEDMA: I'm here.

18 MS. HOLMAN EVANS: -- that would be
19 helpful.

20 CHAIR THOMPSON: Yep. We've got them
21 both. Okay.

22 So we can see that both candidates are

1 present, Charles Panfil and George Viedma.

2 So we'll do this the same way, in
3 alphabetical order. Heads is Charles Panfil and
4 tails is George Viedma.

5 MS. STROUD: Tails.

6 CHAIR THOMPSON: It's tails.

7 MEMBER GILL: 50/50.

8 CHAIR THOMPSON: George Viedma, you
9 are elected to ANC 6E02.

10 MEMBER GILL: Just goes to show every
11 vote counts.

12 CHAIR THOMPSON: Every vote counts,
13 right. Every vote counts.

14 MEMBER GILL: Somewhere out there in
15 those ANCs there is somebody who just didn't mail
16 their ballot back.

17 CHAIR THOMPSON: Okay. Anything else
18 on this issue before we proceed? All right.

19 MS. STROUD: Mr. Chair, just that your
20 results will be certified.

21 CHAIR THOMPSON: Okay.

22 MS. STROUD: Having decided the

1 outcome pursuant to the casting of lots, the
2 updated results will be certified and codified as
3 indicating the results of the outcome of these
4 two contests.

5 CHAIR THOMPSON: Okay. With that,
6 we'll turn to the matter of Elissa for D.C.
7 versus D.C. Office of Campaign Finance, which is
8 an appeal to our Board from the Office of
9 Campaign Finance Order dated October 27th, 2022.

10 And I can see that Counsel and
11 Councilmember Silverman are stepping forward.
12 Counsel, take -- need some time to set up? Okay.

13 (Pause.)

14 CHAIR THOMPSON: All right. If
15 counsel could please identify themselves for the
16 record? Mr. Sanford?

17 MR. SANFORD: Good morning, Mr.
18 Chairman, distinguished Board members. My name
19 is William Sanford, General Counsel for the
20 Office of Campaign Finance.

21 CHAIR THOMPSON: All right.

22 MR. DOWNS: Good morning. Jason Downs

1 for the Petitioners (audio interference).

2 CHAIR THOMPSON: All right.

3 MR. DOWNS: Thank you. Good morning.
4 Jason Downs for the Petitioners and, and Elissa
5 Silverman is present before the Board. Thank
6 you.

7 CHAIR THOMPSON: All right. I want to
8 thank you all for being here in person. We
9 really appreciate it. It will make communication
10 a lot easier. And, fortunately, everybody on
11 Zoom can hear us well.

12 So, as a reminder to everybody, it was
13 on Friday, November 4th, that our Board heard
14 Elissa for D.C.'s arguments that their procedural
15 due process rights were violated, and that a
16 vacatur and remand were required at that time.

17 We respectfully declined those due
18 process arguments, although noting that those
19 arguments are preserved of course for appellate
20 purposes. And at the time, we expressly stated
21 that we were not reaching the merits of the
22 issues, whether Elissa for D.C. had in fact

1 committed any violations of the campaign finance
2 laws, namely 3 DCMR Section 3013.1 or Section
3 4209.6. And that is why we are here today.

4 So let me start by explaining our
5 process for today. This is a contested case
6 hearing. It is governed procedurally by Chapter
7 4 of our regulations, which are found at 3 DCMR
8 400.

9 Section 423.9 specifically lays out
10 that the order of procedure for the hearing
11 involves the following discrete steps, which are
12 pretty straightforward: a) a call to order and
13 an opening statement by the Chair, which is what
14 I am doing presently; b) a statement by the Board
15 staff, which General Counsel Terri Stroud will
16 make momentarily; c) consideration of any pending
17 motions or procedural matters; d) the OCF's case;
18 e) Elissa for D.C.'s case; f) any intervenor --
19 and we don't have any intervenors; and then g) a
20 rebuttal by the OCF, if any.

21 And we'll also allow for opening
22 statements and closing statements, as counsel may

1 prefer. You're free to dispense with opening
2 statements if you'd like and save it all for
3 closing. For opening statements, at your
4 suggestion, something in the neighborhood of five
5 to 10 minutes.

6 So we will follow general rules of
7 procedure and evidence with leeway to waive or
8 relax such rules, which our regulations are very
9 clear about.

10 Under Rule 419, the Chair regulates
11 the course of the hearing, sets reasonable time
12 limits, and rules upon any motions or issues
13 regarding witnesses or evidence. When it is
14 their turn, each side may enter evidence into the
15 record, including, if they wish, through live
16 witnesses. And if that happens, the other side
17 is entitled to cross-examination. Witnesses can
18 also be examined by Board members.

19 Our three-member Board reviews the OCF
20 order on a "de novo basis," which means that our
21 standard of review is new. It's on a blank slate
22 without any presumptions or deference to any

1 findings below.

2 The OCF will have to rebuild its case
3 on the record today. In that regard, the OCF has
4 the burden of proof as stated in Section 424, and
5 Section 423.5 specifically says that the OCF has
6 the "burden of proving a violation with reliable,
7 probative, and substantial evidence."

8 Section 423.8 also has that there
9 shall be substantial evidence adequate to support
10 pertinent and necessary findings of fact.

11 This is not the same kind of burden,
12 obviously, as beyond a reasonable doubt or
13 overwhelming or compelling, but the evidence must
14 still be substantial.

15 And the last point I would like to
16 note in the Chair's opening statement is that the
17 original complaint, which was filed on August
18 23rd by Candidate Karim Marshall, alleged that
19 the Elissa for D.C. campaign "engaged in
20 unauthorized coordination between campaign
21 committees, in violation of District law, and
22 made an unauthorized in-kind contribution through

1 the use of a telephonic push poll to attempt to
2 influence the composition and result of a Ward 3
3 primary election, in violation of D.C. Code 1
4 1163.32F(d)(5)."

5 And to make this easier, let's call
6 that the coordination allegation.

7 In that regard, the OCF found that
8 there was insufficient evidence of such a
9 coordination violation, and that specific finding
10 is not challenged in today's hearing. We take,
11 as a given, that there was no coordination
12 violation.

13 What is challenged in today's hearing
14 is OCF's separate determination that Elissa for
15 D.C. violated 3 DCMR Sections 3013.1 and 4209.6,
16 which I will short reference as the purpose
17 violations.

18 3013.1 provides that "Campaign funds
19 shall be used solely for the purpose of
20 financing, directly or indirectly, the election
21 campaign of a candidate."

22 Section 4209.6 similarly says that FEP

1 funds "may not be used for an expenditure for any
2 purpose other than the furtherance of the
3 participating candidate's nomination in the
4 election."

5 So that is the ultimate question here
6 today. Did the early June 2022 polling conducted
7 by Elissa for D.C. on the Ward 3 race serve a
8 purpose, directly or indirectly, for her own
9 campaign for the at-large seat up for vote on
10 November 8th, 2022?

11 Before turning to General Counsel
12 Stroud, I would ask my fellow Board members if
13 they have any opening remarks. Ms. Greenfield?
14 No. Mr. Gill?

15 MEMBER GILL: No.

16 CHAIR THOMPSON: All right. So with
17 that, we'll turn to the next step in the
18 procedure. General Counsel Stroud?

19 MS. STROUD: Good morning, everyone.
20 So I -- my office held a prehearing conference on
21 December 8th, and at which time we went over the
22 process and procedures that the hearing would

1 follow today.

2 Prior to the conference on December
3 6th, I provided the parties with a list of the
4 items that comprise the record as of the date of
5 the prehearing conference, and the parties agreed
6 as to the contents that I indicated. And so I'm
7 just going to read into the record a list of the
8 items that comprise the record.

9 The first item is the investigative
10 request filed by Karim Marshall on August 23rd of
11 2022.

12 (Whereupon, the above-referred to
13 document was marked as Board's Exhibit No. 1 for
14 identification.)

15 MS. STROUD: The second is an email
16 from the Office of Campaign Finance General
17 Counsel William Sanford to Councilmember Elissa
18 Silverman and Robert Price informing them of the
19 investigative request. And that was sent on
20 August 26th.

21 (Whereupon, the above-referred to document was
22 marked as Board's Exhibit No. 2 for

1 identification.)

2 MS. STROUD: The next item, Item
3 Number 3, is an email from Councilmember
4 Silverman to General Counsel Sanford
5 acknowledging receipt of the investigative
6 request and asking questions regarding the type
7 of investigation. That email was sent on August
8 29th of 2022.

9 (Whereupon, the above-referred to document was
10 marked as Board's Exhibit No. 3 for
11 identification.)

12 MS. STROUD: The next was an email
13 from -- Item Number 4, an email from General
14 Counsel Sanford to Councilmember Silverman
15 responding to the questions. That was sent on
16 August 29th, 2022.

17 (Whereupon, the above-referred to document was
18 marked as Board's Exhibit No. 4 for
19 identification.)

20 MS. STROUD: Item Number 5 was the
21 Petitioner's answers to the questions sent on
22 September 23rd, 2022. They were sent by General

1 Counsel Sanford, and it consists -- and it was
2 accompanied by eight attachments. That -- those
3 answered were filed with OCF on October 7th of
4 2022.

5 (Whereupon, the above-referred to document was
6 marked as Board's Exhibit No. 5 for
7 identification.)

8 MS. STROUD: The next item is the
9 Office of Campaign Finance's order in the matter,
10 OCF 2022 full investigation 006. That was issued
11 on October 27th of 2022.

12 (Whereupon, the above-referred to document was
13 marked as Board's Exhibit No. 6 for
14 identification.)

15 MS. STROUD: Item Number 7 is a
16 request for a hearing de novo that was
17 accompanied by five exhibits. That was filed
18 with the Board on November 2nd, 2022.

19 (Whereupon, the above-referred to document was
20 marked as Board's Exhibit No. 7 for
21 identification.)

22 MS. STROUD: The next item, Item

1 Number 8, was an email from me, General Counsel
2 Stroud, providing notice of the due process
3 hearing related -- due process-related hearing in
4 this matter. That was sent on November 2nd,
5 2022.

6 (Whereupon, the above-referred to document was
7 marked as Board's Exhibit No. 8 for
8 identification.)

9 MS. STROUD: Number 9 is the Office of
10 Campaign Finance's opposition to the hearing de
11 novo, with attachments, submitted on November 4th
12 of 2022.

13 (Whereupon, the above-referred to document was
14 marked as Board's Exhibit No. 9 for
15 identification.)

16 MS. STROUD: The next item is the
17 hearing transcript from the due process hearing
18 that took place on November 4th, 2022.

19 (Whereupon, the above-referred to document was
20 marked as Board's Exhibit No. 10 for
21 identification.)

22 MS. STROUD: Item Number 11 is the

1 Petitioner's brief in support of their request
2 for a hearing de novo, which was filed on
3 November 14th, 2022.

4 (Whereupon, the above-referred to document was
5 marked as Board's Exhibit No. 11 for
6 identification.)

7 MS. STROUD: And the final item in the
8 record as of the date of the prehearing
9 conference was the Office of Campaign Finance
10 brief in opposition to the Petitioner's request
11 for a hearing de novo. And that was filed on
12 November 21st, 2022.

13 (Whereupon, the above-referred to document was
14 marked as Board's Exhibit No. 12 for
15 identification.)

16 MS. STROUD: The parties did not
17 indicate during the prehearing conference that
18 any items were omitted. And that was pretty much
19 what we went over during the prehearing
20 conference.

21 We also provided notice of today's
22 hearing to the parties and published notice of

1 the -- today's hearing on the Board's website, in
2 conformance with the Open Meetings Act.

3 CHAIR THOMPSON: All right. Thank
4 you. So those are -- those 12 exhibits, which
5 you just recited, some of which also have
6 exhibits thereto, my understanding is that both
7 sides have stipulated that all those items are
8 entered into evidence for purposes of our Board.
9 And I just want to make sure on the record if
10 that's agreeable.

11 MR. SANFORD: Thank you, Mr. Chairman.

12 CHAIR THOMPSON: Go ahead, Mr.
13 Sanford. Yes.

14 MR. SANFORD: That's correct, Mr.
15 Chair.

16 CHAIR THOMPSON: All right. Mr.
17 Downs?

18 MR. DOWNS: No objection. No
19 objection to those items being a part of the
20 record.

21 CHAIR THOMPSON: Thank you. So all 12
22 of those things, and their various exhibits as

1 well, are admitted into our record. Appreciate
2 that.

3 (Whereupon, the above-referred to documents were
4 received into evidence Board's Exhibits Nos. 1
5 through 12.)

6 CHAIR THOMPSON: And of course either
7 side can introduce additional exhibits into the
8 record as they may wish during their
9 presentations.

10 So before I turn to opening
11 statements, are there any other motions or
12 procedural matters that either side would like to
13 make at this time?

14 MR. DOWNS: Yes, Mr. Chairman.

15 CHAIR THOMPSON: Go ahead.

16 MR. DOWNS: There was -- during the
17 pretrial hearing, there was a discussion of four
18 items that Petitioners would ask to be admitted
19 into the record. I have a copy of those four
20 items for each member of the Board, and of course
21 for Mr. Sanford, although I've sent them to him
22 electronically as well.

1 May I approach and submit those items?

2 CHAIR THOMPSON: Yeah. We received
3 them and looked at them in digital format. If
4 you have an extra copy, I'd -- you know, would
5 love one.

6 MR. DOWNS: We do have extra copies.
7 Thank you. May I approach?

8 CHAIR THOMPSON: Yeah. Please, yeah.
9 I'm old school. I like paper copies. Thank you.

10 MR. DOWNS: May I be heard?

11 CHAIR THOMPSON: Yeah. Why don't you
12 go ahead and describe what they are and what your
13 motion is.

14 MR. DOWNS: Yes. So Exhibit --
15 Petitioner's Exhibit 1 are Patricia Duncan's
16 answers to the questions that were posed by OCF
17 in the complaint -- in the complaint related to
18 her matter.

19 (Whereupon, the above-referred to document was
20 marked as Board's Exhibit No. 13 for
21 identification.)

22 MR. DOWNS: Exhibit Number 2 from the

1 Petitioner are Patricia Duncan's -- it's her
2 affidavit.

3 (Whereupon, the above-referred to document was
4 marked as Board's Exhibit No. 14 for
5 identification.)

6 MR. DOWNS: Exhibit 3, those are
7 Benjamin Bergman's answers to questions that were
8 posed by OCF, and an accompanying affidavit.

9 (Whereupon, the above-referred to document was
10 marked as Board's Exhibit No. 15 for
11 identification.)

12 MR. DOWNS: And Petitioner's Exhibit
13 4 is a four-page affidavit from Benjamin Bergman.
14 (Whereupon, the above-referred to document was
15 marked as Board's Exhibit No. 16 for
16 identification.)

17 MR. DOWNS: All of these exhibits, Mr.
18 Chairman, directly rebut information that is
19 provided in OCF's order. Specifically, if we
20 look at OCF's order on page 7, page 7 states that
21 this tactic -- the polls -- "was employed to
22 influence the outcome of the election by

1 persuading certain candidates to withdraw from
2 the contest." That's page 7 of OCF's order.

3 Page 9 of OCF's order makes a similar
4 allegation. This tactic was influenced -- excuse
5 me, employed to influence the outcome of the
6 election in Ward 3 by persuading certain
7 candidates to withdraw.

8 Page 10 is yet another example in
9 OCF's order where a similar allegation but a bit
10 more robust was made, and it says that the poll
11 results were used to persuade candidates to
12 withdraw from the race.

13 The affidavits, Exhibit --
14 Petitioner's Exhibits 1 through 4, squarely rebut
15 those allegations. I can't think of any other
16 evidence that's more relevant.

17 The reason I'm specifically mentioning
18 relevance is because during the pretrial
19 conference -- or, excuse me, the prehearing
20 conference, OCF objected to these four exhibits
21 based on their relevance.

22 We'll talk about the relevancy first.

1 There's another objection as well.

2 As it relates to relevancy, Ms.
3 Duncan's affidavit specifically rebuts the
4 allegations I just referenced from pages 7, 9,
5 and 10. Specifically, Ms. Duncan's affidavit
6 affirms that Ms. Silverman did not encourage or
7 recommend Ms. Duncan to drop out of the race.
8 That squarely rebuts pages 7, 9, and 10 of OCF's
9 order.

10 Ms. Duncan's affidavit explains that
11 the idea to suspend her campaign was initiated
12 with Ms. Duncan's team and that the decision to
13 do so was her own. She wasn't persuaded by Ms.
14 Silverman. That squarely rebuts the allegations
15 in OCF's order.

16 And, similarly, Ms. Duncan's affidavit
17 rebuts the -- all of the allegations I just
18 referenced. Mr. Bergman's affidavit does the
19 exact same thing. If you look at page -- excuse
20 me, paragraph number 14 of Mr. Bergman's
21 affidavit, it says, and quote, "At no point in
22 our conversations did Councilmember Silverman

1 request that I withdraw from the Ward 3 Council
2 race, let alone withdraw and endorse Matt
3 Frumin." Again, that squarely rebuts the
4 allegations on pages 7, 9, and 10, of OCF's
5 order.

6 These -- this affidavit is clearly
7 relevant. It also mentions -- "it" being the
8 affidavit from Mr. Bergman -- also mentions that
9 he did not discuss or share his decisions to
10 withdraw and endorse Matt Frumin with
11 Councilmember Silverman in advance of doing so,
12 and that's paragraph 20 of his affidavit, again,
13 squarely rebutting the allegations on pages 7, 9,
14 and 10, of OCF's order.

15 So when it comes to relevancy, members
16 of the Board, these affidavits are clearly
17 relevant.

18 And I think there's a separate
19 analysis, if the Board is amenable, which I'm
20 happy to stop -- there is a separate analysis as
21 it relates to the answers to OCF's questions.

22 OCF specifically objected to those

1 questions based on confidentiality, the purported
2 confidential nature of the answers to their
3 questions.

4 And we would respond to that objection
5 in three ways. First, the confidentiality
6 provision that was cited by OCF is 3 DCMR 3700.
7 Notably, that section prevents the Director of
8 Campaign Finance from releasing "records of the
9 Office of Campaign Finance." That's a spin
10 quote.

11 We're not talking about records of the
12 Office of Campaign Finance. There is nothing in
13 the rule that prevents a private citizen from
14 releasing information that is in his or her
15 control. That's why it's lawful for Ben Bergman
16 and Tricia Duncan to waive any privacy rights and
17 present their information publicly, and that's
18 exactly what Ben Bergman did.

19 He put his answers to OCF's questions
20 online publicly on Twitter. So as a factual
21 matter, those answers are not confidential. They
22 are not private. They are not in the custody or

1 the possession of OCF. They're in the public
2 domain. They're publicly available for everyone
3 to see. There is no reason that this Board
4 should not view information that is publicly
5 available based on an objection that is
6 purportedly confidential.

7 This analysis is similar to a grand
8 jury analysis, for example. So to the extent --
9 which grand jury testimony is confidential. That
10 is Rule 6E of the Federal Rules of Criminal
11 Procedure.

12 This analysis is very similar because
13 when you go to -- when a witness goes to the
14 grand jury, of course it's confidential. The
15 Federal Government or the government cannot
16 disclose what happens there without a court
17 order.

18 But the witness themselves can leave
19 the grand jury and disclose to anyone publicly
20 what happened in the grand jury. It happens all
21 the time. That's why witnesses, after they leave
22 the grand jury, some of them do press

1 conferences, because it's lawful for a witness to
2 leave a proceeding that is confidential to the
3 government and go to the public.

4 Mr. Chair?

5 CHAIR THOMPSON: Mr. Bergman and Ms.
6 Duncan, are they also going to appear live as
7 witnesses, subject to cross-examination?

8 MR. DOWNS: They are not going to
9 appear live subject to -- they are not going to
10 appear live. Their affidavits are the -- their
11 affidavits are testimony that we would present.
12 They are not appearing live.

13 They are -- apparently still having
14 pending investigations. That is information that
15 we learned during the pretrial hearing. That is
16 information that -- and I have been in
17 communication with Ms. Duncan's attorney, and I
18 can proffer to this Board that that is
19 information that was learned during the pretrial
20 conference.

21 Because there is a live investigation,
22 the answer to the Board -- the Chairman's

1 question is no, they are not going to be
2 testifying live. We do proffer their affidavits.

3 CHAIR THOMPSON: So you can represent
4 that both Ms. Duncan and Mr. Bergman waive any
5 confidentiality and are comfortable having both
6 of these affidavits and both of these sets of
7 answers admitted into our record?

8 MR. DOWNS: I can -- I can say -- I
9 can say yes, both Mr. Bergman and Ms. Duncan are
10 comfortable with the affidavits and the answers
11 to their OCF questions being a part of this
12 record. That is affirmative.

13 CHAIR THOMPSON: And they do that
14 knowingly, on advice of whatever other counsel
15 they may have, and understanding that these --
16 these affidavits and these answers, as entered
17 into our record, could possibly be utilized by
18 the OCF perhaps in an incriminating manner with
19 respect to the pending investigation against
20 them?

21 MR. DOWNS: I can say that I have
22 spoken to counsel for Ms. Duncan, and I can

1 answer that in the affirmative. Mr. Bergman, to
2 my understanding, is not represented by counsel,
3 which is why I have spoken with him as opposed to
4 an attorney for Mr. Bergman.

5 I should also represent that Mr.
6 Bergman himself is an attorney. So Mr. Bergman
7 himself understands that he -- by submitting this
8 evidence, it could be used against him. He knows
9 that. So --

10 CHAIR THOMPSON: And with respect to
11 the answers to the 20 questions that they each
12 prepared --

13 MR. DOWNS: Yes.

14 CHAIR THOMPSON: -- that's a formal
15 answer that they prepared in the context of the
16 separate OCF proceeding, correct?

17 MR. DOWNS: Separate and parallel,
18 meaning the facts are the same, the polls are the
19 same, the allegations that there was some sort of
20 pressure from Ms. Silverman related to the polls

21 CHAIR THOMPSON: Right.

22 MR. DOWNS: -- all of that is the

1 same. But to directly answer your question,
2 there is a different case number associated with
3 those matters. They're parallel, but different
4 case numbers. Yes.

5 CHAIR THOMPSON: And the two
6 affidavits, they each intentionally prepared
7 those for the purpose of today's proceedings.

8 MR. DOWNS: Correct.

9 CHAIR THOMPSON: So that exhibits --
10 by preparing an affidavit specifically for this
11 proceeding, that seems to indicate their consent
12 and their comfort with those affidavits being
13 admitted into evidence, and I would note for the
14 record both affidavits obviously reference the 20
15 answers to the questions as well.

16 MR. DOWNS: Yes. Yes, Mr. Chairman.

17 CHAIR THOMPSON: Okay. All right.
18 Okay. Mr. Sanford?

19 MR. SANFORD: Thank you, Mr. Chairman.
20 First of all, the Office of Campaign Finance --

21 CHAIR THOMPSON: Maybe -- is your mic
22 on? Maybe lean into it a little bit. Yeah.

1 MR. SANFORD: Can you hear me?

2 CHAIR THOMPSON: Yeah.

3 MR. SANFORD: All right. The Office
4 of Campaign Finance has expressed its objection
5 to the admission of those documents for reasons
6 of confidentiality. But greater than that,
7 because they have no value regarding this
8 hearing.

9 The OCF did not find that the
10 Councilmember persuaded Ms. Duncan or Mr. Bergman
11 to withdraw. That was not one of our findings.
12 That was a comment in the order but not a
13 finding.

14 The purpose of this hearing today is
15 to determine whether or not the expenditures on
16 two polls in the Ward 3 Democratic primary were
17 appropriate. These witnesses in their affidavits
18 cannot address those findings. So they have no
19 value in this hearing, and they should not be
20 admitted.

21 Counsel for Ms. Silverman has
22 represented that he can represent the interests

1 of both Ms. Duncan and Mr. Bergman. He is not
2 qualified to do that because he is not their
3 counsel. And he is not in a position to place
4 them in a position of potential jeopardy
5 regarding a pending investigation.

6 These investigative matters are still
7 open. And if there are contradictions or prior
8 inconsistent statements, Ms. Duncan and Mr.
9 Bergman could be held accountable for that. And
10 counsel for Ms. Silverman is not in a position to
11 say that they should be -- they should take that
12 risk.

13 So, essentially, I mean, the true
14 issue here is that they bring no value to this
15 proceeding. The proceeding is about
16 inappropriate expenditures. Those were our
17 findings. These affidavits, these questions, do
18 not address those findings. And, therefore, they
19 should not be admitted.

20 CHAIR THOMPSON: Okay. Thank you so
21 much. Anything else, Mr. Downs?

22 MR. DOWNS: No, Mr. Chairman.

1 CHAIR THOMPSON: Okay. All right.
2 Well, I certainly understand the issues. I will
3 note for the record, with respect to the
4 confidentiality aspect of this, that the two
5 affidavits are signed by Ms. Duncan and Mr.
6 Bergman. They are signed under oath. They are
7 specifically prepared for this proceeding. They
8 reference this proceeding's docket number, OCF
9 2022-FI-006.

10 They were submitted through Mr. Downs
11 to be entered into evidence here, clearly
12 understanding that they would -- they might be.
13 And both of the affidavits reference the 20
14 question and answers that are submitted
15 separately in a separate proceeding.

16 So I'm satisfied that both Ms. Downs
17 and Mr. Bergman understand and are -- and are
18 knowingly submitting their affidavits for this
19 proceeding.

20 With respect to relevance, since the
21 OCF found there was no violation of coordination
22 between the campaigns, certainly the substantive

1 testimony is far less relevant than it would be
2 otherwise. I mean, I just heard counsel agree
3 that there was no attempt to unduly influence
4 them to withdraw from the Ward 3 race and that
5 they did not make their decision because of a
6 phone call or any communication, which their
7 affidavits speak to.

8 Nevertheless, the substance of what
9 they're saying in their affidavits is I think
10 inextricably intertwined with the purpose side of
11 the case, that -- the idea that taking the Ward 3
12 poll served no purpose relating to Councilmember
13 Silverman's at-large campaign, but rather served
14 a purpose of trying to interfere in or affect the
15 outcome of the Ward 3 race.

16 And so it's that aspect of the alleged
17 mispurpose where these communications become
18 relevant. I'm -- you know, I'm not saying
19 they're determinative. They're not -- you know,
20 they don't decide the issue, but it's just
21 something for us I think to weigh amidst all of
22 the other evidence.

1 And I will note also for the record
2 that some of them -- something that, really, in
3 my mind anyway counts against putting much weight
4 on the two affidavits and the 20 questions and
5 answers is that neither witness is available and
6 subject to cross-examination.

7 And in a federal court anyway, I think
8 that would be clear grounds for inadmissibility.
9 You can't just submit an affidavit and not tender
10 a witness for cross-examination, unless they are
11 "unavailable" within the meaning of the federal
12 rules. And here they're not unavailable, they're
13 just choosing not to appear. So if this were
14 federal court, they would be I think
15 inadmissible.

16 However, our rules of evidence and
17 procedure clearly say in many different places we
18 are not that strict, as under the federal rules,
19 and that we have the leeway to waive or relax
20 rules of evidence and take in evidence for what
21 it's worth.

22 So we'll admit the four items that are

1 submitted into evidence, and we'll just assign
2 them Exhibits 13, 14, 15, and 16, since we
3 already went through 1 through 12, instead of the
4 four that you recited.

5 So those are admitted into evidence
6 for what they're worth, and, you know, you can
7 each refer to them in your respective arguments
8 and statements as you wish.

9 (Whereupon, the above-referred to documents were
10 received into evidence Board's Exhibits Nos. 13
11 through 16.)

12 CHAIR THOMPSON: So any other motions
13 or procedural matters?

14 MR. DOWNS: None from the Petitioners.
15 Thank you.

16 CHAIR THOMPSON: Okay. All right. So
17 why don't we proceed, then, with opening
18 statements. I'll start with Mr. Sanford, since
19 he carries the burden of proof. And you can take
20 -- how long do you think you need?

21 MR. SANFORD: Five minutes.

22 CHAIR THOMPSON: Five minutes. All

1 right. We'll time you for good measure, but we
2 won't stick to strict time limits, if you need
3 six.

4 MR. SANFORD: All right. Thank you,
5 Mr. Chairman.

6 CHAIR THOMPSON: All right.

7 MR. SANFORD: Good morning again, Mr.
8 Chairman, distinguished Board Members Gill and
9 Greenfield.

10 May it please this honorable Board, I
11 am William Sanford with the Office of Campaign
12 Finance General Counsel.

13 Title 3, subsection 3709.11, of the
14 District of Columbia rules for elections provide
15 that any party adversely affected by any order of
16 the director may obtain review of the order by
17 filing, with the Board of Elections, a request
18 for a hearing de novo.

19 The order -- the Petitioners are
20 requesting that the Board reverse the order
21 issued by the Office of Campaign Finance on the
22 27th of October 2022, in which the Office of

1 Campaign Finance found that Ms. Silverman, the
2 Elissa for D.C. principal campaign committee, and
3 candidate Elissa Silverman, violated the
4 following provisions of Title 3 DCMR, subsection
5 3013.1, which states campaign funds may be used
6 solely for the purpose of financing directly or
7 indirectly the election campaign of a candidate,
8 and subsection 4209.6, which states fair
9 elections program funds may not be used for any
10 expenditure or any purpose other than the
11 furtherance of the participating candidate's
12 nomination or election, and any expenditure in
13 violation of any law.

14 The Office of Campaign Finance will
15 demonstrate during this proceeding that the
16 findings that the Petitioner -- the funds that
17 the Petitioner expended on the two polls related
18 to the Democratic primary in Ward 3 were not
19 expended in furtherance of Candidate Silverman's
20 at-large reelection campaign, that the findings
21 are irrefutable, and that the Petitioners should
22 be required to reimburse the Fair Elections Fund

1 for those expenditures.

2 The Office of Campaign Finance,
3 pursuant to a complaint filed by Mr. Karim
4 Marshall, conducted a complete investigation and
5 determined that those two polls were not remotely
6 related to the campaign of Councilmember
7 Silverman for the at-large position, which was on
8 the ballot in November of 2022, and those polls
9 were specifically conducted for the Democratic
10 primary in Ward 3, which was being conducted on
11 the 21st of June 2022.

12 It is important to note that
13 Councilmember Silverman was not a candidate in
14 that primary, nor is she affiliated with the
15 Democratic party. So there was no nexus between
16 the poll and her aspiration for reelection on
17 November 8.

18 And that is -- we will stop here.

19 CHAIR THOMPSON: Okay. Thank you so
20 much.

21 Mr. Downs?

22 MR. DOWNS: Yes. Thank you, Mr.

1 Chairman, and I'll be five minutes as well, Ms.
2 Stroud.

3 So members of the Board, this is a
4 case about making an informed decision.
5 Councilmember Silverman needed to make an
6 informed decision about an endorsement. She
7 needed to make an informed decision about an
8 endorsement in a ward that is historically and
9 uniquely important to her own reelection efforts,
10 and she needed to make an informed decision about
11 the efficacy of a less expensive automated poll.

12 Now, taking a step back, members of
13 the Board, this is a unique matter where the
14 substantive evidence, as opposed to the arguments
15 of the lawyers, but the substantive evidence is
16 actually uncontroverted. There is not going to
17 be any substantive evidence that contradicts the
18 testimony or the evidence that we are about to
19 discuss.

20 You won't see any documents that
21 contradict the evidence that we're going to
22 discuss. There won't be any answers from an OCF

1 investigation that contradict the evidence that
2 we're going to discuss because there is no such
3 contradictory information.

4 Now, this -- you will learn from
5 Councilmember Silverman's answers that are not
6 controverted -- and your personal experience --
7 that D.C. of course is a very large Democratic
8 jurisdiction. It's heavily made up of Democrats.
9 That's important because in the ward -- at-large
10 races, Democrats typically receive more votes
11 than other candidates, but that hasn't been the
12 case in Ward 3.

13 Specifically, in the 2014 and 2018
14 elections, Councilmember Silverman, as an
15 Independent, received more votes than her
16 Democratic challenger. That means Ward 3 is
17 uniquely and historically important to
18 Councilmember Silverman's own reelection efforts.
19 There is no evidence to the contrary because no
20 contradictory evidence exists.

21 A few days before the Ward 3 -- excuse
22 me, before Memorial Day 2022, Patricia Duncan and

1 Benjamin Bergman, candidates for Ward 3, each
2 asked Councilmember Silverman for an endorsement.
3 Because of how important and uniquely important
4 Ward 3 is to Councilmember Silverman's own
5 electoral efforts, substantial vetting was
6 necessary.

7 Now, Ms. Silverman could not endorse
8 a candidate that lost because that would hurt her
9 own reelection efforts. She couldn't endorse a
10 candidate that was not aligned with her
11 politically, aligned with her interests, aligned
12 with her objectives, because that would undermine
13 her efforts in Ward 3.

14 Councilmember needed to --
15 Councilmember Silverman needed to make an
16 informed decision related to her Ward 3
17 endorsement.

18 Further complicating the Ward 3
19 endorsement is a special interest group,
20 Democrats for Education Reform, also known as
21 DFER. DFER and Councilmember Silverman, there is
22 no love lost between the two of those

1 organizations. Councilmember Silverman, in 2020,
2 endorsed -- or, excuse me, supported a candidate
3 that was opposing a DFER-backed candidate. There
4 is no love lost between the two of them.

5 Also, DFER raises money from groups
6 and constituents that are aligned with
7 Councilmember Silverman's opponents. And then
8 further complicating the matter is that right
9 after Mr. Bergman and Ms. Duncan asked for
10 Councilmember Silverman's endorsement, there was
11 a Washington Post article that mentioned that
12 DFER was spending large sums of money in the Ward
13 3 election.

14 If DFER took hold in Ward 3, if they
15 gained momentum in Ward 3, that would be
16 antithetical to Councilmember Silverman's own
17 electoral efforts, because Ward 3 is historically
18 and uniquely important to Councilmember
19 Silverman's own efforts.

20 There is no dispute there. There is
21 no evidence to the contrary. Councilmember
22 Silverman needed to make an informed endorsement

1 related to Ward 3.

2 Also, this was an opportunity for
3 Councilmember Silverman to test a new polling
4 method that was substantially less expensive than
5 other traditional methods. For example, the
6 Amplify poll cost \$1,200 for five races,
7 including the at-large race, which is fatal to
8 OCF's case. Fatal. Because that poll included
9 the at-large race. That was \$1,200.

10 Another poll similarly would have cost
11 \$25,000. That was Target Smart. So this was an
12 opportunity for Councilmember Silverman to test a
13 less expensive poll, so she can make an informed
14 decision about whether that less expensive poll
15 was actually effective.

16 So when you're considering whether
17 this -- whether these polls directly or
18 indirectly fostered her own campaign elections
19 chance, we're going to ask you to make the only
20 fair decision that is consistent with the
21 undisputed evidence and the lack of evidence in
22 this case, and that is a decision to reverse

1 OCF's order.

2 Thank you.

3 MR. SANFORD: May I respond, Mr.
4 Chairman? Or shall we --

5 CHAIR THOMPSON: Yeah. Why don't we
6 proceed with your case in chief.

7 MR. SANFORD: I will, but really --

8 CHAIR THOMPSON: Yeah. Please go
9 ahead. Take a minute or two.

10 MR. SANFORD: Councilmember Silverman
11 is a Councilmember at large. City-wide
12 elections, she has been successful on two prior
13 occasions. Still, quite frankly, I don't
14 understand the argument that only Ward 3 was
15 important to her because she has represented the
16 entire District for eight years. So that
17 argument falls flat and comes up short.

18 She was not on the ballot until
19 November, and the regulations require that there
20 is a direct or indirect connection with
21 expenditures to the campaign. It does not
22 suggest that there must be an abstract

1 connection, which counsel has indicated, because
2 depending on the outcome of Ward 3 she might fail
3 -- the regs do not suggest that. The regs say
4 direct or indirect. And there was no direct
5 connection here, and no matter how they attempt
6 to spin it, they can never show that there was a
7 direct connection here.

8 And, reportedly, she wanted to test a
9 new polling device. Well, testing is not a
10 justification for an expenditure, and it does not
11 show a direct connection to the campaign's goals.

12 And I will proceed with the remainder
13 of my case.

14 CHAIR THOMPSON: Thank you so much.
15 So opening statements being concluded, we'll turn
16 now to --

17 MR. SANFORD: Thank you.

18 CHAIR THOMPSON: -- OCF's case in
19 chief. And you're entitled to call witnesses or
20 enter any additional exhibits into evidence or
21 otherwise, if -- or you just -- you can make your
22 own lawyerly presentation as well. What's your

1 plan?

2 MR. SANFORD: We do not have any
3 witnesses. We have, we believe, laid out in our
4 brief the position of the Office of Campaign
5 Finance, demonstrates that there is irrefutable
6 evidence that there was no connection to those
7 polls, and the Councilmember's aspirations as an
8 at-large candidate in the November 8 general
9 election.

10 The petitions -- the Petitioner's
11 activity was clearly in violation of the
12 regulations that implement the Campaign Finance
13 Act. The Petitioner, in their own words, has
14 indicated on more than one occasion that she
15 commissioned a poll that was related to a primary
16 election in which she was not a candidate, that
17 was conducted for a party in which she is not a
18 member, and she paid for it out of Fair Elections
19 Funds.

20 Now, despite the fact that we might
21 have concluded that there -- we could not find
22 coordination, clearly there was suggestion and

1 nuance between the Councilmember and two members
2 of -- two candidates in the Ward 3 Democratic
3 primary who withdrew shortly before the election,
4 after both -- after they had received a combined
5 amount of over \$300,000 in public funds.

6 To say that Councilmember Silverman
7 did not play a role in that I think is
8 inaccurate. And the reason why she --
9 Councilmember Silverman indicated in a response
10 to a question that after she received the results
11 of the poll, she discussed those results with Mr.
12 Bergman and Ms. Duncan.

13 She called them both. She informed
14 them that she would not be endorsing them, but
15 she talked to them about vote splitting. That is
16 a nuanced way of communicating that they might
17 want to consider withdrawing. And, actually,
18 they did.

19 The regs are pretty clear. I think
20 the evidence and the facts are clear here, and
21 there is no way that Councilmember Silverman has
22 ever demonstrated that she, in paying for those

1 polls, supported her aspirations as an at-large
2 candidate in the November 8. Her name was not
3 mentioned in the polls. DFER was not mentioned
4 in the polls. And the polls did not include any
5 questions regarding what the aspirations of the
6 residents of Ward 3 might have considered
7 important.

8 The polls were conducted, and even
9 counsel's reference to the at-large question in
10 the Amplify, it was an at-large Democratic race.
11 It did not mention Councilmember Silverman as an
12 at-large Independent.

13 And, in addition --

14 CHAIR THOMPSON: Can I interrupt and
15 ask a --

16 MR. SANFORD: Yes.

17 CHAIR THOMPSON: -- question or two?

18 MR. SANFORD: Of course.

19 CHAIR THOMPSON: Is this a good time?

20 MR. SANFORD: If I could make one
21 other point.

22 CHAIR THOMPSON: Oh, please go ahead.

1 MR. SANFORD: In addition, only
2 Democrats were polled. No Republicans were
3 polled in that poll. No Independents were polled
4 in that poll. And no Statehood Green Party
5 members were polled. Only Democrats. So the
6 poll was designed to use as leverage in the
7 Democratic primary to support whomever
8 Councilmember Silverman believed had the best
9 chance of defeating the candidate she refers to
10 as being supported by the DFER.

11 I'll take your question.

12 CHAIR THOMPSON: All right. So here's
13 the big question. Going back to the October 7th,
14 2022, answers, I think it was question number 2,
15 the answer to question number 2, they set forth
16 the three reasons.

17 Those three reasons were briefed a
18 couple of times, and Mr. Downs just recited them
19 again today in his opening statement; namely,
20 that Elissa for D.C., in conducting that polling
21 of the Ward 3 Democratic primary, did have three
22 purposes relating to her at-large campaign.

1 Namely, number 1, she wanted to be
2 sure to endorse the winning Ward 3 progressive
3 candidate that would tie best into her base of
4 progressive support in Ward 3 for the general
5 election. That's my rephrasing of it.

6 Number 2, she wanted to back the
7 candidate that would defeat the DFER-backed
8 candidate, knowing that DFER would be funding
9 candidates opposed to her in the general
10 election.

11 And, number 3, she wanted to test the
12 usefulness of a cheaper automated polling
13 service. I believe those three reasons are
14 uncontradicted in the record, so I guess the big
15 question to you is, why didn't you address those
16 in the original OCF order? Or, in any event, why
17 do you discount those? Why do you disbelieve
18 those three reasons?

19 MR. SANFORD: Because those are
20 abstract connections to the campaign. The
21 regulation is clear. They do not talk about an -
22 - they talk about directly or indirectly

1 supporting a campaign. No matter how you look at
2 those responses, they do not directly or
3 indirectly support.

4 How would that determine Councilmember
5 Silverman's outcome in the general election on
6 November 8th because of those three reasons in a
7 Ward 3 Democratic primary? Does that endear with
8 the residents of Ward 3?

9 Well, if that was her concern, not
10 only Democrats were going to vote when she is on
11 the ballot. Republicans are going to vote,
12 Independents were going to vote, and Statehood
13 Green Party members are going to vote. So to
14 concentrate specifically on the Democratic
15 members of the Ward 3 is an abstract connection
16 to --

17 CHAIR THOMPSON: So let me press the
18 question. Elissa for D.C.'s campaign has
19 explained this. They have said that Elissa
20 Silverman has always had a strong base of support
21 in Ward 3, especially among progressive voters,
22 and that she needed to align herself, like an

1 overlapping Venn diagram circle, with the Ward 3
2 progressive candidate that draws on that same
3 base of support.

4 So there were obviously three or four
5 or five progressive candidates in a Democratic
6 primary, and she has explained "I wanted to be
7 sure and endorse the one that could win," so that
8 it would align her with that progressive voting
9 base in Ward 4 and ultimately also in the context
10 of defeating the DFER candidate, give her the
11 most momentum, and allow her to draw out the most
12 support among Ward 3 progressive voters in the
13 at-large campaign.

14 That seems to be her judgment and the
15 judgment of her campaign team, that by endorsing
16 the right progressive candidate, who turned out
17 to be Matt Frumin, that this would -- this would
18 lead into a -- the best way to maximize the votes
19 she would in turn receive in the at-large race.

20 I mean, that's -- on its face makes
21 sense. It takes a little bit of I guess
22 knowledge of how campaigns work and how things

1 are interconnected, but it -- on its face, it
2 makes sense. What -- why -- I guess I'm
3 struggling with, why do you -- why do you, in the
4 absence of any evidence, on your own just deem
5 that to be unpersuasive?

6 MR. SANFORD: Well, to me, I'm
7 struggling with how it makes sense when one is
8 running city-wide, because I doubt that Silverman
9 would say that she was only concerned about Ward
10 3, and she is running as an at-large candidate
11 for the entire city.

12 So it doesn't quite add up to me,
13 because I don't see the direct connection to her
14 ultimate goal, which was to be reelected in
15 November. And, quite frankly, one of the polls
16 actually indicated that Ms. Duncan was in second
17 place.

18 And so -- but Ms. Silverman chose to
19 not to endorse her, to endorse Mr. Frumin. So
20 it's inconsistent reasoning here.

21 And I think -- but, more importantly,
22 what the people in Ward 3 want is for her to

1 determine who should represent Ward 3, or is it
2 for the voters in Ward 3 to make that
3 determination?

4 CHAIR THOMPSON: Let me ask you a
5 hypothetical. Let's say it's a future campaign
6 for mayor or any city-wide election, but I'll
7 just use the mayor as an example. And this -- a
8 person running for mayor is also looking at a
9 crowded field of candidates in a particular ward,
10 just, you know, say it's Ward 4.

11 And the mayor is not sure who to
12 endorse in that race, but wants to -- this mayor
13 -- mayoral candidate is not sure who to endorse
14 that race, but basically wants to stand beside
15 whoever is going to win, whoever is the most
16 popular.

17 So, in that hypothetical, could the
18 mayor running for a city-wide seat decide to
19 conduct polling of a ward-level race like that,
20 inform that endorsement decision?

21 MR. SANFORD: And if the mayor took
22 that position, the Office of Campaign Finance

1 would take the same position we have taken today.
2 That's an abstract connection to advising her
3 campaign, and the regulations are
4 straightforward. There is no ambiguity.

5 It says it must be a direct or
6 indirect connection to the campaign.

7 MEMBER GILL: Mr. Chairman?

8 CHAIR THOMPSON: Yes.

9 MEMBER GILL: Mr. Sanford, so that the
10 -- the indirect part of this is what gets
11 difficult I guess. But just earlier you objected
12 to the affidavits because they weren't relevant.
13 But in your brief of the case, you referred to
14 those conversations.

15 I guess at what point -- at what point
16 was the violation? Was the violation when the
17 poll was commissioned? Would using fair -- the
18 campaign -- the fair -- why can't I think of the
19 name off the top of my head? The public funds.

20 When the poll was commissioned and the
21 funds were spent, was the violation? Knowing the
22 parameters of the questions and such, because if

1 -- if that's the violation, that there was no
2 direct or indirect nexus with Councilmember
3 Silverman's campaign, then everything else is
4 irrelevant.

5 But if the results of that poll and
6 how it was conveyed are relevant, then you start
7 to see an indirect connection. So I guess just
8 at what point was the violation? Was the
9 violation --

10 MR. SANFORD: Let me just find it.

11 MEMBER GILL: -- the results of the
12 polls and the discussions, or was the violation
13 the poll had nothing to do with her; therefore,
14 it was a violation?

15 MR. SANFORD: The violation was the
16 poll -- the polls that were not connected to her
17 campaign. And that's what we found. We found
18 that if you -- if you read the order, it only
19 references those two requirements, those two
20 parts of the regulation.

21 And let me just say this. Even if the
22 candidates had not withdrawn, it would have still

1 been a violation because the poll was the
2 violation. Using campaign funds for a poll
3 that's not related to the Silverman campaign.
4 Those were -- that's the violation.

5 CHAIR THOMPSON: Yeah. That seems to
6 be an important question and answer that draws
7 out what I think you're saying. I think you're
8 arguing that it is -- it's a per se or automatic
9 violation for a city-wide candidate to conduct a
10 poll of a ward-specific race. Just conducting
11 the poll is --

12 MR. SANFORD: Conduct a poll that's
13 not related to his or her campaign. That's not
14 directly or indirectly related to his or her
15 campaign.

16 CHAIR THOMPSON: And are you saying
17 that a -- if a city-wide candidate conducts a
18 poll of a ward-level race, that that
19 automatically is going to be deemed to be
20 unrelated? Or could it -- could there be
21 circumstances where the city-wide candidate --

22 MR. SANFORD: I'm saying the --

1 CHAIR THOMPSON: -- has a reason?

2 MR. SANFORD: What I'm saying is they
3 have the burden of demonstrating that there's a
4 relationship, that there is a nexus. And it has
5 not been demonstrated in this case.

6 MEMBER GILL: So the -- I don't want
7 to beat a dead horse here, but for the purposes
8 of examples, a mayoral candidate conducts a poll
9 in Ward 5 in some future race about Ward 5 views
10 on bike lanes. And it has nothing to do with --
11 it doesn't mention the mayor.

12 It doesn't mention any other
13 candidates. It's just simply about whether they
14 are in favor or not in favor of bike lanes. Is
15 that a -- and I know all the hypotheticals are
16 horrible, and if I was on your side, I'd say
17 these are hypotheticals, but --

18 MR. SANFORD: That's an issues-based
19 poll. And, see, the issue -- the problem with
20 this one, there was no issue, no advocacy issue,
21 voting rights for the District of Columbia. We
22 have found in the past that that's an acceptable

1 expenditure of funds.

2 CHAIR THOMPSON: Why could you take --
3 why could an at-large -- I mean, a city-wide
4 candidate take a poll of only a certain ward with
5 regard to an issue as opposed to a poll of the
6 candidates in that ward who each represent their
7 own range of issues and values and positions?

8 MR. SANFORD: Because that's not an
9 issue-based poll. This is a poll to size up
10 candidates which does not relate to the
11 aspirations of the campaign of the city-wide
12 candidate.

13 The outcome of a race in Ward 3 did
14 not determine how Councilmember Silverman was
15 going to fare in the November election. There
16 was never a connection there. So despite the
17 fact that she used fair elections funds to
18 conduct -- to pay for those polls --

19 CHAIR THOMPSON: We also have a
20 vagueness or a slippery slope argument here that,
21 you know, on the one hand, obviously, if you use
22 campaign funds for a personal use, like a

1 vacation, you know, that's obviously an improper
2 purpose of an expenditure.

3 But once you're in this zone of a
4 candidate and her or his campaign's team, they're
5 making a decision based on their expertise, what
6 do they want to do to win, what information do
7 they need to figure out how to win.

8 So they make a decision and they spend
9 some money, maybe on a poll, maybe on, you know,
10 any number of things. Going forward, how are
11 these campaigns supposed to know when their
12 expenditure is going to be deemed to be directly
13 or indirectly related to that campaign purpose as
14 opposed to be deemed to be unrelated to a
15 campaign purpose?

16 Isn't this going to create a lot of
17 fuzziness? And isn't this going to leave -- just
18 as an aside, as a digression, the point was made,
19 wouldn't this lead to complaints being filed for
20 campaign violations and then campaign literature
21 being peppered with, you know, how so-and-so is
22 under, you know, investigation, et cetera?

1 Like how do you address this sort of
2 vagueness/slippery slope argument?

3 MR. SANFORD: We would take the
4 opposite view. Failure to stop this at this
5 point will open the floodgates for all kinds of
6 abuses. We take the opposite view here. I think
7 the regulations are not that complicated. And,
8 quite frankly, this has not happened before.

9 So if it had been confusing or
10 ambiguous, we would have dealt with this issue on
11 numerous prior occasions. However, if it does
12 not stop here, I can guarantee you we will see it
13 in the future.

14 MEMBER GREENFIELD: I've got a
15 question, because we understand it's an at large
16 position, and it's city wide, and I assume
17 campaigns look city wide at the wards, and at the
18 ward that their candidate's in, and we all know
19 that certain wards will vote higher for certain
20 candidates, and some lower.

21 And what is -- if a campaign decides
22 I only want to poll certain wards, because I know

1 that's where I'll pull most of my votes, so I
2 want to make sure what's going on there, you're
3 saying that as an at large candidate, would that
4 be a problem? If I'm running for at large, and
5 decide I only want to poll Wards One, and Two,
6 because that's where I seem to get heavier votes,
7 so I want to make sure that that occurs.

8 Are you saying that that, because I'm
9 running for at large, that creates an issue?

10 MR. SANFORD: I'm saying, but if it
11 relates to your campaign, and thank you for
12 asking that question, these polls did not --
13 Council Member Silverman was never mentioned in
14 any of the polls. An at large candidate trying
15 to determine how he, or she might fair in an
16 election, and they put themselves before the
17 people being polled, that is at least an indirect
18 connection to the campaign.

19 In this case, Council Member Silverman
20 was never mentioned, DFER was never mentioned,
21 and only democrats were polled.

22 CHAIR THOMPSON: Okay, so we just

1 threw a bunch of questions at you in the middle
2 of your presentation.

3 MR. SANFORD: I will stop here unless
4 the board has further questions.

5 CHAIR THOMPSON: Yeah, I do have one
6 last question for me, it's kind of a straight
7 question, just to educate myself perhaps. The
8 fine that you imposed, 6000 dollars, and change.
9 Isn't the fine allowed by the regulations limited
10 to 4000 dollars?

11 MR. SANFORD: This is not the fine, we
12 are posting reimbursement for the price of the
13 polls, and we're asking that the council, that
14 the Elissa for D.C. campaign reimburse the Fair
15 Elections Fund. It is not a fine, we did not
16 impose a fine.

17 CHAIR THOMPSON: All right, that helps
18 me understand, okay. Any other questions? Mr.
19 Gill, Ms. Greenfield? Okay, thank you very much,
20 no additional exhibits to enter into the record?

21 MR. SANFORD: No Mr. Chairman, no, no
22 additional exhibits.

1 CHAIR THOMPSON: Thank you so much.

2 MR. SANFORD: Hopefully my voice will
3 last.

4 CHAIR THOMPSON: All right, turning
5 then to Elissa for D.C., Mr. Downs?

6 MR. DOWNS: Yes, thank you council
7 member. Mr. Chairman, members of the board, we
8 don't have any additional evidence to offer. I
9 don't know if we should go straight into closing
10 argument, but we do not have any additional
11 evidence, we rest on the record as it stands, and
12 we will argue that evidence in closing arguments,
13 so no, we don't have any additional evidence.

14 CHAIR THOMPSON: Do you mind if we
15 throw some questions at you?

16 MR. DOWNS: Of course not.

17 CHAIR THOMPSON: All right, and you
18 don't have to stand, maybe pull the mic up a
19 little closer.

20 MR. DOWNS: Yes Mr. Chairman.

21 CHAIR THOMPSON: So that people on
22 Zoom can hear. So, we just heard Mr. Sanford

1 basically say that these three reasons are
2 abstract. That it's almost like he's saying
3 they're just kind of made up after the fact to
4 justify something that took place. They're too
5 abstract, how do you respond to that?

6 MR. DOWNS: I'd respond in two ways.
7 First, that D.C. law specifically allows for
8 indirect -- there's a question as to whether, or
9 not the polls indirectly further Council Member
10 Silverman's campaigns. We would submit that the
11 polls directly furthered her campaign interest,
12 but to the extent that the board would disagree,
13 D.C. law allows for indirectly supporting Council
14 Member Silverman's campaign.

15 An abstract in OCF's words is another
16 way of saying indirect, and that is specifically
17 allowed under D.C. law. As a matter of fact --
18 that's a matter of law. But as a matter of fact
19 there is no reason to discount Council Member
20 Silverman's allegations. There's been -- OCF had
21 an opportunity to investigate, they had an
22 opportunity to issue subpoenas, to interview

1 witnesses, to do depositions.

2 There is no witness that undermines
3 the three reasons that Council Member Silverman
4 has provided. There is no text message that
5 undermines the reasons that she's provided,
6 there's no evidence what so ever. In fact, there
7 is information to buttress it in the form of Ben
8 Bergman's answers. I'll give you one example if
9 the board would permit me.

10 And that would be under tab three on
11 the exhibits that I provided, and for the record,
12 that would be Exhibit No. 15. Those are the
13 answers to Ben Bergman's questions from OCF. The
14 very last sentence on page one mentions that she,
15 that's Council Member Silverman, also saw this as
16 an opportunity to try out two polling firms.

17 The reason I flag just that one
18 statement, is because it was made on June 11th,
19 prior to the filing of a complaint. So, I think
20 that timing is important, because we would submit
21 that Council Member Silverman of course had no
22 reason to lie, she is being forthcoming. But the

1 timing of that statement was made well before any
2 allegations that she had any motivation to lie,
3 so we would ask that --

4 CHAIR THOMPSON: Yeah, that's a good
5 point. That kind of preempted my next question,
6 which was when were these three reasons
7 articulated by the Elissa for D.C. campaign? Are
8 these three reasons that were basically thought
9 up after the polling took place, or before the
10 polling took place, did Council Member Silverman,
11 and her team basically sit down, and say you know
12 what, we need to understand the Ward Three race
13 better.

14 We need to conduct some polling,
15 because we've got to make sure that we pick the
16 right progressive candidate, we've got to make
17 sure we defeat the DFER backed candidate, and we
18 all know what that means for my at large -- I
19 mean I'm just sort of sounding that out. When
20 did that discussion, when were those purposes
21 manifested?

22 MR. DOWNS: Those purposes were

1 manifested prior to OCF's investigation.
2 Specifically when Ben Bergman, and Patricia
3 Duncan requested an endorsement from Council
4 Member Silverman. After they came to her, I
5 think it's important that she didn't go to them,
6 they came to her asking for an endorsement.

7 And when they came to her, she knew
8 that she needed to make an informed decision, and
9 that's when the conversation surrounding a poll,
10 or polls began. These justifications were not
11 made up after the OCF investigation began. These
12 justifications arose specifically after Patricia
13 Duncan, and Benjamin Bergman requested an
14 endorsement from Council Member Silverman, and
15 she knew she needed to make a thoughtful
16 endorsement.

17 CHAIR THOMPSON: And did Candidate
18 Frumin also request an endorsement?

19 MR. DOWNS: No, he did not. In fact
20 the first time that Council Member Silverman
21 spoke with Mr. Frumin was when she endorsed him.
22 So, to directly answer the board, no, Mr. Frumin

1 did not ask for an endorsement.

2 CHAIR THOMPSON: I guess here's my big
3 question. Why wasn't it enough for Elissa for
4 D.C. just to know the private poll results, and
5 use that information privately to decide to
6 endorse the leading progressive candidate? Which
7 endorsement may in turn have helped influence
8 candidates Duncan, and Bergman to decide to
9 withdraw.

10 What purpose did it serve for the
11 candidate Silverman to also affirmatively call
12 Duncan, and Bergman, and essentially share the
13 broad level results of the polling, even though
14 not overtly, but maybe implicitly persuading, or
15 nudging them to withdraw?

16 MR. DOWNS: I appreciate the question,
17 the answer is twofold. First, calling them was a
18 sign of respect for other candidates. I think
19 Ben Bergman actually mentions that, he does
20 mention that in his answers, that he took the
21 call as a sign of respect, so that he did not
22 learn that Council Member Silverman wasn't

1 endorsing him from Twitter.

2 Picking up the phone, and making a
3 personal phone call was sort of respectful to do.
4 During those conversations, Council Member
5 Silverman's answers were specifically tailored to
6 the questions that were asked by Ms. Duncan, and
7 Mr. Bergman respectively. So, they asked
8 questions about why she wasn't endorsing them,
9 and she answered those questions, and as a part
10 of those answers, there was high level.

11 She didn't go into the specifics of
12 the poll, sort of exactly what the poll said, and
13 what the numbers were, but she gave high level
14 information about why she wasn't endorsing them,
15 and that was related to polling.

16 CHAIR THOMPSON: I believe this
17 evidence is in the record, but my understanding
18 from the answers, and now the affidavits, is that
19 Council Member Silverman did not expressly
20 recommend, or lean on either candidate to
21 withdraw from the race?

22 MR. DOWNS: That is correct. And that

1 is specifically mentioned in each of their -- in
2 Mr. Bergman's affidavit, and Ms. Duncan's
3 affidavit.

4 CHAIR THOMPSON: And each of those
5 candidates, from their affidavits I gleaned this,
6 made their own independent decisions to withdraw
7 in the context of a long, and exhausting campaign
8 for each of them, and in light of other factors
9 that were swirling about at the time?

10 MR. DOWNS: That is correct, and each
11 of their affidavits specifically says so, so that
12 is correct Mr. Chairman.

13 CHAIR THOMPSON: This is kind of a
14 rhetorical question, but I think it's important
15 to ask, because I've heard this, or read this in
16 various places. How do you answer certain Ward
17 Three voters who say that the Silverman campaign
18 was meddling in the Ward Three race to try to
19 manipulate, or affect the outcome, how do you
20 respond to that sort of general comment that
21 we've seen out there?

22 MR. DOWNS: We would respond to that

1 by saying that Council Member Silverman needed to
2 make an informed decision about who to endorse in
3 the Ward Three race. And she did so, and she
4 needed to make a thoughtful decision. Failing to
5 do so would have cost her votes, and she could
6 have been standing next to someone that lost the
7 election in Ward Three, and that, standing next
8 to the person that lost would hurt her own
9 electoral chances.

10 And so she wasn't meddling, she was
11 making an informed decision. Her purpose was to
12 make an informed decision about who to endorse in
13 the Ward Three race.

14 CHAIR THOMPSON: And also, especially
15 for the people on Zoom, this issue of the DFER
16 backed candidate, I mean I get it now, I had to
17 read it like five, or six times, and I didn't
18 know what DFER was before this matter, maybe I'm
19 not paying attention. And I do want to say I
20 don't know if there's anything right, or wrong
21 about being a DFER backed candidate.

22 It could be a very good thing, DFER

1 for all I know is a very, obviously thoughtful,
2 and important organization that decides who to
3 back, whoever they want to decide to back. And
4 so I respect that if somebody receives their
5 endorsement, or funding from them, I'm not
6 casting any aspersions on somebody being a DFER
7 backed candidate.

8 But in the broader context of city
9 wide races, where DFER's financial support plays
10 a role, maybe you could explain more, how that
11 purpose, apart from just who to endorse, but how
12 that purpose was served by conducting the
13 polling.

14 MR. DOWNS: Yes Mr. Chairman. So, I
15 think as a starting point, as a threshold matter,
16 outside groups, independent expenditures do make
17 up sort of a large part of the money that is
18 spent in D.C. electoral politics. I don't think
19 there's a dispute that outside money, independent
20 expenditures are at play.

21 And more specifically, in this matter,
22 outside expenditures, specifically in the form of

1 DFER spent money in order to defeat Council
2 Member Silverman. It's not a secret that DFER is
3 not a friend, and not politically aligned with
4 Council Member Silverman. I agree with the chair
5 that that doesn't mean just inherently that there
6 is something nefarious, or evil about DFER, it
7 doesn't mean that at all.

8 It means a political reality in the
9 District of Columbia is that DFER opposes Council
10 Member Silverman. And when DFER was spending
11 large sums of money in the Ward Three election,
12 that could influence Ward Three politics. By
13 spending money in Ward Three, by influencing the
14 voters in Ward Three.

15 Those voters are uniquely, and
16 historically important to Council Member
17 Silverman's own electoral efforts, because that
18 is a ward where Council Member Silverman as an
19 independent, actually garnered more votes than
20 the democratic challengers in 2014, and 2018.
21 She needed to perform strongly in Ward Three,
22 which means that she needed to make sure that

1 DFER was not having an out sized impact in Ward
2 Three.

3 CHAIR THOMPSON: And what about Mr.
4 Sanford's point, that well why didn't the polling
5 just focus on issues? Why couldn't you sort of
6 draw out all this information to inform the right
7 endorsement, and defeat the DFER backed
8 candidate? Why couldn't that be done by polling
9 issues, as opposed to just straight up asking
10 voters who are you going to vote for in the
11 democratic primary?

12 MR. DOWNS: I appreciate the question.
13 Questioning about who someone is going to vote
14 for is a proxy for the issues that they care
15 about. One example is -- one example could be if
16 in 2024 if a person supports Donald Trump for the
17 presidency, they could be supporting the issue
18 that January 6th was a hoax. You don't have to
19 ask the question do you support the idea that
20 January 6th is a hoax?

21 By supporting a specific candidate
22 that advances those ideas, you understand what

1 the voters were after. Council Member Silverman
2 understood what Ward Three voters were looking
3 for when she understood exactly who they were
4 inclined to support. In other words, the person
5 is a proxy for the issue.

6 CHAIR THOMPSON: And Mr. Sanford also
7 said when it comes to the slippery slope issue,
8 actually the flood gates would be open the other
9 way. That if this purpose is recognized, a city
10 wide candidate polling a particular ward at least
11 with respect to candidate's names, the flood
12 gates are open, and it could all be subject to
13 abuse. How do you respond to that?

14 MR. DOWNS: We respectfully disagree.
15 We respectfully submit that the risk is the exact
16 opposite. If we were to stray away from the
17 personal matter test. In other words is an
18 expenditure personal in nature? Which is exactly
19 what OCF's prior guidance relied upon, which is
20 in line with FEC guidance. If we stray from
21 that, and go into a subjective analysis as to
22 what exactly was a particular campaign thinking?

1 And is going to a parade, is that in
2 furtherance of a campaign? Is ordering pizza for
3 volunteers, is that in furtherance of a campaign?
4 I think that if we get into the subjective
5 beliefs of every single candidate, that will open
6 the floodgates to abuse from opposing candidates
7 filing claims such as the claim that we saw
8 today. That we have here -- excuse me, in the
9 instant case.

10 CHAIR THOMPSON: And your briefing
11 also articulated some first amendment concerns in
12 this regard?

13 MR. DOWNS: That is correct, because
14 there would be no guidance as to what exactly is
15 impermissible. The personal matter test is
16 clear. Either an expenditure is related to a
17 campaign, and it's lawful, or it's personal, and
18 it's unlawful. That is a clear test that
19 everyone can wrap their arms around. If we stray
20 from the personal matter test, now the statute
21 would be unclear.

22 We would have no guidance as to what

1 expenditures are permissible, and impermissible.
2 Or which would be unconstitutionally advantaged,
3 excuse me.

4 CHAIR THOMPSON: Well, setting aside
5 personal use, surely there could be campaign
6 expenditures that serve no purpose what so ever
7 to that candidate's campaign. Say a candidate,
8 it doesn't benefit, or affect their campaign at
9 all, but they decide to use some of their
10 campaign dollars to help a fellow candidate that
11 they like, or support with their campaign.

12 Either directly, which you obviously
13 can't do, but some indirect expenditure that is
14 quite clear, it serves no direct, or indirect
15 purpose for that candidate's campaign, but rather
16 this is kind of a behind the door sort of
17 assistance to somebody else, that could happen,
18 right?

19 MR. DOWNS: Yes, it could, it would be
20 flat out unlawful. And I'm using the word
21 collusion, I think the word under D.C. law is
22 coordination, I think it would be impermissible

1 coordination. So, that would be flat out
2 unlawful.

3 CHAIR THOMPSON: Well, that's a good
4 point. So, my question really gets to the
5 coordination violation, which was specifically
6 not found here.

7 MR. DOWNS: Yes Mr. Chairman.

8 CHAIR THOMPSON: I mean obviously you
9 agree with the broader point that Fair Elections
10 Program funds, these are tax payer dollars, and
11 so the public, perhaps more so than private
12 sources needs to be sure that their money is
13 being used by candidates for purposes relating to
14 that candidate's campaign.

15 MR. DOWNS: That is correct, yes Mr.
16 Chairman, that's correct.

17 CHAIR THOMPSON: All right. Go ahead,
18 Mike Gill.

19 MEMBER GILL: So, just a few questions
20 on the indirect. So, following up on Gary's
21 questions in terms of coordination. I'll try to
22 paraphrase Office of Campaign Finance, but I

1 think what bill is articulating is you need a
2 clean precedent here in order to prevent the
3 slippery slope of indirect becoming opening the
4 flood gates. And so what I heard was names on
5 the ballot is important.

6 So, if a candidate who is paying for
7 the poll is part of the poll, that makes sense.
8 If not, then it would get into the black area,
9 the not gray, but wrong area with the Office of
10 Campaign Finance. You can do issue related, so
11 if it's a bike lane, that's fine, because that's
12 issue related, that doesn't cause a problem.

13 So, and I think you've answered this,
14 but I'm just going to ask it again. You would
15 agree that the sort of initial allegation here,
16 that the poll was specifically geared towards
17 figuring out who was -- the folks that weren't
18 polling well should drop out of the race. But
19 I'm just saying you would disagree that that was
20 the point of the poll.

21 And I'm going to make sure I ask this
22 correctly. The problem there is that that, can

1 you coordinate indirectly, I guess. So, the
2 problem with that outcome is that's coordination
3 with other campaigns, because you conducted a
4 poll for the explicit purpose of deciding who
5 should stay in, who should come out, and that's
6 coordination, is that -- I want to make sure,
7 what I'm getting to here is we all agree if a
8 poll was conducted for that reason, then that
9 would have been a problem.

10 Not the problem that -- the problem
11 would have been coordination, not that it's an
12 unlawful use of funds. I'm trying to get to the
13 point of what Bill is saying is commissioning a
14 poll without Council Member Silverman's name was
15 the problem. And you guys have now said no, no,
16 here's why, and here's how it's indirectly
17 related, and such.

18 But could under that same indirect
19 analysis, you say we did this poll because we
20 wanted those people that couldn't win the race,
21 and beat the non-progressive candidate to drop
22 out. Even if you never called anybody, you

1 simply did the poll, and published it, and didn't
2 call anybody, didn't say anything, didn't
3 reference endorsements.

4 You just did the poll, and published
5 it. Is that a violation here? It's not
6 coordinating, you didn't talk to anybody, but
7 essentially you're using tax payer funding to get
8 to a purpose. Now, publishing that would have
9 got to the same purpose, because it would have
10 probably encouraged people to drop out if that
11 was going to be one of the factors of them
12 dropping out.

13 What I'm trying to get to is how do we
14 decide at what point indirect becomes way too
15 vague to enforce? So, if you had simply
16 commissioned the poll, and published the results,
17 would that have been a violation?

18 MR. DOWNS: I think that would be a --
19 thank you for the question. I think that would
20 be a substantial deviation from what we have
21 here, because the purpose was to make an informed
22 decision related to an endorsement. I understand

1 your question to be to take away that purpose.
2 To mean that there was no endorsement question,
3 there was no purpose for an endorsement.

4 I think if you strip away Council
5 Member Silverman's purpose specifically related
6 to an endorsement, then yes. I think if she has
7 no purpose that is related to her campaign, if
8 she's not looking to make an informed decision
9 related to an endorsement, then now she has no
10 purpose that is related to her campaign. Because
11 I don't hear in your -- I don't hear in the board
12 member's hypothetical that there is a purpose.
13 So, without a purpose it's --

14 MEMBER GILL: Right. But it's not
15 personal in that respect either. You could make
16 the case that indirectly, it was more campaign
17 related than personal related by commissioning
18 the poll. Next question, when it comes to issues
19 -- so, if your argument holds, then this was a
20 correct use of the campaign finance dollars
21 because of the indirect value to the Silverman
22 campaign.

1 Could a candidate use campaign dollars
2 to do push polling in a particular ward? Meaning
3 it's sort of that it's polling, but really you're
4 sort of associating a particular candidate with
5 an unpopular issue, and you're saying Candidate
6 Jones does not support child care funding. Are
7 you more likely to support Candidate Jones
8 knowing this?

9 If Candidate Jones is not the one
10 paying for this poll, but it indirectly, by sort
11 of knocking down Candidate Jones' numbers, you
12 help somebody else who does support your
13 positions as a candidate, is that indirectly
14 valuable to your campaign?

15 MR. DOWNS: If I understand the
16 question correctly, that sounds like an in kind
17 contribution. That would be prohibited. I think
18 that's something that was specifically not found
19 here, and --

20 MEMBER GILL: No, no, absolutely,
21 absolutely not found here. I'm just trying to
22 think about how we keep indirect from being -- so

1 long as it's not pizza for your friends, how do
2 we narrow -- I think Gary was looking there,
3 there has to be campaign related expenditures
4 that are still not appropriate for tax payer
5 dollars.

6 Now, you're right, if it's an in kind
7 contribution, there's a hook there. If it's
8 coordination, there's a hook there. I'm just
9 trying to make sure that -- Bill in my mind
10 offers a very clean dividing line between this.
11 Either the candidate's name is on the poll, or
12 it's issue related, and such like.

13 This is a gray area, where the
14 candidate's name was not a part of this. Now,
15 and the record states the rationale gets to that
16 indirect value of why the Silverman campaign
17 might want to do this. And that rationale, those
18 people gave those statements prior to this sort
19 of playing out here. But had they -- if they had
20 given statements another way, it still leads to
21 how does this happen next time around?

22 Two years down the road, and this

1 indirect term, we're going to have lots of cases
2 where people are going to challenge funding,
3 unless it sort of hits the -- I'm not making
4 these factors Mr. Sanford, but it's -- to me, it
5 becomes really difficult how to manage that. And
6 I'm concerned that the reasons given in this
7 situation sort of make sense to me, and I get
8 Ward Three is unique.

9 But I worry that how do you then
10 differentiate those reasons from everyone's going
11 to start getting involved in other primaries, and
12 beyond just simply sort of gauging who's got the
13 most momentum at a particular time? You know,
14 you can see all sorts of activity falling into
15 this indirect category. I didn't really give you
16 a question, I'm just speaking out loud.

17 MR. DOWNS: Yes Mr. Board Member, yes.
18 Unless there's a question, I probably shouldn't
19 try to respond.

20 CHAIR THOMPSON: Here's a question,
21 and I'll ask this for Mr. Sanford too. Is an
22 endorsement a valid campaign related activity?

1 MR. DOWNS: Yes, because it can impact
2 the outcome of Ms. Silverman's election, or any
3 candidate's election. So, an endorsement is
4 valid, it's a valid campaign activity because it
5 could impact the outcome of an election.

6 CHAIR THOMPSON: And to inform the
7 endorsement decision, can a candidate use a poll
8 to help inform herself, or himself?

9 MR. DOWNS: Yes.

10 CHAIR THOMPSON: And in using a poll,
11 should it be limited to issues, or can it also be
12 a poll of voter preferences for the candidates in
13 that other race?

14 MR. DOWNS: I think it can be, and
15 should be either. Depending on the circumstances
16 unique to that particular election, and that
17 particular candidate, and that particular
18 strategy. I don't think that there is a cookie
19 cutter answer as to whether, or not it must be
20 issue based. Whether it must be candidate based,
21 I think it depends.

22 But to directly answer your question,

1 yes, you should be able to conduct a poll to make
2 an informed endorsement decision.

3 CHAIR THOMPSON: All right. Before
4 turning to the OCF's rebuttal, anything else?
5 Okay, Mr. Sanford, please proceed with your
6 rebuttal.

7 MR. SANFORD: Thank you Mr. Chairman.
8 I have several things here. The counsel has
9 indicated that Council Member Silverman conducted
10 the poll to make an informed decision regarding
11 who she would subsequently endorse. Polling is
12 not the only way to do that, to accomplish that.
13 And quite frankly, after the poll it appeared
14 that the candidate Council Member Silverman
15 opposed was leading in the polls.

16 So, if her concern was to build the
17 sentiment of the voters in Ward Three, then
18 apparently at that particular point, Mr. Goulet
19 appeared to be the most favored. And so, it
20 wasn't about the sentiments of the voters in Ward
21 Three. It was about Council Member Silverman's
22 own biases regarding who was leading.

1 Because if you look at our submissions
2 throughout the questions, and answers she
3 provided, she makes numerous references to
4 defeating Eric Goulet. She does not talk about
5 trying to endear herself with the voters in Ward
6 Three, to introduce innovative ideas for those
7 constituents, either in Ward Three, or city wide,
8 but her primary focus was defeating Eric Goulet.

9 Whom she referred to as the DFER
10 backed candidate. But Democrats for Election
11 Reform actually endorsed Mayor Bowser. They also
12 endorsed Chairman Mendelson. She did not take a
13 poll city wide to discuss with anyone about
14 trying to defeat Chairman Mendelson, or Mayor
15 Bowser.

16 CHAIR THOMPSON: I think the point is
17 that DFER also endorsed Anita Bonds, and Kenyan
18 McDuffie, Council Member Silverman's direct
19 competitors in the at large race. And I think
20 she's explained that it wasn't just bias, she
21 would not favor, or endorse Mr. Goulet because
22 he's a DFER backed candidate.

1 She was trying to decide among the
2 remaining mostly progressive candidates which one
3 of those non-DFER candidates should she endorse.

4 MR. SANFORD: And that's a fine
5 position, honorable position to take. But it
6 does not mean that she had the license to spend
7 campaign funds to conduct the poll to reach that
8 decision.

9 CHAIR THOMPSON: Well, let me press
10 the same question. Is an endorsement a valid
11 campaign related activity?

12 MR. SANFORD: Well, we have cited that
13 the regulations indicate that elected officials
14 in the District of Columbia have an opportunity
15 to express their preference on electoral issues,
16 so clearly endorsement is valid.

17 CHAIR THOMPSON: So, when deciding to
18 make an endorsement, how is a candidate supposed
19 to go about informing herself, or himself about
20 who to endorse? Is it just I'll think about it
21 on my own, about who I -- the positions I like,
22 or can they also engage in some information

1 gathering? Namely a poll, or something else that
2 might cost money?

3 Can they spend money on gathering
4 information to help inform that endorsement
5 decision?

6 MR. SANFORD: Well for many years, and
7 including this election cycle, elected officials
8 have made endorsement. None of them required a
9 poll prior to making an endorsement. There were
10 endorsements in this election cycle, and no one
11 commissioned a poll prior to making it. So, a
12 poll is not essential to an endorsement.

13 I mean quite frankly I think an
14 elected official probably owes the voters more
15 than just conducting a poll if they're going to
16 make an endorsement.

17 CHAIR THOMPSON: How do you know that
18 no city wide candidate, or any city wide office
19 has ever conducted a poll of a ward level race?

20 MR. SANFORD: Because they're required
21 to file reports of receipts, and expenditures.
22 And if, as in this case, it shows up on the

1 reports of receipts, and expenditures, the audit
2 division will send a request for additional
3 information, as was sent to the Council Member
4 Silverman's campaign. And they are required to
5 explain how it was campaign related.

6 CHAIR THOMPSON: And that's
7 independent of whether somebody files a
8 complaint?

9 MR. SANFORD: Independent of whether
10 anyone files. Our rules require that candidates,
11 and committees periodically file reports of
12 receipts, and expenditures. And if things like
13 polls appear on the reports of receipts, and
14 expenditures, automatically, as what happened in
15 this case, a request for additional information
16 is sent to that committee.

17 CHAIR THOMPSON: Is that a search you
18 conducted specifically today, to rule out that
19 any such polling has ever taken place?

20 MR. SANFORD: I couldn't quite --

21 CHAIR THOMPSON: I mean you're saying,
22 you seem to be almost testifying that you can't

1 recall any polling ever being spotted on a
2 candidate's reports. Are you saying that you did
3 a search for this, and you --

4 MR. SANFORD: No, I'm saying that I
5 can't recall polling being done to proceed an
6 endorsement, that was the question as I saw it.

7 CHAIR THOMPSON: Okay, sorry, I didn't
8 mean to -- please continue with your rebuttal.

9 MR. SANFORD: Actually I'm prepared to
10 just make my closing remarks.

11 MEMBER GILL: So, just one last quick
12 question, because I want to just quickly --
13 endorsements are a valid political action.
14 Research for endorsements are a valid political
15 action related to a campaign. Commissioning a
16 poll without the candidate's name on it as a part
17 of that research gets over the line?

18 MR. SANFORD: Yes.

19 MEMBER GILL: Okay.

20 CHAIR THOMPSON: All right. So, we
21 can proceed to closing statements then? Maybe
22 you have some surrebuttal points to make, but I'm

1 sure you'll work them into your closing statement
2 Mr. Downs.

3 MR. DOWNS: Yes.

4 CHAIR THOMPSON: So, Mr. Sanford, why
5 don't you proceed?

6 MR. SANFORD: My closing will be
7 brief, because my voice is starting to fail me at
8 this stage.

9 CHAIR THOMPSON: Do you need some more
10 water?

11 MR. SANFORD: No, I --

12 CHAIR THOMPSON: You're okay?

13 MR. SANFORD: I finished one already.
14 We think the facts are clear here. The Elissa
15 for D.C. campaign, and candidate Elissa Silverman
16 commissioned a poll, and paid for it with free
17 election funds, and the poll was not related
18 either directly, or indirectly to the furtherance
19 of the Elissa for D.C. campaign. That's what the
20 rules require.

21 They have not been able to make any
22 connection that demonstrates that there was a

1 direct, or indirect connection. It is fine to
2 talk about Council Member Silverman's reliance on
3 Ward Three, because she has done well, and she's
4 done better than democrats on occasion, and that
5 is fine, but that does not justify a poll only
6 for Ward Three.

7 The council member was running at
8 large. I think it would be very dangerous for
9 her politically to say that only Ward Three
10 mattered to her. But that sounds like what we're
11 hearing here. There was no other ward polled,
12 only democrats were polled. Not independents,
13 not republicans, not state or green. So her
14 concentration was only on the democratic primary.

15 And what's probably more alarming
16 here, is that Council Member Silverman was one of
17 the early advocates of the Fair Elections
18 Program. This would take the fair out of fair
19 elections if this is allowed. In the future, as
20 I stated earlier, the flood gates would open, and
21 candidates will use FEP funds for any whim that
22 they think is important to them, not to the

1 voters.

2 The program has very lofty goals, and
3 we have seen the potential of this dynamic
4 program. In the District of Columbia, even
5 though we were not the first, we have the best
6 public financing program in the country. Our
7 colleagues attended CALGL last week, and they got
8 rave reviews for what we're doing here.

9 That's why the stakes are so high
10 here. If we allow this kind of behavior to
11 stand, then we see the potential for abuse of
12 this program. This program is too important to
13 the district, to the city, to the citizens, to
14 the voters for anyone to be in a position to
15 abuse it. The board has to make the right
16 decision.

17 The board can decide whether, or not
18 it will allow this kind of behavior on
19 inappropriate expenditures from the Fair
20 Elections Fund, or even from a traditional
21 program to stand. And we can expect many cases
22 like this in the future. However, if the board

1 makes it clear that this is unacceptable, it will
2 repel any future attempts to abuse the Fair
3 Elections Program.

4 And I am certain that the board will
5 make the right decision.

6 CHAIR THOMPSON: Thank you. Mr.
7 Downs?

8 MR. DOWNS: Yes, thank you. As I
9 mentioned at the beginning of this case, this is
10 a case about making an informed decision.
11 Council Member Silverman conducted the polls at
12 issue to ensure that she made an informed
13 endorsement decision, and that endorsement
14 decision could impact the results of her own
15 election.

16 OCF has conceded to the board that an
17 endorsement is a valid campaign activity. The
18 board doesn't have to make that decision any
19 longer, OCF has conceded it. The next question
20 is whether, or not a poll could be conducted in
21 order to make an endorsement, and the answer to
22 that question is yes.

1 The point of remaining disagreement is
2 apparently OCF is asking the board to create a
3 bright line rule that a candidate's name must be
4 in the poll. That is the point of disagreement
5 between OCF, and the petitioners at this point.
6 There is no bright line rule, there is no per se
7 rule. Earlier today, OCF mentioned that they're
8 advocating for a per se rule.

9 No such per se rule exists in D.C.
10 law, we would ask the board to decline to create
11 a per se rule today. The rules in the District
12 of Columbia as they stand today allow for direct,
13 or indirect furtherance of a candidate's
14 campaign, and that's exactly what we have here.
15 An endorsement directly impacts a candidate's
16 campaign for the simple fact that if you're
17 standing next to someone that loses a campaign,
18 if you endorse the wrong candidate, that can
19 negatively impact your campaign.

20 Conversely, endorsing the right
21 candidate, endorsing the candidate that wins
22 directly fosters Council Member Silverman's

1 campaign interest, because she needed to endorse
2 the candidate, or she wanted to endorse the
3 candidate that had the strongest chance of
4 winning. That could directly impact her own
5 election.

6 And under the test as it stands today
7 in the District of Columbia, that is a lawful
8 campaign expenditure. I think the federal system
9 provides us some guidance because it is
10 substantially similar to OCF's prior guidance,
11 and that is specifically on page eight of OCF's
12 brief. Confirming that the district's campaign
13 finance law is written in quote broad terms, end
14 quote.

15 This law at issue, the law that we're
16 talking about today is a broad law. OCF is now
17 asking us to take a narrow view, and that would
18 be in direct contradiction of an OCF prior
19 opinion, and we would ask the board to decline to
20 do so. As it relates to federal law, the
21 irrespective test, the question there is whether
22 fulfilling the commitment, the expenditure that

1 would exist irrespective of the candidate's
2 campaign, that provides instructive guidance
3 here.

4 I'm not suggesting it's binding to
5 this board, but instructive to the board, because
6 the expenditures here would not exist but for
7 Council Member Silverman's campaign to be elected
8 as an at large council member. So, we would ask
9 the board to take into account federal law as
10 well. We are happy to answer anymore of the
11 board's questions.

12 But at this juncture, we are asking
13 that the board reverse OCF's order, and we're
14 happy to answer any other questions.

15 CHAIR THOMPSON: I think we've thrown
16 enough questions at all. You have one --

17 MR. SANFORD: May I have one
18 surrebuttal point? Very brief.

19 CHAIR THOMPSON: As the party with the
20 burden of proof, I guess you get the last word,
21 go ahead.

22 MR. SANFORD: Thank you very much.

1 Endorsing the wrong candidate for an office does
2 not determine anything. On prior occasions, the
3 mayor has endorsed a candidate who was competing
4 with Council Member Silverman for an at large
5 position. It did not determine the outcome of
6 anything.

7 To suggest that one needs to spend
8 polls in a specific ward on a specific contest
9 with a party that one, is not affiliated with to
10 make an informed decision regarding endorsement
11 is not valid. It is an invalid argument, and I
12 am sure that the board will not sanction this
13 behavior.

14 CHAIR THOMPSON: Okay. Thank you so
15 much for your presentations. We've received into
16 our record, what did I say, 16 exhibits? We've
17 heard your arguments loud, and clear, I think we
18 really get it. We've studied your briefs very
19 closely. All of these exhibits I've read multiple
20 times, maybe in between watching soccer games,
21 but I have definitely taken a deep dive into all
22 of this.

1 I've learned a lot. We really
2 appreciate you being here, we'll go ahead, and
3 close our record since there's nothing hanging
4 out there for potential additional submission.
5 Our record is closed. Our rules tell us that we
6 have a quote reasonable time to render our
7 decision, which will also be in writing.

8 Our habit is to go ahead, and go into
9 executive session, and have our own private
10 deliberation, and usually we come back on the
11 record to issue verbally our determination, and
12 then it's followed up with a written decision
13 several days, or maybe a week, or two hence. So,
14 in a moment I'll move that we retire to executive
15 session.

16 And I don't know if we can promise to
17 come back today to issue our verbal. Okay, so
18 we'll probably take lunch of course, give
19 ourselves a little time to discuss it, and I
20 don't know if we want to -- we can only ball park
21 a time. But 1:00 p.m., or is that too late? Is
22 1:00 p.m. okay? All right, we'll ball park 1:00

1 p.m. to come back on the record, to briefly make
2 our determination.

3 Don't hold us to it, we may need more
4 time. If that's the case, we'll come back on,
5 and say so, because we may realize we need days
6 to really dive into all this, and continue to
7 discuss it. But if we can, we'll come back at
8 1:00 p.m., communicate our determination, and
9 then follow that up with a written one.

10 So, with that I will move that we go
11 into executive session to deliberate upon our
12 decision in this matter. That's under D.C. Code
13 2-575B. Do I have a second?

14 MEMBER GREENFIELD: Second.

15 CHAIR THOMPSON: All in favor?

16 (Chorus of aye.)

17 CHAIR THOMPSON: All right, so that
18 concludes our hearing today. Everybody on Zoom
19 out there, thank you so much for listening, we
20 appreciate your participation, and you're welcome
21 to click onto the same Zoom link at 1:00 p.m., if
22 that's when we're ready to make our announcement.

1 (Whereupon, the above-entitled matter
2 went off the record at 11:42 a.m. and resumed at
3 1:05 p.m.)

4 CHAIR THOMPSON: All right, we're
5 going to come back on the record. I'll start
6 with a motion that we go out of executive
7 session, and back onto the public record.

8 MEMBER GILL: Second.

9 CHAIR THOMPSON: All in favor?

10 (Chorus of aye.)

11 CHAIR THOMPSON: Okay, welcome back
12 everybody. Counsel for both parties are present
13 here in our boardroom. Also a number of people
14 are on via Zoom. I see Council Member Silverman
15 is present by Zoom as well, thank you for
16 returning, thanks for your patience. We've had
17 time to deliberate.

18 Before I make a motion, I do want to
19 say for the public's benefit especially, that our
20 board is completely independent. We did not
21 receive any ex parte communications about this
22 matter at any time. We didn't even talk to each

1 other about this on the merits before today's
2 hearing. So, we really did come at this
3 independently, open minded.

4 We obviously reviewed all the
5 evidence, and thought really carefully about it,
6 and we really heard both sides' arguments today.
7 With that, I'll go ahead, and make a motion that
8 our board reverse the OCF order of October 27th,
9 2022, namely that there were no violations
10 committed by Elissa for D.C. of 3 DCMR 3013.1, or
11 4209.6.

12 Full reasons to be sent forth in a
13 written opinion. Before I say anything else, I
14 want to see if there's a second for my motion.

15 MEMBER GILL: Second.

16 CHAIR THOMPSON: So, having a second
17 with the motion on the table, I'll just briefly
18 share my thoughts that Elissa for D.C. provided
19 three reasons for having conducted the polling of
20 the Ward Three race. Those reasons are
21 uncontroverted in the record, and they explained
22 that the Ward Three polling that her campaign

1 conducted, even though of a different race, did
2 serve a purpose directly, or indirectly for her
3 at large campaign.

4 It's also important to me that the OCF
5 found that there was no coordination with respect
6 to the communications that were made between
7 Council Member Silverman, and two candidates in
8 the Ward Three race. An endorsement decision is
9 obviously a valid campaign related activity, as
10 both sides acknowledged.

11 And a candidate can spend money to
12 gather information to make an endorsement
13 decision that she, or he best feels best furthers
14 their campaign, including a poll. Here
15 candidates are told that they can spend campaign
16 money, whether it's from the FEP program, or
17 otherwise, on any purpose that serves their
18 campaign directly, or indirectly.

19 And here we have three reasons, at
20 least in this case to justify the expenditure as
21 being a proper purpose. And that said, the OCF
22 might promulgate regulations that provide future

1 candidates with bright line rules. But there was
2 certainly nothing here to inform this campaign,
3 or any other, or city wide campaign that spending
4 money for polling of this nature would be per se
5 improper.

6 And in this case in fact, the only
7 evidence in the record does set forth three
8 reasons why, in the judgement of the Elissa for
9 D.C. campaign, the expenditure was made. So,
10 that's my thinking, and that's why I made the
11 motion, and it's been seconded, and I would ask
12 my fellow board members if they have any comments
13 to make before we call a vote.

14 MEMBER GILL: Thanks Gary. So, as we
15 sort of saw during the questioning, the concept
16 of a bright line, I think this -- is the poll de
17 facto not permitted because it didn't involve the
18 candidate directly, didn't involve an issue? I
19 would very much like to come to a conclusion that
20 would set a bright line. But the fact remains
21 there isn't a bright line.

22 And the rationale provided by the

1 campaign, to me fits. Indirect is a wide gate,
2 and to me, these were indirectly furthering the
3 Silverman campaign, and so based on the record,
4 and the evidence, I'd be hard pressed to sort of
5 stretch, and find a bright line where one doesn't
6 exist. I would second Gary's comments that
7 regulations to this effect may be helpful.

8 I kept trying to -- I worry when
9 something's vague that you open the flood gates,
10 and now we're going to have sort of further, and
11 further expenditures that are indirectly related
12 to the furtherance of a campaign. And I can
13 think of a few examples, but the fact remains in
14 this example before us now, and the facts before
15 us now, I do think it's within the line of that
16 indirect furtherance of the campaign.

17 And so I vote to reverse the OCF's
18 decision.

19 MEMBER GREENFIELD: Yeah, I think that
20 we all agreed that endorsements, or seeking
21 endorsement is part, one of the actions, one of
22 the activities in a campaign. And I did feel

1 that the Elissa for D.C. campaign, they did --
2 one of the rationale for why they did it was to
3 determine the endorsement, and they thought it
4 was an impact.

5 And I thought that that, whether it
6 meant direct, or not, I thought it meant
7 indirect. And I think if there is indeed a
8 bright line, I don't think you can draw it after
9 the event occurs. I think we need to know what
10 it is, and they need to know what it is. I'm
11 also a little concerned that if we say there's a
12 bright line, that do we no longer mean direct, or
13 indirect?

14 And that does need to be more
15 promulgated in either regulations, or whatever.
16 But I felt that the reasons that she gave, they
17 didn't seem to really be refuted, and therefore I
18 didn't see a reason to uphold the order.

19 CHAIR THOMPSON: All right. With
20 that, just to be clear on the record, I'll call
21 the vote. All in favor of the motion?

22 (Chorus of aye.)

1 CHAIR THOMPSON: So, three to zero,
2 our decision is made. We'll obviously write
3 probably an extensive opinion, and release it in
4 due course. I don't know if it'll be a week, or
5 two weeks. But we'll get that out for you all,
6 and the public to see. It's of course subject to
7 appeal to our D.C. Court of Appeals, just like we
8 oversee the OCF, the D.C. Court of Appeals
9 oversees us.

10 And I believe that concludes the
11 matter, and our business for today. So, I will
12 go ahead, and move that we adjourn.

13 MEMBER GILL: Second.

14 CHAIR THOMPSON: All in favor of
15 adjourning?

16 (Chorus of Aye.)

17 CHAIR THOMPSON: Thank you all, thanks
18 everybody on Zoom.

19 (Whereupon, the above-entitled matter
20 went off the record at 1:13 p.m.)
21
22

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Special Board Meeting

Before: Board of Elections

Date: 12-12-22

Place: Videoteleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



Court Reporter

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