ORAL ARGUMENT NOT YET SCHEDULED

No. 24-7005

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

ERIC J. FLANNERY, and DRANE FLANNERY RESTAURANT, LLC, T/A THE BIG BOARD,

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, and LAQUANDRA S. NESBITT, in her official capacity,

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Columbia, No. 1:22-cv-3108-ABJ

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

A. Parties and Amicus Curiae and Disclosure Statement

Appellants are (1) Eric J. Flannery and (2) Drane Flannery Restaurant, LLC, T/A The Big Board. Appellant Flannery is an individual and resident of the District of Columbia, who owns and operates The Big Board restaurant. Appellant Drane Flannery Restaurant, LLC, T/A The Big Board is an LLC which operates The Big Board restaurant. Both Appellants are subject to, and responsible for, The Big Board restaurant's compliance with the District of Columbia Department of Health's regulations.

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Drane Flannery Restaurant, LLC, T/A The Big Board states that it does not have a parent, subsidiary, or affiliate that has issued shares or debt securities to the public. No parent companies or publicly-held companies have a 10% or greater ownership interest in Appellant.

Appellees are the District of Columbia Department of Health and LaQuandra S. Nesbitt, Director, in her official capacity.[1]

[1] Dr. Ayanna Bennett has replaced Dr. LaQuandra Nesbitt as the Director of D.C. Health. Under Federal Rule of Civil Procedure 25(d), "[a]n action does not abate when a public officer who is a party in an

There are no intervenors or amici to date.

B. Rulings Under Review

Appellants seek review of the final order issued by U.S. District Judge Amy Berman Jackson of the District Court for the District of Columbia, Order, *Flannery v. D.C. Dep't of Health*, No. CV 22-3108 (ABJ) (D.D.C. Dec. 18, 2023), and the accompanying memorandum opinion, Mem. Op., *Flannery v. D.C. Dep't of Health*, No. CV 22-3108 (ABJ), 2023 WL 8716812 (D.D.C. Dec. 18, 2023), both of which were entered on the court's docket on December 18, 2023.

C. Related Cases

Appellants are not aware of any related cases, as defined by Circuit Rule 28(a)(1)(C).

official capacity . . . ceases to hold office while the action is pending." Fed. R. Civ. P. 25(d). "The court may order substitution at any time, but the absence of such an order does not affect the substitution" and "any misnomer not affecting the parties' substantial rights must be disregarded." *Id.* If this case is remanded to the trial court, Appellants will move to update the case caption to recognize the substitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutions

GLOSSARY

The Big Board	Plaintiffs-Appellants Eric J. Flannery, and Drane Flannery Restaurant, LLC, T/A The Big Board
D.C. Health	Defendants-Appellees District of Columbia Department of Health, and LaQuandra S. Nesbitt, Director, in her official capacity
OAH	District of Columbia Office of Administrative Hearings

INTRODUCTION

The Big Board's claims address the limits that the United States Congress, acting pursuant to article 1, section 8, clause 17 of the U.S. Constitution, has placed on the District of Columbia's Mayor and government as a whole operating under the D.C. Home Rule Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1–201-07). The Big Board seeks vindication of its rights under the U.S. Constitution's guarantee of due process and the D.C. Administrative Procedure Act, D.C. Code §§ 2–501-511, after D.C. Health relied on *ultra vires* "emergency" orders to shutter and fine The Big Board in 2022.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because The Big Board asserted claims that allege violations of the U.S. Constitution and federal law. *See also* 28 U.S.C. § 2201. And because The Big Board brought this suit to vindicate the deprivation of "rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983, the district court also had jurisdiction under 28 U.S.C. § 1343. Additionally, the district court had supplemental jurisdiction under 28

U.S.C. § 1367 regarding the D.C. Administrative Procedure Act claims.

This Court has jurisdiction under 28 U.S.C. § 1291 because The Big Board appeals a final decision of the district court. The district court granted D.C. Health's motion to dismiss by opinion and order dated December 18, 2023. Mem. Op., 2023 WL 8716812 (noting that the decision was a final appealable order). "[T]he dismissal of an action—whether with or without prejudice—is final and appealable." *Ciralsky v. C.I.A.*, 355 F.3d 661, 666 (D.C. Cir. 2004). The Big Board timely filed a notice of appeal on January 17, 2024.

STATEMENT OF THE ISSUES

I. Whether the district court erred in dismissing The Big Board's 42 U.S.C. § 1983 claim based on the denial of The Big Board's Fifth Amendment rights to operate its business without interference from the government's ultra vires emergency orders.

II. Whether the district court erred in not exercising supplemental jurisdiction over The Big Board's D.C. Administrative Procedure Act claims.

III. Whether the district court erred in dismissing The Big Board's declaratory judgment claim.

STATUTES AND REGULATIONS

42 U.S.C. § 1983, the most pertinent sections of the District of Columbia Home Rule Act, Public Law 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1–201-07), and D.C. Code § 7–2306 are reprinted in the addendum.

STATEMENT OF THE CASE

Over a two-year period, the D.C. Mayor issued more than a dozen "emergency" executive orders in response to the COVID-19 pandemic. The D.C. Council purportedly authorized repeated extensions of the Mayor's orders through successive "emergency" legislation. The emergency legislation—and the emergency executive orders issued pursuant thereto—avoided congressional review, as is required by the Home Rule Act and article I, section 8 of the U.S. Constitution. D.C. Health shuttered and fined The Big Board in February 2022, for noncompliance with some of these orders. The Big Board sued to vindicate its rights secured by the Fifth Amendment's Due Process Clause and the D.C. APA. The district court granted D.C. Health's motion to dismiss The Big Board's claims and this appeal followed.

I. D.C.'s Emergency Actions

On March 11, 2020, the D.C. Mayor issued a pair of orders declaring

a public emergency and public health emergency due to the COVID-19 pandemic. Compl. ¶23. Each order was set to expire "fifteen (15) days after its effective date, unless earlier rescinded or suspended." 67 D.C. Reg. 2956, 2960 (Mar. 11, 2020); 67 D.C. Reg. 2961, 2962 (Mar. 11, 2020); Compl. ¶23. In reality, the series of orders would not expire until April 2022—over two years later.

On March 17, 2020, the D.C. Council issued its first emergency, "temporary" (90-day) amendment to authorize the Mayor to extend her emergency orders for an additional period beyond the 15 days permitted by the D.C. Code. *See* § 301(b) of COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-247, 67 D.C. Reg. 3093, 3099 (Mar. 17, 2020); Compl. ¶25. The D.C. Council's first emergency, temporary amendment created a new subsection to the D.C. Code. Notwithstanding existing provisions that limited emergency executive orders to 15 days, the new subsection "authorize[d] the Mayor to extend the 15-day March 11, 2020, emergency executive order and public health emergency executive order ("emergency orders") issued in response to the coronavirus (COVID-19) for an additional 30-day period." D.C. Code § 7–

2306(c-1) (as amended Mar. 17, 2020); Compl. ¶26.

Over the span of two years, the D.C. Council issued 15 emergency, "temporary" (90-day) amendments to D.C. Code § 7–2306 to "authorize[] the Mayor to extend the 15-day March 11, 2020, emergency executive order" all the way "*until April 16, 2022*." D.C. Code § 7–2306(c-1) (as amended Mar. 16, 2022) (emphasis added); Compl. ¶27.[2] And the D.C.

[2] The D.C. Council's 15 acts of emergency, "temporary" legislation to amend D.C. Code § 7–2306 are: § 301(b) of COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-247, 67 D.C. Reg. 3093, 3099 (Mar. 17, 2020); § 507(c) of Coronavirus Support Emergency Amendment Act of 2020, D.C. Act 23-326, 67 D.C. Reg. 7045, 7107 (May 27, 2020); § 507(c) of Coronavirus Support Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-328, 67 D.C. Reg. 7598, 7654 (June 8, 2020); § 2 of Public Health Emergency Authority Additional Extension Emergency Amendment Act of 2020, D.C. Act 23-411, 67 D.C. Reg. 11513 (Oct. 5, 2020); § 301(a) of Protecting Businesses and Workers from COVID-19 Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-483, 67 D.C. Reg. 13860, 13865 (Nov. 16, 2020); §§ 2 and 4(a) of Coronavirus Public Health Extension Emergency Amendment Act of 2020, D.C. Act 23-524, 67 D.C. Reg. 14747 (Dec. 18, 2020); § 2 of January 2021 Public Emergency Extension Authorization Emergency Amendment Act of 2021, D.C. Act 24-1, 68 D.C. Reg. 1525 (Jan. 15, 2021); § 507(d) of Coronavirus Support Emergency Amendment Act of 2021, D.C. Act 24-30, 68 D.C. Reg. 3101, 3158 (Mar. 17, 2021); § 2 of Coronavirus Public Health Extension Emergency Amendment Act of 2021, D.C. Act 24-79, 68 D.C. Reg. 5600 (May 19, 2021); § 2 of Public Emergency Extension and Eviction and Utility Moratorium Phasing Emergency Amendment Act of 2021, D.C. Act 24-125, 68 D.C. Reg. 7342, 7343 (July 24, 2021); § 3 of Foreclosure Moratorium Extension, Scheduled Eviction Assistance, and Public Emergency Extension Emergency Amendment Act of 2021, D.C. Act 24-178, 68 D.C. Reg. 10692,

Council authorized the "temporary" amendments to last until October 26, 2022. Compl. ¶28.

The Mayor took full advantage of the D.C. Council's grant of authority. In fact, the Mayor kept successive "emergency" orders in place for a period exceeding two years—extending her initial emergency orders on March 20, 2020, through at least April 16, 2022—with only one brief break in the continuous emergency. 67 D.C. Reg. 3601 (Mar. 20, 2020); Compl. ¶¶29–31 (emphasizing that the Mayor extended her initial public emergency declaration seven times during 2020 alone). During this time, the Mayor imposed and extended scores of other restrictive orders in the

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10693 (Oct. 7, 2021); § 2 of Public Emergency Extension Emergency Amendment Act of 2021, D.C. Act 24-276, 69 D.C. Reg. 214 (Jan. 6, 2022); § 2 of Public Health Emergency Extension Emergency Amendment Act of 2022, D.C. Act 24-313, 69 D.C. Reg. 850 (Jan. 26, 2022); § 2 of Public Emergency Extension Emergency Amendment Act of 2022, D.C. Act 24-346, 69 D.C. Reg. 2614 (Mar. 16, 2022).

The D.C. Council's second amendment, in § 507(c) of Coronavirus Support Emergency Amendment Act of 2020, D.C. Act 23-326, 67 D.C. Reg. 7045, 7107 (May 27, 2020), actually authorized the Mayor to extend her March 11, 2020 executive orders "for an additional 135-day period" by tacking on a new 90 days to the 45 days remaining under the first amendment's extension. This act, in and of itself, violated the D.C. Home Rule Act's 90-day limit for emergency legislation. *See* D.C. Code § 1–204.12(a). Nevertheless, the successive extensions, all of which evaded congressional review, authorized the Mayor to issue new orders (or extensions) for a period exceeding two years.

name of, and based on the authority of, the continuous emergency. Compl. ¶33.

Several of these emergency orders created restrictions that negatively impacted The Big Board. *See, e.g.*, 67 D.C. Reg. 3312, 3314 (Mar. 16, 2020) (requiring taverns to suspend table service operations); Compl. ¶24. In late 2021, Mayor Bowser issued two "emergency" orders imposing an indoor mask requirement including at bars and restaurants, Mayor's Order 2021-147, 68 D.C. Reg. 13954 (Dec. 20, 2021), and proof of vaccination requirement, Mayor's Order 2021-148, 68 D.C. Reg. 14222 (Dec. 22, 2021). Compl. ¶33. These improperly enacted and therefore unlawful orders adversely affected The Big Board's operations—first by closing The Big Board and, second, after the government permitted it to reopen, by requiring it to screen customers and restrict who may enter and how they may dine and interact with one another. The Big Board declined to follow or enforce the December 2021 orders.

II. D.C. Health's Penalization of The Big Board

On February 1, 2022, D.C. Health issued a "Notice of Infraction" and "Notice of Closure/Summary Suspension" to The Big Board for alleged violations of D.C. Code § 7–2307. Compl. Ex. A. The summary

suspension alleged that The Big Board violated three of the Mayor's orders: Mayor's Order 2021-147 (mask mandate), Mayor's Order 2021-148 (vaccine mandate), and Mayor's Order 2022-007 (vaccine mandate clarification). Compl. Ex. A at 1. The Big Board received a similar "Notice of Infraction" the following week (on February 7), again for alleged violations of the mask and vaccine mandates. Compl. Ex. B. Both notices came with $1,000 fines for each alleged violation. Compl. ¶¶36, 39.

Although the D.C. Office of Administrative Hearings later dismissed the fines because the fine amounts were not set by statute, The Big Board nonetheless had to pay "a non-compliance restoration fee of $100," required by D.C. Health "[i]n order for license to be restored." Compl. ¶41; Compl. Ex. A at 4. D.C. Health does not and cannot dispute that The Big Board paid the $100 fee as a mandatory condition to reopening in March 2022. Compl. ¶41; Compl. Ex. C at 2 (acknowledging that "Mr. Flannery paid his restoration fee").

On February 14, 2022, the Mayor announced that she would lift the vaccination requirement effective the next day, and the mask requirement effective March 1. 69 D.C. Reg. 1376 (Feb. 18, 2022). The Big Board then initiated its challenge to D.C. Health's sanctions in the

D.C. administrative courts. *D.C. Dep't of Health v. Drane Flannery Restaurant LLC/Big Board (The)*, D.C. OAH, Case No. 2022-DOH-C21046 (NOI No: C21046). That tribunal explained that "[a]n administrative agency may not act in excess of its statutory authority," but that tribunal "is not delegated authority to grant [The Big Board's] request to invalidate the Mayor's Orders and declare them invalid and in violation of the Home Rule Act." Order on Summ. Adjudication, *D.C. Dep't of Health v. Drane Flannery Restaurant LLC/Big Board (The)*, Case No. 2022-DOH-C21046 at 9–10 (citing *Archer v. D.C. Dept of Human Resources*, 375 A.2d 523, 526 (D.C. 1977) ("an administrative agency has no authority to declare invalid legislation enacted by the parent legislature")). That tribunal ultimately admitted that it was "not authorized to grant [The Big Board] the relief it seeks." *Id.* at 10. Even so, the administrative law judge recognized that the civil fine schedule applicable to D.C. Health violations did not authorize a fine amount for the alleged violations and dismissed the case. *Id.* at 12–13. In doing so, she acknowledged that The Big Board nonetheless "paid a $100

restoration fee" due to D.C. Health's enforcement of the Mayor's Orders.

III. District Court Proceedings

On October 13, 2022, The Big Board brought the current action. First, The Big Board's Complaint alleged that D.C. Health acted *ultra vires* when it suspended The Big Board's licenses. D.C. Health relied on authority that violated the D.C. Home Rule Act. These actions violated The Big Board's due process rights under the Fifth Amendment. *See, e.g.*, Compl. Count I. Second, The Big Board also alleged that D.C. Code § 7–2308, which suspends judicial review during an emergency declaration, violated The Big Board's procedural due process rights. Compl. Count II.[3] Third, The Big Board brought a supplemental claim alleging that D.C. Health exceeded its regulatory authority by issuing a summary suspension of The Big Board's license for its alleged infractions. And finally, The Big Board sought a declaration that D.C. Health's actions relied on ultra vires actions by the D.C. Council and Mayor and were thus themselves *ultra vires*. Compl. ¶¶76–83. The Big Board seeks compensatory damages, including for the $100 restoration fee, a

[3] The Big Board does not appeal the district court's ruling on Count II.

declaratory judgment holding that D.C. Health's actions in reliance on the D.C. Council's emergency legislative amendments and the Mayor's orders are contrary to law, and all other relief to which The Big Board is entitled. Compl. ¶¶79-83.

On January 13, 2023, D.C. Health moved to dismiss The Big Board's Complaint for lack of subject matter jurisdiction and for failure to state a claim. The Big Board opposed the motion. On December 12, 2023, the District Court for the District of Columbia issued a memorandum opinion and accompanying order granting D.C. Health's motion to dismiss. The Big Board timely filed a notice of appeal to challenge that opinion and order.

SUMMARY OF THE ARGUMENT

Article I, Section 8 of the Constitution vests in Congress exclusive authority to legislate over the District of Columbia. Congress, however, delegated that authority via the Home Rule Act with several important reservations. Among them, legislation enacted by the D.C. Council remains subject to congressional review. The only exception to the congressional review requirement is for emergency legislation, which "shall be effective for a period of not to exceed 90 days." D.C. Code § 1–

204.12(a). The Home Rule Act does not contemplate or permit successive emergency periods for the same underlying "emergency." *See, e.g., Fabick v. Evers,* 956 N.W.2d 856, 869 (Wis. 2021) (a governor cannot "make an end run around" duration-limiting language in an emergency management statute by issuing new emergency orders after the fulfillment of the time allowed for a prior emergency order based on the same predicate emergency). Such repeated actions would thwart Congress's reserved constitutional power.

After COVID-19 emerged in the United States in 2020, D.C. Mayor Muriel Bowser issued more than a dozen "emergency" executive orders over the ensuing two years in response to the pandemic. And the D.C. Council purported to authorize these repeated extensions of emergency orders for months on end through successive "emergency" legislation that avoided congressional review. The Mayor's orders imposed many restrictions and were issued without review by the D.C. Council or Congress, despite the fact that they touched on all aspects of civic life.

While acknowledging the government's interest in combating COVID-19 in a challenge to another DC emergency order, D.C. Superior Court nonetheless concluded that "our system does not permit the Mayor

to act unlawfully even in the pursuit of desirable ends." *Fraternal Ord. of Police v. District of Columbia*, Case No. 2022 CA 000584 B, at *16 (D.C. Super. Ct. Aug. 25, 2022) (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)). Just as the D.C. Superior Court found that the Mayor lacked the authority to impose a vaccine mandate on D.C. employees, *id.* at *14, the Mayor likewise lacked the authority to impose the rolling "emergency" orders that D.C. Health used to shutter The Big Board in 2022.

Enabled by the D.C. Council's successive and unlawful emergency legislation, the Mayor first issued the gathering prohibition in March 2020. *District Of Columbia: State-By-State Covid-19 Guidance*, Husch Blackwell, perma.cc/7LZ9-24ZE (last visited May 24, 2024). In October 2020, the Mayor announced that restrictions on bars and indoor dining would be extended through 2020. *Id.* Even when indoor dining was allowed in late 2020 and early 2021, capacity and hours of operation were significantly restricted. *Id.* In late 2021, the Mayor issued the mask mandate and vaccine mandate orders that The Big Board was cited for violating. The Mayor's gathering prohibition effectively shut down The Big Board and the latter orders greatly restricted The Big Board and its

patrons. In early 2022, D.C. Health summarily suspended The Big Board's license, imposed a restoration fee, and shuttered the business in February 2022 for alleged noncompliance with the mask and vaccine mandate orders. These orders and the imposed fee violated the Fifth Amendment because they were based on the Mayor's and the council's actions that contravened the Home Rule Act.

The Big Board had no choice but to pay D.C. Health's restoration fee in order to obtain an agency order lifting the summary suspension and allowing The Big Board to re-open. What's more, D.C. Health shuttered the Big Board without proper authority under D.C.'s own regulations. D.C. Municipal Regulations give D.C. Health the authority to require a business to cease operations for food safety issues. Yet no provision authorizes such a drastic measure related to the existence of airborne pathogens that have nothing to do with food safety. D.C. Mun. Regs. tit. 25-A, § 4408.1(k). D.C. Health's attempt to extend its regulatory purview beyond the limited circumstances identified by the D.C. Municipal Regulations to justify closure provides another viable claim for relief under the D.C. Administrative Procedure Act through the exercise

of supplemental jurisdiction.

The penalties D.C. Health levied on The Big Board, including the restoration fee, were unlawful. As detailed in the Complaint, these actions harmed The Big Board by infringing on its right to property without due process as required by the Fifth Amendment. The district court thus had no basis to dismiss The Big Board's claims for harm stemming from the Mayor's unlawful orders. This Court should reverse the district court's grant of D.C. Health's motion to dismiss.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint for lack of standing or for failure to state a claim. *Washington All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 892 F.3d 332, 339 (D.C. Cir. 2018) (citing *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (standing); *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (failure to state a claim)). Whether the district court erred in not exercising supplemental jurisdiction after the dismissal of the federal claims is reviewed for abuse of discretion. *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423 (D.C. Cir. 2005) (citing *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260,

1265–66 (D.C. Cir. 1995)).

ARGUMENT

I. The U.S. Constitution and D.C. Home Rule Act limit D.C.'s local government power.

This dispute originates squarely in the U.S. Constitution. The Constitution vests in Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. U.S. Const. art. I, § 8, cl. 17. That clause requires a delegation of power from Congress to give D.C. any legislative authority "whatsoever." The Constitution thus requires that the extent and limits of that delegation to D.C. be set by Congress.

In 1973, Congress enacted the Home Rule Act to balance congressional oversight with local authority over the District of Columbia. D.C. Code § 1–201.01. While establishing the D.C. Charter—which in turn created and organized the D.C. Council, D.C. Mayor's office, and various government agencies, D.C. Code § 1–204.01-96—Congress granted the D.C. government limited legislative powers. *See* D.C. Code § 1–201.02 ("Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution, the intent of Congress is to delegate certain

legislative powers to the government of the District of Columbia;" and, among other purposes, "consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters."). By its plain text, Congress retains ultimate legislative authority over D.C. via the Home Rule Act. Accordingly, D.C.'s "power to govern itself," is not absolute, but rather subject to reservations that Congress included in the Home Rule Act.

Congress requires via the Home Rule Act that the D.C. Council submit legislation it enacts to Congress for a 30-day review period, during which time Congress may act to disapprove and invalidate the legislation. *See* D.C. Code § 1–206.02(c)(1). This is no mere formality; congressional review is key to preserving Congress's exclusive authority to legislate over D.C., which the Constitution granted authority directly to Congress. *See Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994) ("[T]he Home Rule Act allows Congress a layover period of thirty statutory days to review legislation submitted by the D.C. Council."). Congress also retained the authority to amend or repeal any act of the D.C. Council. D.C. Code § 1–206.01.

The parties agree that the Home Rule Act provides for emergency

legislation that is exempt from the congressional review requirement. But in such case, the legislation "shall be effective for a period of not to exceed 90 days." D.C. Code § 1–204.12(a). In making a limited exemption for legislation that was only to be effective for 90 days, Congress did not—explicitly or implicitly—authorize action by the D.C. Council and executive to escape congressional review for years on end.

The D.C. Council's invented mechanism for enacting temporary legislation does not shield the excessive in-seriatim use of emergency legislation from judicial scrutiny. Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 24, Rule 413, 68 D.C. Reg. 228, 292 (Jan. 8, 2021). In fact, the Home Rule Act does not even contemplate temporary legislation. In any event, temporary legislation is at most useful to bridge the "gap" between the expiration of emergency legislation "and the enactment of permanent legislation." *Winters v. Ridley*, 596 A.2d 569, 572 (D.C. 1991) (Schwelb, J., concurring). Temporary legislation cannot simply substitute for permanent legislation. Because the Home Rule Act does not permit emergency legislation to last longer than 90 days, a lengthier piece of temporary legislation—completely foreign to and unauthorized by the D.C. Code—

cannot save emergency legislation or executive orders promulgated thereunder that exceed statutory duration limitations. D.C. Health's proffered temporary legislation escape hatch would nullify the Home Rule Act's provision that emergency legislation "shall be effective for a period of not to exceed 90 days." D.C. Code § 1–204.12(a). That cannot be so.

Further, D.C.'s Public Emergency Act of 1980 gives the Mayor the authority to "issue an emergency executive order" for the "immediate preservation of the public peace, health, safety of welfare." D.C. Code § 7–2304(a). The Mayor may also issue a "public health emergency executive order" under a companion provision. D.C. Code § 7–2304.01. Yet either type of emergency order "shall be effective for a period of no more than 15 calendar days from the day it is signed by the Mayor" and "may be extended for up to an additional 15-day period, only upon request by the Mayor for, and the adoption of, an emergency act by the Council of the District of Columbia." D.C. Code § 7–2306. At its longest, an

emergency order from the Mayor is limited to 30 days in duration.[4]

These strict durational limits are sensible—if not constitutionally required—because the effects of these emergency orders can be—and in this case were—sweeping in scope. *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one."). Closing businesses or severely restricting their operations implicates fundamental property rights and due process rights. U.S. Const. amend. V. No government official should have such unrestricted authority.

II. The district court erred in finding The Big Board lacked standing to bring Count I for due process violations.

The district court's dismissal of Count I of the Complaint was based on its misunderstanding of The Big Board's Section 1983 claim. The

[4] And yet at least one of the Mayor's orders implicated in D.C. Health's actions against The Big Board greatly exceeded this time limitation. D.C. Health's "COVID-19 Food Inspection Form" (Doc.1-1 at 3) attached to the February 1, 2022, notice references both Mayor's Order 2021-147 and Mayor's Order 2021-148, as well as yet another order: Mayor's Order 2022-007. Mayor's Order 2022-007 amended "the vaccination entry requirements of Mayor's Order 2021-148," effective January 6, 2022 "through March 17, 2022," barring repeal. Mayor's Order 2022-007, §§ III, V. Accordingly, Mayor's Order 2022-007 apparently amounted to a 71-day extension of the requirement, which is not a valid time frame for an emergency order.

district court misconstrued Count I of The Big Board's Complaint as a claim for rights under the Home Rule Act. Mem. Op., 2023 WL 8716812, at *5-*7. Instead, The Big Board's claim alleged violations of The Big Board's due process rights, through the government's actions that ran afoul of its Home Rule Act authority. The Big Board has standing to maintain a Section 1983 claim for the alleged due process violations.

A. D.C. Health unlawfully deprived The Big Board of its rights under the Fifth Amendment by relying on the misuse of powers under the Home Rule Act.

Section 1983 ensures that every person acting under color of D.C. law who deprives a citizen "of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured" for redress. 42 U.S.C. § 1983; *Torres v. Madrid*, 592 U.S. 306, 310 (2021) (Section 1983 "provides a cause of action for the deprivation of constitutional [and statutory] rights by persons acting under color of state [or D.C.] law.").

Under the Fifth Amendment, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. There is a "basic proposition" under the Fifth Amendment that "once a going business has been established on the basis of a license or

certificate of authority, property rights attach. This means that such license or certificate may not be revoked, nor may renewal be denied, without procedural and substantive due process of law." *Jordan v. United Ins. Co. of Am.*, 289 F.2d 778, 781 (D.C. Cir. 1961) (citations omitted). If the State's action "has the broad effect of largely precluding [someone] from pursuing her chosen career" that would "implicate a liberty interest." *Kartseva v. Dep't of State*, 37 F.3d 1524, 1528 (D.C. Cir. 1994); *see also PDK Labs Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 9 (D.D.C. 2004) (government action "'largely precluding' the plaintiff from pursuing a business" impairs a liberty interest under the Due Process Clause); *ABA, Inc. v. D.C.*, 40 F. Supp. 3d 153, 167 (D.D.C. 2014) (A liberty interest "may be at issue where a plaintiff challenges the rationality of government regulations on entry into a particular profession.").

The government can only satisfy due process if it has the authority to act. *Watrous v. Town of Preston*, 902 F. Supp. 2d 243, 267 (D. Conn. 2012). That is because "the touchstone of due process is protection of the individual against arbitrary action of government." *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)). "If a government body or official 'did not have authority for the actions it took regarding' a

plaintiff's property, such 'actions were ultra vires and, as a result sufficiently arbitrary to amount to a substantive due process violation.'" *Id.* (quoting *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2d Cir. 2007)). In other words, a due process violation occurs when the government acts without "authority under state law." *See Brady v. Town of Colchester*, 863 F.2d 205, 215–16 (2d Cir. 1988) (reversing grant of summary judgment to defendants on substantive due process claim where question of fact existed regarding whether defendant zoning board took actions with "no authority under state law" to do so).

"To challenge agency action on the ground that it is *ultra vires*, [a plaintiff] must show a 'patent violation of agency authority.'" *Am. Clinical Lab'y Ass'n v. Azar*, 931 F.3d 1195, 1208 (D.C. Cir. 2019) (quoting *Indep. Cosmetic Mfrs. & Distribs., Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 574 F.2d 553, 555 (D.C. Cir. 1978)). To establish *ultra vires* actions, "Plaintiffs must have alleged 'facts sufficient to establish that the officer was acting without any authority whatsoever, or without any colorable basis for the exercise of authority.'" *Missouri v. Biden*, 662 F. Supp. 3d 626, 667 (W.D. La. 2023) (quoting *Danos v. Jones*, 652 F.3d 577,

583 (5th Cir. 2011)).

In *Cine SK8*, the plaintiff had obtained a permit to operate a dance club on its property. 507 F.3d 778. The town board subsequently amended the permit to prevent the plaintiff from operating the dance club. *Id.* at 783. The plaintiff challenged the board's amendment as a violation of due process. The town code provided the board authority to revoke or suspend a permit, but not the authority to amend one. *Id.* at 789. The Second Circuit found it reasonable to infer that the board's actions in amending the plaintiff's permit were sufficiently arbitrary or irrational because the board "did not have authority for the actions it took regarding [the plaintiff's] permit" under the town code and that the process that the board used in amending the permit "failed to comply with the procedural requirements" of the town code. *Id.* at 790. The Second Circuit thus reversed the trial court's grant of summary judgment to the town and allowed the plaintiff to proceed with its § 1983 due process challenge.

Because The Big Board was required to establish that the government acted without authority to bring its due process claim, The Big Board's Complaint extensively discusses the authority under the Home Rule Act. Count I of the Complaint squarely sets out the issue

whether D.C. Health acted *ultra vires* and violated The Big Board's Fifth Amendment right to due process. The heading for Count I of the Complaint specifically references the Fifth Amendment:

Section 1983 Claim for D.C. Home Rule Act Violation
(DC Health's *ultra vires* suspension of The Big Board violated federal law)
D.C. Code § 1–204.12(1), 1–206.02(c)(1); U.S. Const., art. I, § 8; U.S. Const. amend. V; 42 U.S.C. § 1983

Compl. Count I. Four of the seven paragraphs in Count I argue that the fines and fees charged to The Big Board, and the revocation of its license are *ultra vires* actions and violate the Fifth Amendment. Compl. ¶¶62–65. The Big Board's response to the motion to dismiss likewise responds to D.C. Health's claims regarding a lack of jurisdiction, noting that D.C. Health "do[es] not and cannot provide a jurisdictional reason to dispose of the due process claim, which plainly arises under the Fifth Amendment. And the Due Process claim likewise arises under §1983." Pls.' Resp. in Opp'n to Mot. to Dismiss at 21 (internal citation omitted). The district court recognized this by noting that

> Plaintiffs conclude Count I by alleging that "it is contrary to law for DC Health to cite and penalize The Big Board in reliance of [*sic*] the Mayor's ultra vires orders and therefore the suspension [of The Big Board's license] itself is ultra vires, null and void." Compl. ¶ 62. They add . . . that the suspension and the imposition of fines violated the Due Process Clause of

> the Fifth Amendment, Compl. ¶ 65 . . . .

Mem. Op. at 7–8 n.2.

Despite The Big Board listing the Fifth Amendment in the heading of Count I—and making arguments specific to due process in the body of the count—the district court disregarded the Fifth Amendment's key relevance to Count I. Rather, the court dismissed the Fifth Amendment's involvement in Count I with a cursory footnote, stating that The Big Board "pursue[s] the due process theory directly in Count II." Mem. Op. at 8 n.2. The district court then analyzed Count I by incorrectly construing the argument as the assertion of a right created or protected only under the Home Rule Act. But The Big Board does not argue that the Home Rule Act created rights. Rather, the Home Rule Act delegated limited authority to the District of Columbia, which the District then abused. The crux of The Big Board's Count I is that the District deprived The Big Board's protected property interests through *ultra vires* actions—and that deprivation violates due process.

Count I revolves around the gathering prohibition order—shuttering The Big Board—and the mask and vaccine mandates. The orders culminated in D.C. Health's imposition of fines against The Big

Board, the revocation of The Big Board's license, and the imposition of a restoration fee following that revocation. *See* Compl. ¶63 ("DC Health's extraction of a $100 restoration fee from The Big Board as a condition on the return of The Big Board's license and the restaurant's authorization to re-open violates the Fifth Amendment's Due Process Clause."). To establish that D.C. Health's fines, fees, and revocation deprived The Big Board of its property interest in its license, it was imperative for The Big Board to show that D.C. Health's actions were taken without lawful authority. *See Missouri*, 662 F. Supp. 3d at 667. Thus, The Big Board's Complaint walked through the legal framework of Article I, Section 8 of the Constitution, and the D.C. Home Rule Act, *see* Compl. ¶¶16–46, 61, to establish that D.C. Health was acting without lawful authority.

The Big Board's property rights under the Fifth Amendment to its continued licensure had long ago attached. This includes the right to operate one's business without interference from unlawful government orders. The government may not close a business or revoke a business license "without procedural and substantive due process of law." *Jordan*, 289 F.2d at 781. Rather than address the violation of these rights, the district court determined that the Home Rule Act did not confer a right

upon The Big Board. Mem. Op. at 10. Even assuming, *arguendo,* that the Home Rule Act does not confer rights, it only grants to the District limited authority. And importantly, The Big Board had preexisting rights that the District violated by its *ultra vires* actions that exceeded the limited authority granted to it from Congress in the Home Rule Act. 42 U.S.C. § 1983 provides the statutory cause of action for the violation of those rights. The District's orders, fines assessed and fees charged to The Big Board based on those orders, and the revocation of its license are *ultra vires* and violate the Fifth Amendment. Therefore, the district court erred in construing Count I as a violation of the Home Rule Act and not as a violation of The Big Board's underlying rights and due process rights—challenged via § 1983.

B. The Big Board has standing to bring a due process claim in Count I.

The Big Board's Complaint sufficiently alleges facts to establish that it has standing to bring a claim for violation of its due process rights in Count I. To establish standing, "[t]he plaintiff must have (1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan*

v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). "At the pleading stage, general factual allegations" are sufficient. *Lujan*, 504 U.S. at 561.

As outlined above, The Big Board has suffered an injury to its property interest in its license under the Due Process Clause. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) (noting that traditional harms sufficient for standing "may also include harms specified by the Constitution itself" (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (abridgment of free speech), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (infringement of free exercise)). D.C. Health compounded the injury to The Big Board's property interest by the imposition of fines that it issued *ultra vires*, the required $100 restoration fee that The Big Board had to pay to begin enjoying its property interest again, and the lost business during the suspension. Compl. ¶41. These monetary losses are "a classic pocketbook injury sufficient to give [The Big Board] standing," *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023) (citing *TransUnion LLC*, 594 U.S. at 425), because even a "dollar of economic harm is still an injury-in-fact for standing purposes," *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017). Thus, The Big Board has suffered an injury sufficient

for standing.

The Big Board's injuries are "fairly traceable" to the District's *ultra vires* actions. "But for" the emergency declarations that lasted longer than allowed by the Home Rule Act, D.C.'s Mayor could not have issued the executive orders that led to The Big Board's unlawful initial closure and subsequent restrictions and then fines and closure. As such, D.C. Health's reliance on authority that it did not have under the Home Rule Act directly caused the violations of The Big Board's due process rights. And, if D.C. Health had not enforced the Mayor's unlawful orders against The Big Board, The Big Board would not have had to pay the restoration fee directly to D.C. Health, nor remained closed while under the summary suspension. At bottom, the violations of the Home Rule Act by the Mayor and council and the *ultra vires* actions of D.C. Health caused The Big Board's injuries.

Finally, the district court can redress The Big Board's injuries by declaring the government's actions unlawful and awarding The Big Board its $100 restoration fee, nominal damages, and attorneys' fees, and any other relief the court deems proper. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006) (noting that "the lower

courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application"). Because classic pocketbook injuries and "nominal damages were available at common law in analogous circumstances," the Big Board's request for the restoration fee and "nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021); *see also Carey v. Piphus*, 435 U.S. 247 (1978) (holding in a due process case that damages are allowable for § 1983 claims). Here, those damages are exactly what The Big Board has requested.

The Big Board has satisfied each element of standing to bring its claim in Count I.

III. The district court erred in not exercising supplemental jurisdiction.

Because The Big Board had standing to bring its due process claims—and the district court erred in dismissing those claims—the district court erred in not exercising supplemental jurisdiction over the D.C. APA claims. Under 28 U.S.C. § 1367(a), "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form

part of the same case or controversy under Article III of the United States Constitution." When the district court has subject matter jurisdiction and the plaintiff has pled a proper claim, the court may decline to exercise supplemental jurisdiction in only limited instances. 28 U.S.C. § 1367(c). The justification for supplemental jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants . . ." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). "[I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." *Id.* at 725.

Count III of the Complaint alleges that D.C. Health exceeded its regulatory authority by issuing a summary suspension to The Big Board for the alleged violations of the Mayor's orders. The Big Board brought Count III pursuant to the D.C. APA, which prohibits any agency action "[i]n excess of statutory jurisdiction, authority, or limitations." D.C. Code § 2–510(a)(3)(C); Compl. ¶74. The Big Board's principal argument is that the alleged violations involve purported public health risks that are not properly contained within the authority delegated by the regulations.

D.C. Mun. Regs. tit. 25-A, § 4408(k); Compl. ¶75. Thus, D.C. Health's actions taken under the *ultra vires* orders exceeded the scope of D.C. Health's authority. Because the federal tribunal must already determine whether D.C. Health acted without the proper authority in issuing The Big Board its suspension, fines, and fees, judicial economy and fairness to the litigants favors exercising supplemental jurisdiction and not forcing the parties to relitigate in D.C. court.

Because the district court erred in dismissing the federal claims for lack of subject matter jurisdiction, and the D.C. APA claims arise from a common nucleus of operative facts, the district court also erred in not exercising supplemental jurisdiction here.

IV. The district court erred in dismissing the declaratory judgment claim.

Finally, the district court erred in dismissing The Big Board's declaratory judgment claim. Count IV of the Complaint incorporates all of The Big Board's prior allegations. Compl. ¶76. As with all the matters in the Complaint, there is an actual controversy between the parties regarding D.C. Health's authority to issue the suspension, fines, and fees for The Big Board's alleged violations. The Big Board sought a declaration from the district court of The Big Board's rights regarding

these issues.

To fully effect the relief sought, The Big Board requested that: (i) the district court declare that the D.C. Council's actions violated the Home Rule Act, (ii) the Mayor's reliance on that violation in implementing the orders was likewise *ultra vires*, and (iii) D.C. Health's issuance of The Big Board's suspension and the subsequent fines and fees, taken pursuant to those *ultra vires* actions, was also taken without lawful authority. The Big Board's request for a declaratory judgment is necessary because this precise scenario of never-ending emergency orders restricting constitutional rights is "capable of repetition, yet evading review." *See* Pls.' Resp. in Opp'n to Mot. to Dismiss at 15 (citing *D.C. v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1350 (D.C. 1980) (question of whether the D.C. Council had the power to enact substantially identical successive emergency acts was "capable of repetition, yet evading review")); *see also Lara v. Comm'r Pennsylvania State Police*, 91 F.4th 122, 138 (3d Cir. 2024) (finding case not moot because "Pennsylvania has a recent history of declaring multiple emergencies, and it is reasonably likely that" it will once again restrict individuals' constitutional rights). The district court improperly

dismissed The Big Board's request for a declaratory judgment where it had jurisdiction to hear the claims.

CONCLUSION

This Court should reverse the district court's opinion and order and remand for further proceedings.

Respectfully submitted,

Dated: May 24, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 7,208 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

Date: May 24, 2024 */s/* David L. Rosenthal

CERTIFICATE OF SERVICE

I filed this brief with the Clerk via ECF, which will email everyone requiring service.

Date: May 24, 2024 /*s*/ David L. Rosenthal

STATUTORY ADDENDUM

18 U.S.C. § 1983 – Civil Action for the Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

D.C. Code § 1–204.12 – Acts, resolutions, and requirements for quorum.

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

(b) A special election may be called by resolution of the Council to present for an advisory referendum vote of the people any proposition upon which the Council desires to take action.

(c) A majority of the Council shall constitute a quorum for the lawful convening of any meeting and for the transaction of business of the Council, except a lesser number may hold hearings.

D.C. Code § 1–206.01 – Retention of constitutional authority.

Notwithstanding any other provision of this chapter, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this chapter, including legislation to amend or repeal any law in force in the District prior to or after enactment of this chapter and any act passed by the Council.

D.C. Code § 1–206.02 – Limitations on the Council.

(a) The Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter, or to:

(1) Impose any tax on property of the United States or any of the several states;

(2) Lend the public credit for support of any private undertaking;

(3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District;

(4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts);

(5) Impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in § 47-1801.04);

(6) Enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations contained in § 6-601.05, and in effect on December 24, 1973;

(7) Enact any act, resolution, or regulation with respect to the Commission on Mental Health;

(8) Enact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts, or relating to the duties or powers of the United States Attorney or the United States Marshal for the District of Columbia;

(9) Enact any act, resolution, or rule with respect to any provision of Title 23 (relating to criminal procedure), or with respect to any provision of any law codified in Title 22 or 24 (relating to crimes and treatment of prisoners), or with respect to any criminal offense pertaining to articles subject to regulation under Chapter 45 of Title 22 during the 48 full calendar months immediately following the day on which the members of the Council first elected pursuant to this chapter take office; or

(10) Enact any act, resolution, or rule with respect to the District of Columbia Financial Responsibility and Management Assistance Authority established under § 47-391.01(a).

(b) Nothing in this chapter shall be construed as vesting in the District government any greater authority over the National Zoological Park, the National Guard of the District of Columbia, the Washington Aqueduct, the National Capital Planning Commission, or, except as otherwise specifically provided in this chapter, over any federal agency, than was vested in the Commissioner prior to January 2, 1975.

(c)(1) Except acts of the Council which are submitted to the President in accordance with Chapter 11 of Title 31, United States Code, any act which the Council determines, according to § 1-204.12(a), should take effect immediately because of emergency circumstances, and acts proposing amendments to subchapter IV of this chapter and except as provided in § 1-204.62(c) and § 1-204.72(d)(1) the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate, a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting, each act passed by the Council and allowed to become effective by the Mayor without his signature, and each initiated act and act subject to referendum which has been ratified by a majority of the registered qualified electors voting on the initiative or referendum. Except as provided in paragraph (2) of this subsection, such act shall take effect upon the expiration of the 30-calendar-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the

Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such 30-day period, there has been enacted into law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 30-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law, subsequent to the expiration of such 30-day period, shall be deemed to have repealed such act, as of the date such resolution becomes law. The provisions of § 1-206.04, except subsections (d), (e), and (f) of such section, shall apply with respect to any joint resolution disapproving any act pursuant to this paragraph.

(2) In the case of any such act transmitted by the Chairman with respect to any act codified in Title 22, 23, or 24 of the District of Columbia Code, such act shall take effect at the end of the 60-day period beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate unless, during such 60-day period, there has been enacted into law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 60-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law subsequent to the expiration of such 60-day period shall be deemed to have repealed such act, as of the date such resolution becomes law. The provisions of § 1-206.04, relating to an expedited procedure for consideration of joint resolutions, shall apply to a joint resolution disapproving such act as specified in this paragraph.

(3) The Council shall submit with each Act transmitted under this subsection an estimate of the costs which will be incurred by the District of Columbia as a result of the enactment of the act in each of the first 4 fiscal years for which the act is in effect, together with a statement of the basis for such estimate.

D.C. Code § 7–2306 – Duration of emergency executive order; extension; publication of order; regional programs and agreements.

(a) An emergency executive order, or a public health emergency executive order, issued by the Mayor shall be effective for a period of no more than 15 calendar days from the day it is signed by the Mayor, but may be rescinded in whole or in part by the Mayor within that period should the Mayor determine that the public emergency no longer exists, or no longer warrants the part rescinded.

(b) An emergency executive order, or a public health emergency executive order, may be extended for up to an additional 15-day period, only upon request by the Mayor for, and the adoption of, an emergency act by the Council of the District of Columbia.

(c) Should extenuating circumstances, such as death, destruction or other perilous conditions prohibit the convening of at least two-thirds of the members of the Council of the District of Columbia for consideration of emergency legislation, the Mayor shall make a reasonable attempt to consult with those members of the Council of the District of Columbia not affected by death, destruction, or other perilous conditions, after which the Mayor may extend the emergency executive order for up to 15 days.

(c-1)(1) Notwithstanding subsections (b) and (c) of this section, the Mayor may extend the 15-day November 13, 2023, emergency executive order declaring a public emergency in response to the opioid crisis (Mayor's Order 2023-141) and the 15-day November 13, 2023, emergency executive order declaring a public emergency in response to juvenile crime (Mayor's Order 2023-141) until February 15, 2024. After the extensions authorized by this subsection, the Mayor may extend the emergency orders for additional 15-day periods pursuant to subsection (b) or subsection (c) of this section.

(2) Notwithstanding § 7-2304(b), the Mayor shall comply with all District laws when exercising her authority pursuant to Mayor's Order 2023-141, including those laws stated in Mayor's Order 2023-141 to be subject to waiver, suspension, or modification; except, that

the Mayor may waive the requirements of subchapter IV of Chapter 3A of Title 2.

(3) The Mayor shall, prior to any exercise of the authority granted by this subsection, provide written notice to the Council. Such notice shall include, at a minimum:

(A) Citations to the law or laws being waived;

(B) In any instance where the Mayor is waiving procurement laws, a summary of each proposed procurement, which shall include:

(i) A description of the specific goods or services to be procured;

(ii) The source selection method, including whether the procurement was competitively sourced;

(iii) The contract amount and the source of funds, whether federal or local;

(iv) The name and certified business enterprise status of the proposed awardee; and

(v) An explanation regarding why expedited procurement procedures are necessary to meet the specific need identified.

(c-2)(1) Notwithstanding subsections (b) and (c) of this section, the Mayor may extend the 15-day February 27, 2024, emergency executive order declaring a public emergency in response to the opioid crisis (Mayor's Order 2024-035) and the 15-day February 27, 2024, emergency executive order declaring a public emergency in response to juvenile crime (Mayor's Order 2024-035) while the Opioid Crisis and Juvenile Crime Public Emergencies Extension Authorization Emergency Amendment Act of 2024, passed on emergency basis on March 5, 2024 (Enrolled version of Bill 25-733) [D.C. Act 25-412 expires June 11, 2024] is in effect. After the extensions authorized by this subsection, the Mayor may extend the emergency orders for additional 15-day periods pursuant to subsection (b) or subsection (c) of this section.

(2) Notwithstanding § 7-2304(b), the Mayor shall comply with all District laws when exercising her authority pursuant to Mayor's Order 2024-035, including those laws stated in Mayor's Order 2024-035 to be subject to waiver, suspension, or modification; except, that the Mayor may waive the requirements of subchapter IV of Chapter 3A of Title 2, and part B of subchapter XII-A of Chapter 3 of Title 1.

(3) The Mayor shall, prior to any exercise of the authority granted by this subsection, provide written notice to the Council of any waiver under paragraph (2) of this subsection. The notice shall include, at a minimum:

(A) Citations to the law or laws being waived; and

(B) In any instance where the Mayor is waiving procurement laws, a summary of each proposed procurement, which summary shall include:

(i) A description of the specific goods or services to be procured;

(ii) The source selection method, including whether the procurement was competitively sourced;

(iii) The contract amount and the source of funds, whether federal or local;

(iv) The name and certified business enterprise status of the proposed awardee; and

(v) An explanation regarding why expedited procurement procedures are necessary to meet the specific need identified.

(4) The Mayor shall provide the Council with copies of any grants awarded or contracts entered into using the authority granted by this subsection no later than 15 days after awarding the grant or entering into the contract.

(d) Upon the issuance of any emergency executive order, or a public health emergency executive order, as soon as practicable given the condition of the emergency, the order shall be published in the District

of Columbia Register, in 2 daily newspapers of general circulation in the District of Columbia, and shall be posted in such public places in the District of Columbia as the Mayor determines by regulation.

(e) The Mayor may adopt and implement such rules and regulations as the Mayor finds necessary to carry out the purposes of this chapter, pursuant to the District of Columbia Administrative Procedure Act (§ 2-501 et seq.).

(f) The Mayor may join or enter into, on behalf of the District of Columbia government, regional programs, and agreements with the federal government, neighboring states, and political subdivisions thereof, for the coordination of disaster preparedness programs.