ORAL ARGUMENT NOT YET SCHEDULED

No. 17-7155

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. ASSOCIATION OF CHARTERED PUBLIC SCHOOLS, *ET AL.*,

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia,
No. 1:14-cv-01293-TSC

BRIEF OF COMMUNITY MEMBERS AND ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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September 14, 2018

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties and Amici

Pursuant to Circuit Rule 28(a)(1)(A), Amici Curiae certify that the parties and amici curiae in the case are as follows:

- D.C. Association of Chartered Public Schools
- Eagle Academy Public Charter School
- Washington Latin Public Charter School
- The District of Columbia
- Muriel S. Bowser, in her official capacity as Mayor of the District of Columbia
- Jeffrey S. DeWitt, in his official capacity as Chief Financial Officer of the District of Columbia
- The Council of the District of Columbia
- 21st Century Schools Fund
- Senior High Alliance of Parents, Principals and Educators ("S.H.A.P.P.E.")
- Washington Teachers Union, Local #6, American Federation of Teachers
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- Brian Doyle, Co-Chair, Ward 3 – Wilson Feeder Education Network; DCPS Parent, Hearst Elementary School
- Mary Filardo, Executive Director, 21st Century School Fund
- Tina Fletcher, DCPS Parent; Ward 8 Education Council
- Matthew Frumin, Former Chair, ANC 3E; Former DCPS Parent
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- Nancy Sarah Smith, Takoma Education Campus PTO; Founding Member, Ward 4 Education Alliance

- Faith Swords, Ward 1 Parent; Former HD Cooke PTO President; Co-Founder, Ward 1 Education Collaborative
- Eboni-Rose Thompson, Chair, Ward 7 Education Council; Former Chair, ANC 7F
- Martin Welles, Esq., Vice-President, Hardy Middle School PTO; DCPS Parent; Public Charter School Parent; Ward 6 Resident; Member, PAVE: Parents Amplifying Voice in Education
- Suzanne Wells, Founder, Capitol Hill Public Schools Parent Organization; DCPS Parent, Eliot-Hine Middle School

B. Rulings Under Review

The rulings under review are the September 30, 2015 District Court order and accompanying opinion dismissing one count of Plaintiffs' complaint and the September 30, 2017 order and accompanying opinion granting Defendants' cross-motion for summary judgment on the remaining counts. Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia issued the orders and opinions. The orders and opinions are entries 31, 32, 57, and 58 on the District Court docket and are available in the appendix at JA 116-48 and JA 1005-28.

C. Related Cases

Undersigned counsel are not aware of any related cases.

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GLOSSARY OF ABBREVIATIONS

DCPS	District of Columbia Public Schools
DCPSB	D.C. Public Charter School Board
DGS	Department of General Services
HRA	District of Columbia Self–Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (codified at D.C. Code § 1-201 *et seq.*)
JA	Joint Appendix
OSSE	Office of the State Superintendent
SRA	District of Columbia School Reform Act of 1995, Pub. L. No. 104–134, § 2002, 110 Stat. 1321 (1996) (codified as amended at D.C. Code § 38–1800.02 *et seq.*)
UPSFF	Uniform Per Student Funding Formula

STATEMENT OF IDENTITY, INTEREST IN CASE, SOURCE OF AUTHORITY TO FILE, AND AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Amici are residents of the District of Columbia, current and former District of Columbia Public Schools ("DCPS") parents, and organizations and individuals who are leaders in the effort to ensure that every child in the District of Columbia has a quality public education. Amici have long histories of advocacy for strong public education for all District of Columbia children. They support a strong neighborhood, matter-of-right system, complemented by high quality public school options. Amici believe that quality public education in the District of Columbia can only be achieved when District citizens have input into decisions regarding their children's education. Amici have been advocates for a strong education system in the District, but their ability to continue to do so is threatened by Plaintiff-Appellants' contention in this case that the elected D.C. Council does not have the right under the Home Rule Act to make changes to the School Reform Act and the Uniform Per Student Funding Formula. Amici strongly disagree with Plaintiffs' contention that future changes to District of Columbia education law should solely be in the purview of Congress – a body in which they have no voting representation and extremely limited ability to influence. All parties have consented to the filing of this brief.

Amici are:

- 21st Century Schools Fund
- Senior High Alliance of Parents, Principals and Educators ("S.H.A.P.P.E.")
- Washington Teachers Union, Local #6, American Federation of Teachers
- Thomas Byrd, Ward 8 Education Council; Education Town Hall – We Act Radio
- Brian Doyle, Co-Chair, Ward 3 – Wilson Feeder Education Network; DCPS Parent, Hearst Elementary School
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Amici filed their notice of intent to participate as Amici Curiae on July 19, 2018. Amici certify that (1) no counsel for a party authored this brief in whole or in part, and that (2) no person other than the amici curiae, their members (if

applicable), or their counsel contributed money that was intended to fund the preparation or submission of this brief.

CORPORATE DISCLOSURE STATEMENT

Amici Curiae are individuals or non-profit organizations. They have no parent corporations and do not issue stock.

INTRODUCTION

The Defendants-Appellees' brief demonstrates why this Court should deny Plaintiffs-Appellants ("the Charter Schools") the relief that they seek under a proper construction of the School Reform Act ("SRA").[1] It explains why, even if the SRA as drafted did not authorize the contested categories of funding, the District has the full authority under the Home Rule Act ("HRA")[2] to make adjustments to the SRA to enable the contested funding. The Council amicus brief will likely further show that the Charter Schools' claim that District residents have no power to address the most local of issues – how their children's education is funded – has no basis in law. The District manifestly has the authority under the SRA and the HRA to make decisions on how to fairly and equitably fund public education.

This amicus brief outlines the practical implications of The Charter Schools' requested ruling, explaining that such relief would leave the District with an impossible choice, either to:

- Reduce funding for its matter-of-right system and limit its ability to serve its children and communities with the greatest needs; and/or

[1] District of Columbia School Reform Act of 1995, Pub. L. No. 104–134, § 2002, 110 Stat. 1321 (1996) (codified as amended at D.C. Code § 38–1800.02 *et seq.*).

[2] District of Columbia Self–Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (codified at D.C. Code § 1-201 *et seq.*).

- Increase funding to charter schools when many charter schools already enjoy very significant surpluses.

Further, such a ruling would make the courts the day-to-day arbiter of the propriety of all District of Columbia Public School ("DCPS") and charter school funding in direct contradiction of the strong tradition of local control of education. The underlying rationale for that tradition is equally compelling in the District of Columbia. Similar in some ways to the challenges in other urban school districts, the District faces a distinctive array of education challenges, including:

- Ongoing racial and economic segregation;
- Significant opportunity and achievement gaps;
- A dual-sector system – DCPS and charter – with each sector independently operated and subject to different rules (as just two examples, with charter schools exempt from Freedom of Information and Open Meeting laws, shielding them from transparency and public input);
- Many schools with extremely high concentrations of "at risk" students – students living in poverty and/or falling behind – with the vast majority of those the matter-of-right DCPS schools in low-income neighborhoods[3];
- DCPS managing a shrinking matter-of-right neighborhood system (38 DCPS schools, mostly in low-income neighborhoods, have been shuttered since 2008)[4] as well as an array of specialty and application schools;

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[3] 32 of the 40 public schools in the District that have very high "at-risk" concentrations (70% or more of each school's total population) are DCPS schools, D.C. Office of the State Superintendent of Education ("OSSE") Audit Data, *available at* https://osse.dc.gov/node/1306796.

[4] Emma Brown, *D.C. To Close 15 Underenrolled Schools*, Washington Post, Jan. 17, 2013, https://www.washingtonpost.com/local/education/chancellor-kaya-henderson-names-15-dc-schools-on-closure-list/2013/01/17/e04202fa-6023-11e2-9940-6fc488f3fecd_story.html?utm_term=.087de78ca127.

- Other issues relating to the growing charter sector launched in the mid-1990s and now serving 43,393 students – over 47% of District public school students[5];

- Access to charter schools (and out-of-boundary access to DCPS schools) secured through an on-line lottery in a city with a significant digital divide;

- High levels of midyear mobility – thousands of students either leaving a school and joining another midyear or arriving at a school midyear from out-of-state – with matter-of-right DCPS schools in low-income neighborhoods receiving the vast majority of those students midyear and charter schools experiencing a net reduction in students midyear[6]; and

- DCPS's inability to carry over surpluses from one year to the next to enable it to address contingencies, while charter schools retain the ability to do so and, in the aggregate, have accumulated hundreds of millions of dollars in net assets.

This complex context forms the backdrop for school funding decisions in the District. Not surprisingly, there are fierce debates about how best to address funding (and other issues) in this landscape.

The Charter Schools, however, argue that the District – its families, community groups, and taxpayers – has *no* say in that debate but rather that Congress has established permanent rules and that it falls to the courts to apply those rules. They press their argument, which the District Court rejected and aptly described as "a rather extreme restriction of the District's ability to manage its

[5] The Office of the State Superintendent for Education Audit for the 2017-18 school year shows overall enrollment at 91,537 and charter school enrollment at 43,393. *See* Audit, *supra* n.3.

[6] *See* Report, Mid-Year Student Movement in DC (July 2015), https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/15%2007%2022_Mid-Year_Student_Movement_Final_toPost.pdf.

budget process" (Dist. Ct. Op. at 9, JA 1013), while failing to identify any real-world harm to charter schools from the existing system.

This Court should affirm the District Court's ruling.

ARGUMENT

If the courts were to grant The Charter Schools relief, there are two possibilities: (1) increasing funding to charter schools, where there is no evidence such funding is needed in the aggregate and/or (2) reducing funding to DCPS, which would constrain the District's ability to serve its students and communities with the greatest needs. Meanwhile, such a decision would put the courts on a path to overseeing education spending in the District to determine what may and may not be allowed, a role that would break with traditions of local control and is utterly unwarranted here. Indeed, the law is clear that the District has the full authority to fund schools as it has, and that funding has been quite generous to charter schools.

I. Charter Schools Have Flourished in the District, and the District Has Amended the SRA To Add to Education Funding in Ways That Have Benefited Charter Schools.

Although The Charter Schools paint a portrait of the charter sector being treated unfairly at every turn,[7] the truth is that it has been treated extraordinarily

[7] *See, e.g.*, Init. Brief at 24 (asserting that the District "tilts the playing field in favor of traditional public schools"). Indeed, the Charter Schools' opening brief is significant in how often it implies that the District has tried to undermine the

well and has flourished in the District. As of June 30, 2017, in the aggregate, charter schools had accumulated $336 million in unrestricted cash and equivalents, as well as $481 million in net assets.[8] Each year, these surpluses grow. For example, between June 30, 2016 and June 30, 2017, in the aggregate, charter schools added $41 million in unrestricted cash and cash equivalents.[9]

At the same time, the sector has enjoyed immense student growth. At their launch in the District of Columbia during the 1996–97 school year, charter schools educated a grand total of 160 students; a little over 20 years later, during the 2017–18 school year, that number had skyrocketed to 43,393 – or over 47% of District public school students.[10]

National charter advocates have consistently singled out the District for being friendly to charters. Indeed, the President and CEO of the National Alliance for Public Charter Schools pointed to the District's policy choices in favor of charter schools as leading to what it considers "*the* healthiest charter sector" in the

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SRA or undercut charter schools. *See id.* at 33-34 (arguing that the District's reading of the SRA would allow it to "undermine the public charter school model," either "intentionally or inadvertently," and "frustrate or defeat" the SRA); *id.* at 42 (arguing that the HRA cannot be used to "override or evade" the SRA). They cannot explain how, if District policymakers *were* conspiring against public charter schools, they could fail so spectacularly that national charter advocates rank the District policy environment as best in the nation, as shown below.

[8] 2017 FY Financial Analysis Report, D.C. Public Charter School Board *available at* http://www.livebinders.com/play/play?id=2383674.

[9] *Id.*

[10] *See supra* n.5.

country.[11] Similarly, the Center for Education Reform, another pro-charter school organization, ranked the District of Columbia as the *most* hospitable jurisdiction towards charters schools in the country,[12] and specifically found that the District was the best in the nation when it came to treating traditional public schools and charter schools fairly.[13]

Given this context, it is no surprise that the Charter Schools have not once argued here, or in the District Court, that they have any financial need that goes unmet.[14] Nor have they argued that the charter system as a whole has suffered

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[11] The D.C. Public Charter School Board ("DCPCSB") claims that "DC's public charter schools [are] the healthiest charter sector year after year." DCPCSB 2016 Annual Report, Table of Contents, www.dcpcsb.org/sites/default/files/2016.07.27-dcpcsb-annual-report-single-page.pdf. The National Alliance for Public Charter Schools describes itself as "the leading national nonprofit organization committed to advancing the public charter school movement" and counts among its partners state charter support organizations from throughout the United States. *See* Nat'l Alliance for Pub. Charter Schs., What We Stand For, https://www.publiccharters.org/our-work/what-we-stand-for.

[12] Center for Education Reform, *2015 and 2017 Charter School Law Rankings and Scorecard*, https://www.edreform.com/wp-content/uploads/2017/03/CSLAWS_SCORECARD_2017.pdf.

[13] *Id.* The Center, founded in 1993, counts among its board members the Founder & CEO of Charter Schools USA, Inc. and leaders of various charter schools. *See* Center for Education Reform, Our Board of Directors, https://www.edreform.com/about/board-of-directors/.

[14] Indeed, even in challenging the District Court's conclusion that they lack standing to raise one of their arguments (regarding the District's method for calculating enrollment), the Charter Schools point to abstract notions of "competitor standing," which they admit they borrowed from cases addressing commercial contexts (*see* Init. Br. at 59), rather than to anything in the record showing they have been harmed financially.

financially. Despite consistently referring to a "tilted" playing field, the Charter Schools cannot show that *any* departure from the SRA has resulted in an impact on charter schools' missions, educational operations, or their bottom line. To the contrary, the District has made changes to the SRA – the very thing The Charter Schools claim may not be done – that have benefited charter schools.[15]

For example, until 2004, the SRA required an October audit of enrollment in charter schools and a second audit in March of the school year.[16] The second audit could result in a financial adjustment to reflect enrollment changes. If enrollment increased, a charter school would receive an additional 50% of the annual per-pupil funding for each additional student. But if enrollment decreased, the funding for the school would correspondingly drop by 50% for each student lost.[17] When charter school advocates sought the repeal of this provision of the SRA, the D.C. Council accommodated them.[18]

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[15] *See*, *e.g*., Fiscal Year 2001 Budget Support Act of 2000, D.C. Law 13-172 (2000); Public School Enrollment Integrity Clarification and Board of Education Honoraria Amendment Act of 2004, D.C. Law 15-348 (2005) (codified as D.C. Code §38-1804.03); Fiscal Year 2006 Budget Support Act of 2005, D.C. Law 16-33 (2005); Public Charter School Assets and Facilities Preservation Amendment Act of 2006, D.C. Law 16-268 (2007); Public Education Reform Amendment Act of 2007, D.C. Law 17-9 (2007); Fiscal Year 2012 Budget Support Act of 2011, D.C. Law 19-21 (2011).

[16] SRA, §2403.

[17] *Id.*

[18] "Public Roundtable, Committee on Education, Libraries and Recreation," District of Columbia Office of Cable Television (Dec. 6, 2004),

Given the fact that charter schools have consistently lost students after the October audit, the D.C. Council change to the SRA has enabled charter schools to retain tens of millions of dollars over the course of the following fourteen years associated with students who left their schools midyear that would have been clawed back under the SRA as passed by Congress. OSSE has done reviews in recent years of midyear student mobility. It found that charter schools experienced net declines of between 1330 and 1666 in school years 2011–12, 2012-13 and 2013–14, respectively.[19] Assuming a conservative average per-pupil funding in those years of $12,000, including the facilities allocation described below, a 50% clawback just in these three years would have totaled over $25 million.[20] The District amended the SRA and protected charter schools from such a clawback.

In addition, after the SRA was enacted, the D.C. Council added a facilities allocation to enable charter schools to secure buildings in which to operate. There is no explicit restriction on the use of the facilities allocation to support operating expenses.[21] If the Charter Schools prevailed here, any judicial admonition against the use of any non-formula funds being used to fund operating expenses would

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http://dccarchive.oct.dc.gov/services/on_demand_video/on_demand_december_2004_week_2.shtm.

[19] *See* Report, *supra* n.6.

[20] *See* District of Columbia Proposed F.Y. 2012 Budget, https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/ocfo_gc_dcpcs_chapter.pdf.

[21] D.C. Law 12-207 (1998) (codified as D.C. Code §38–2908).

necessarily apply to charter school use of facilities allocation funds. Charter school audit materials make clear that significant expenditures deemed "occupancy" expenses and linked to the facilities allocation are for things like utilities, maintenance and repairs[22] – precisely the kinds of expenses The Charter Schools claim may only be funded through the UPSFF funds.

To be sure, not every charter school is flourishing financially. But many are. The key point is that the portrait of the charter sector, in the aggregate, as victim is untenable. The District has been accommodating and generous to the charter sector, including modifying the SRA to protect it from funding reductions, and allocating new funding sources for charters and making appropriations outside the UPSFF for individual charter schools such as funding 24-hour vocational training or providing funds for charters to relocate when DCPS building renovations force them to do so.[23]

II. Granting the Charter Schools' Requested Relief Would Constrain the District's Ability To Fully Serve Its Most Vulnerable Students and Communities.

In passing the SRA, Congress made clear it did not want to create a two-tiered system and wanted to ensure funding based on students' needs.[24] Delivering

[22] D.C. Public Charter School Board, School Budgets, Fiscal Audits and 990s, https://www.dcpcsb.org/report/school-budgets-fiscal-audits-and-990s.
[23] The District Defendants' Brief provides a background of these expenditures. *See* Ans. Br. at 19.
[24] *Id.* at 7, 30.

a windfall in the form of increased funding to charter schools (at the expense of other critical District priorities) would advance neither of those goals. Meanwhile, significantly cutting the funding to the matter-of-right DCPS system would utterly undermine both goals and could impose the most severe harm on the District's most vulnerable students and communities.

DCPS matter-of-right neighborhood schools serve both as centers for communities and as a safety net, providing a matter-of-right place to secure an education, including for those less able to take advantage of the on-line lottery or who have had difficulty in school settings. Given this safety net function, DCPS schools often serve a higher proportion of "at risk" students than charter schools.[25] This term applies to students who "are in foster care or homeless, who are receiving welfare benefits or food stamps, or who are performing at least a year behind in high school."[26] While the two systems overall serve similar proportions of "at risk" students, because DCPS schools are the matter of right schools in all neighborhoods, including those with the highest levels of poverty, many of its schools serve populations with the highest concentrations of "at risk" students.

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[25] Michael Alison Chandler, *D.C. Charter Schools Serve Fewer At Risk Students Than Nearby Neighborhood Schools*, Washington Post, Oct. 8, 2015, https://www.washingtonpost.com/news/education/wp/2015/10/08/d-c-charter-schools-serve-fewer-at-risk-students-than-nearby-neighborhood-schools/?utm_term=.4d2fe0b1fe1b.

[26] *Id.*

The District of Columbia's Office of Revenue Analysis found in 2015 that 47 out of 53 charter schools served a smaller proportion of "at risk" students than the DCPS neighborhood schools. More recently, OSSE found in a 2017–2018 audit that nearly 9,000 "at risk" students attend DCPS schools that have concentrations of 70% or more "at risk" students, whereas the charter sector had only 3,000 "at risk" students attending schools with concentrations of 70% or more "at risk" students.[27]

DCPS schools also serve as a midyear safety net for students who either move between schools or arrive from out-of-state midyear. Indeed, thousands of students either leave charters or move into the District from out of state during each school year, and nearly all of those students begin attending their by-right, neighborhood DCPS schools. Other students also leave the District midyear, the net result, though, is that DCPS gains students midyear[28] and experiences significant changes in its school populations. High rates of student mobility challenge and negatively affect the receiving DCPS schools, which most frequently

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[27] DC Office of the State Superintendent for Education, 2017-2018 Audit, supra n.3. DCPS also has schools with significant populations of more affluent students, while the charter sector as a whole serves a significant number of at risk students. However, relatively few charter schools serve a very high at-risk concentrated population, in comparison to DCPS. *See id.*

[28] Between 511 and 890 in School Years 2011-12 through 2013-14, see Report, *supra* n.6.

are in low-income neighborhoods.[29] DCPS schools that receive students midyear do not get UPSFF funds tied to those students (as described above, charter schools that lose students midyear retain the funding associated with those students).

In addition, DCPS must maintain capacity to ensure a matter-of-right system in all communities, and when schools are under-enrolled, the per-pupil costs associated with the operation of those buildings increases. The high cost of operating schools with low enrollments has been a source of significant debate in the District and, as described above, has led to the closure of 38[30] DCPS matter-of-right schools, mostly in low-income communities.

Administering a judicially-imposed cut to DCPS funding could make it more difficult for DCPS to fully serve its significant number of schools, by far the most schools in the District, that have very high concentrations of at-risk students; it could make it more difficult for DCPS to contend with the unfunded challenges of midyear mobility, which buffet in particular DCPS schools in low-income communities; and it could put more schools at risk of closure once again, creating

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[29] *See id.*; *see also* Soumya Bhat, *Five Things You Should Know About Student Mobility in DC*, DC Fiscal Policy Institute, https://www.dcfpi.org/all/five-things-you-should-know-about-student-mobility-in-dc/.

[30] Emma Brown, *D.C. to close 15 unenrolled schools*, Washington Post, Jan. 17, 2013, https://www.washingtonpost.com/local/education/chancellor-kaya-henderson-names-15-dc-schools-on-closure-list/2013/01/17/e04202fa-6023-11e2-9940-6fc488f3fecd_story.html?utm_term=.f4b7d7913735&noredirect=on.

an even greater divide in the educational and community experience between our low-income and more prosperous communities.

III. Granting the Charter Schools' Relief Would Lead to Endless Litigation About District School Funding Decisions.

The District's approach has been more than fair to charter schools and has preserved a local say over the quintessentially local question of school funding. "No single tradition in public education is more deeply rooted than local control over the operation of schools." *Chiras v. Miller*, 432 F.3d 606, 611 (5th Cir. 2005) (quoting *Miliken v. Bradley*, 418 U.S. 717, 741 (1974)). And courts have recognized that "local control over the educational process affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *see also Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."). Throughout the country, local school boards retain responsibility over this question.

Congress passed the SRA against this backdrop of community control. Indeed, the legislative history shows that Congress decided *against* wresting control from the local community, as is often done in a state takeover situation, noting: "When local school districts in other jurisdictions have encountered

trouble often a State government stepped in to take control, *returning authority to the local school district when the problem was solved or the crisis passed.* The Nation's Capital does not have the luxury of another level of government to turn to, except for the Federal Government." S. Rep. 104-144, at 6 (1996). Rather than taking authority from the District, even temporarily, Congress decided to set out a structure, including the funding formula that was created by local experts, to *guide* the community's future decision-making. *See id.* ("Needed changes . . . must come from the local community . . . What the Congress can do . . . is to create a structure within which change and reform will take place."); H.R. Rep. 104-455, at 146 (1996) (Conf. Rep.) (the funding formula "will clarify and focus decisions regarding funding for public education around students' needs"). Indeed, the SRA was modeled on legislation prepared by the D.C. Council. *See* H.R. Rep. No. 104-455 at 141 (citing "debate, discussion, and negotiation from the local school level to the Congress regarding the amount, shape and pace of education reform necessary"). In the process, Congress declined to define "operating expense."

The Charter Schools now make two fundamental claims. First, that Congress required that no operating expense may be funded with non-UPSFF funds. And, second, that certain expenses must be deemed operating expenses. If the Court were to find for the Charter Schools on the first question, given that Congress did not define operating expenses – it would fall to the courts to

determine whether funding provided outside the UPSFF constituted operating expenses and what should not be. This is not a purely hypothetical issue. For example, the facilities allocation is not UPSFF funding. Would charter schools be able to use it for operating expenses? A ruling for The Charter Schools could result in courts being required to scrutinize charter school financial records to determine if any dollars were provided under the facilities allocation in excess of those required to acquire facilities that could have been or were used to fund operating expense.

Similarly, here, the challenge is to certain District spending in support of DCPS, but needs are constantly shifting. What happens if a critical unforeseen need arises requiring prompt attention and funding? The District's response to such a situation could lead to a lawsuit in which a court would be asked to determine if emergency funding was forbidden under an ill-conceived holding in this matter.[31] There are many good reasons Congress left the District with local control over its schools. One, however, is that local control allows for speed and flexibility in responding to unforeseen circumstances. An adverse finding here would mean that responding to changing circumstances would require action, in effect, by a 535-person school board made up of all members of Congress.

[31] Put another way, the District Court pointedly asked counsel for the Charter Schools at oral argument, if a DCPS school burned down and had to be replaced for millions of dollars, would that emergency funding have to result in a windfall in the same amount to the charter school sector? *See* JA 961.

District residents, who send their children and their tax dollars[32] to the schools, must and do have a meaningful voice through the D.C. Council in managing the quintessential local issues surrounding education. This Court should view with skepticism the alternative notion – that Congress intended to require that any changes to a 50-page law governing one district's schools must pass both houses of Congress, subject to a presidential veto, or that any D.C. Council non-UPSFF allocation to any Local Education Agency could be subject to court challenge on the grounds that it amounts to funding of operating expenses.

IV. The Funding for DCPS to Which the Charter Schools Object Represents a Reasonable Response to Need and in No Way Harms Charter Schools.

The Charter Schools object to four categories of funding provided to DCPS outside the UPSFF: (1) funding through the Department of General Services ("DGS") for building maintenance and repairs; (2) funding for the Teachers' Retirement Fund; (3) emergency midyear funding; and (4) funding allegedly related to a difference in formula allocations with DCPS funding based on projections and charter funding based on the October Audit. In each case the

[32] District citizens devote on the order of 1 in 4 of their locally raised tax dollars to public education. In 2018, the District spent $2.137 billion on the public education system, which includes charter schools, out of locally raised dollars of $7.745 billion. *See* FY 2018 Proposed Budget, Executive Summary, Tbl. 1-2a, https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/DCOCFO_FY19_Budget_vol_1.pdf.

funding provided to DCPS outside of the UPSFF represents a reasonable response to need.

DCPS is tasked with maintaining a matter-of-right set of schools in every community in the city. Even when those schools have low enrollment, it is important that they be maintained in order to serve students who arrive midyear and accommodate potential enrollment growth over time. Moreover, DCPS neighborhood schools serve as centers for the broader community. Any additional funding provided through DGS to meet these important needs would be eminently reasonable. Meanwhile, it makes no sense to require the District to forego the investment, take it from funds meant to educate children, or to double the expense by providing an equal amount to charter schools that do not have an obligation to maintain capacity for future needs or serve the local communities.

Funding for the Teachers' Retirement Fund maintains the soundness of that fund for current and future retirees, some of whom have taught or do teach in charter schools. Protecting the economic security of District seniors, particularly those who worked in front-line public service as teachers, is appropriately a high priority for the District. The idea that if an actuary finds the teacher retirement fund requires an infusion, the District must choose between stabilizing the fund and either taking dollars intended to be used in its classrooms or providing supplemental funding to charter school is misguided.

While it may be the case that the District has provided funding midyear to address emergencies in the DCPS system, the suggestion that it may not do so underscores the "Alice in Wonderland" quality of the Charter Schools' requested relief. As described above, can it really have been anyone's intention that in the face of unforeseen circumstances the District could not act to protect the interests of its children, but rather would either have to double the cost by providing funds to others not facing the contingency or get Congress to undertake emergency measures? Charter schools, meanwhile have the capacity to accumulate cash and assets to address unforeseen needs (and where the Council has seen a need, it has also stepped in with support to charter schools[33]). This is not to suggest that the answer is for DCPS to retain funds from year-to-year which would violate current law, rather it is to suggest that in the rare circumstances in which significant DCPS needs arise based on unforeseen circumstances, it is perfectly reasonable for the Council to provide needed funding.

Finally, the fact that DCPS budgeting is based on projected enrollment and charter funding on audited enrollment also is sensible. As described above, enrollment shifts during the course of the year. DCPS enrollment consistently grows, charter enrollment consistently shrinks.[34] Requiring that funding for both be based on the October audit would ignore the differences between the DCPS

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[33] *See* Ans. Br. at 19; *supra* Section I.
[34] *See* Report, *supra* n. 6.

matter-of-right system and charter schools, inevitably underfunding DCPS and overfunding charter schools. Indeed, the approach taken, particularly after the repeal of the March clawback described above, is generous to charter schools allowing them to keep funds associated with students who leave midyear, including both UPSFF and facilities allocation funds. The "one-size-fits-all" approach the Charter Schools say is embedded in the SRA cannot be what was required. Indeed, in this area, the Council has already stepped in to adjust the SRA rules to the benefit of charter schools and any effort to strike the proper balance inevitably would require Council action and flexibility.

V. **The D.C. Council's Approach is the Only Reading That Harmonizes the HRA and the SRA.**

While the Charter Schools advocate an approach that would read the SRA to remove *all* authority from the District,[35] in conflict with the Home Rule Act that has governed the District's lawmaking for decades, the District's past approach reconciles the two statutes. The very purpose of the HRA is to "relieve Congress of the burden of legislating upon essentially local District Matters," as The Charter Schools themselves acknowledge. Init. Br. at 4 (quoting Pub. L. No. 93-198, § 102, 87 Stat. 774, at 777). In the past four decades, the Act has worked as intended—the District has had the right to legislate regarding local matters, while

[35] *See* Dist. Ct. Op. at 9, JA 1013 ("Plaintiffs' interpretation would be a rather extreme restriction of the District's ability to manage its budget process with respect to any and all educational spending.").

Congress has retained the ultimate authority which it can exercise through rejecting or further refining District legislation.[36] The Act includes a number of express limitations on the District's right of self-government, principally a restriction on the District's legislative authority "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." D.C. Code § 1-206.02(a)(3).[37] Nowhere does the HRA limit the authority of the District of Columbia government to alter a law passed by Congress subsequent to Home Rule that is applicable solely to the District of Columbia, however. If the District were held to lack authority to refine the SRA, the burden of legislating with respect to schools would be returned squarely to Congress's shoulders.

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[36] Under the HRA, Congress has thirty days to review and override District legislation, including budgets passed by the D.C. Council. *See* D.C. Code § 1-206.02(c)(1). This specific mechanism differs from general congressional "inaction," in the face of agency decisions, rendering inapposite the cases the Charter Schools say undermine an argument that Congress has approved the District's changes to the SRA. *See* Init. Br. at 53; *see also Barnes v. Dist. of Columbia*, 611 F. Supp. 130, 135 (D.D.C. 1985) (citing Congress's "implicit approval" of District legislation by inaction during the thirty-day period).

[37] Other provisions explicitly limit the District of Columbia Council's ability to legislate to amend the HRA, D.C. Code §1-206.02(a), to impose taxes on property of the United States or any states, *id.* at §1-206.02(a)(1), to legislate regarding public credit, *id.* at §1-206(a)(2), the D.C. courts, *id.* at §1-206.02(a)(4), commuter taxes, *id.* at §1-206.02(a)(5), building heights, *id.* at § 1-206.02(a)(6), the Mental Health Commission, *id.* at §1-206.02(a)(7), federal courts, *id.* at §1-206.02(a)(8), criminal laws and procedure, *id.* at §1-206.02(a)(9), and various other federal entities, *id.* at §1-206.02(b).

Nor does the SRA itself contain any provision showing that Congress sought to depart from the HRA framework. Instead, as the District Court concluded, the SRA shows that Congress "did not intend to take over the D.C. public school system." *See* Memorandum Opinion, JA 138. The SRA directs actions to be taken by local District officials and left significant decisions – including calculation of the funding formula itself – to District officials. Significantly, the SRA stands in stark contrast to the D.C. Financial Responsibility and Management Assistance Act, passed by the same Congress in the same year, which *does* contain language expressly foreclosing District action. Section 108 of that Act amended the HRA to provide that "[t]he Council shall have no authority . . . to . . . enact any act, resolution, or rule with respect to the [Control Board] established under the [Financial Responsibility Act]." D.C. Code §1-206.02(a)(10). Accordingly, with respect to the Financial Responsibility Act, Congress limited the Council's authority to legislate on local matters. It made no such exception when it passed the SRA. The HRA, in practice, results in a system under which Congress does have the final say, but it cannot be deemed to have preempted District action in an area unless it very clearly indicates its intention to have done so. It did so in the Financial Responsibility Act; the very same Congress did *not* do so in the SRA. Adopting the Charter Schools' incorrect interpretation of the SRA and HRA would restrict the D.C. Council's ability to oversee local schools, strip the Council of the

flexibility needed, and granted under the SRA, to pursue education justice in the District, and potentially result in worse outcomes for students in the District.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's judgment.

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Respectfully submitted,

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This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 5,830 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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