NOT YET SCHEDULED FOR ORAL ARGUMENT

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.*,
APPELLANTS,

v.

DISTRICT OF COLUMBIA, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.— The appellants are D.C. Association of Chartered Public Schools, Eagle Academy Public Charter School, and Washington Latin Public Charter School. The appellees are the District of Columbia, Muriel S. Bowers, in her official capacity as Mayor of the District of Columbia and Jeffrey S. DeWitt, in his official capacity as Chief Financial Officer of the District of Columbia. Noticed *amici curiae* are the Council of the District of Columbia, Washington Lawyers Committee for Civil Rights and Urban Affairs, Senior High Alliance of Parents, Principals, and Educators (S.H.A.P.P.E), Mary Filardo, Matthew Frumin, Terry Goings, Ron Hampton, Cathy Reilly, Victor Reinoso, Eboni-Rose Thompson, Martin Welles, Suzanne Wells, The 21st Century School Fund, Nancy Sarah Smith, Faith Swords, Mark Simon, Iris Jacob, Brian Doyle, Rebecca Reina, Tina L. Fletcher, Thomas Byrd, and Michael Grier.

B. *Ruling under review*.— The District Court rulings under review in this appeal are the District Court's September 30, 2015 Order granting Defendants' Motion to Dismiss Count II of Plaintiffs' Complaint and Memorandum Opinion in support thereof and September 30, 2017 Order granting summary judgment to Defendants (and denying Plaintiffs' Motion for Summary Judgment) and Memorandum Opinion in support thereof.

C. *Related cases*.— Undersigned counsel are not aware of any related cases.

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GLOSSARY

DCPS	District of Columbia Public Schools
FRMMA	District of Columbia Financial Responsibility Management Assistance Act of 1995, Pub. L. 104-8, 109 Stat. 97 (Apr. 17, 1995)
HRA	District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act"), Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973)
HRA Legis. History	Home Rule for the District of Columbia, 1973-1974, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93–198, 93d Cong., 2d Sess. (1974).
JA	Joint Appendix
SRA	District of Columbia School Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-107 (Apr. 26, 1996)
UPSFF Act	Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998, effective Nov. 20, 1998 (D.C. Law 12-207; D.C. Official Code § 38-2901 *et seq.*)

INTRODUCTION AND INTERESTS OF AMICUS CURIAE

Amicus curiae is the Council of the District of Columbia ("Council"),[1] created pursuant to the District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act") and vested with the District of Columbia's ("District") legislative authority.[2] The Council's interest in this matter is to preserve and defend its powers as the District's only democratically elected legislature.

In 1996, Congress passed the District of Columbia School Reform Act of 1995 ("School Reform Act"), which created a framework for establishing public charter schools ("charter schools") in the District.[3] The law also created a framework for funding the operating expenses of District of Columbia Public Schools ("DCPS") and charter schools, but left establishment of an actual funding formula to the District.[4] Pursuant to the section 2401 of the School Reform Act ("section 2401"), the Council passed the Uniform Per Student Funding Formula for

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[1] The parties consented to submission of this brief. No party counsel has authored this brief in whole or in part; no party, party counsel, or person other than Amicus has contributed money to prepare or submit the brief.

[2] HRA, Pub. L. 93-198; 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 *et seq.*).

[3] SRA § 2201 *et seq.*, (codified as amended at D.C. Code § 38-1802.01 *et seq.*).

[4] *Id.* § 2401 *et seq.*

Public Schools and Public Charter Schools Act of 1998 ("UPSFF Act").[5] The District has developed budgets for DCPS and charter schools pursuant to the UPSFF Act and its amendments for two decades.

Appellants argue that the District has violated section 2401 by unequally funding DCPS and charter schools and, in doing so, contravened the "exclusive authority" of Congress to legislate for the District. Appellants base this claim upon their novel theory that the Home Rule Act prohibits the Council from amending any local District laws Congress enacted after January 2, 1975, the effective date of title IV of the Home Rule Act (also known as the District's Charter). This theory finds no support in the text or purposes of the Home Rule Act.

The broad legislative authority Congress delegated to the Council in the Home Rule Act includes the ability to pass and amend local congressional laws. Congress may revoke, modify, or alter that delegation by expressly or implicitly amending the Home Rule Act.[6] However, neither the text, legislative history, nor context in which Congress enacted the School Reform Act indicate that Congress intended to prohibit the Council from amending that law or enacting budgetary measures consistent with its authority under the Home Rule Act.

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[5] D.C. Law 12-207 (1998) (codified as amended at D.C. Code § 38-2901 *et seq.*). Unless otherwise provided, the D.C. Laws and committee reports cited herein are available at http://lims.dccouncil.us/.

[6] *See infra* Part I.

Reliance on preemption principles to determine the validity of the challenged Council actions, as the district court did, jeopardizes the Council's powers by treating the Council as an executive agency rather than a co-equal legislature with Congress. The Council therefore seeks to provide the Court with a framework for determining the validity of Council action, one that respects Congress's plenary authority over the District and also preserves the expansive legislative authority granted to the Council in the Home Rule Act.

The Council agrees with the district court and Appellees that the UPSFF Act and budgetary actions of which Appellants complain are consistent with the School Reform Act. Therefore, the issue of whether the School Reform Act amended the Council's authority under the Home Rule Act need not be reached. However, Appellants' suggestion that the broad legislative and budgetary authority delegated to the Council in the Home Rule Act is far narrower than anyone heretofore believed warrants the Council filing this brief. Accepting Appellants' extreme position on the scope of the Council's legislative powers would contravene the twin paramount purposes of the Home Rule Act: "to grant to the inhabitants of the District of Columbia powers of local self-government . . . and . . . relieve Congress of the burden of legislating upon essentially local District matters."[7] Furthermore, it would hamstring the Council's ability to craft legislation and budgets responsive

[7] HRA § 102.

to the needs of the District's students and to meet the overarching budgetary realities facing the District government. For the reasons stated herein, this Court must reject Appellants' arguments.

ARGUMENT

I. Congress delegated its legislative authority to the Council.

Article 1, section 8 of the U.S. Constitution vests Congress with plenary authority over the District. When Congress legislates for the District pursuant to this authority, its actions are akin to those of a state legislature, and its laws are of local not federal character.[8] In 1973, Congress passed the Home Rule Act. In that law, Congress delegated the full scope of its legislative authority over the District to the Council, subject to express limitations and Congress's authority to alter, revise, or revoke the Council's authority at any time.[9]

Section 302 of the Home Rule Act contains Congress's broad delegation of legislative authority to the District; section 404(a) vests that authority in the Council. Both provisions subject the grant of legislative authority to the limitations in title VI of the act.[10] As discussed in Part I.B., *infra*, title VI reserves for Congress the power to legislate for the District at any time, including the ability

[8] *See e.g., Brown v. United States*, 742 F.2d 1498, 1502 (D.C. Cir. 1984) (en banc).

[9] *See* HRA §§ 302, 404(a), 601, 602(a); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953).

[10] *See* HRA §§ 302, 404(a).

to amend or repeal Council laws;[11] it enumerates specific limitations on the Council's otherwise broad legislative powers, including a prohibition against enacting, amending, or repealing *non-local* laws;[12] and it requires Council enactments to undergo a 30-day congressional review period before taking effect, during which Congress may disapprove a measure.[13] But for these limitations, the Council's legislative authority under the Home Rule Act is coextensive with Congress's legislative authority under the Constitution.[14] This authority includes the power to amend local District laws, whether passed by Congress or the Council.[15] Nothing in section 302, 404(a), or title VI limits the Council's authority to amend post-home rule local congressional laws.

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[11] *Id.* § 601.

[12] *Id.* § 602(a)(3).

[13] *Id.* § 602(c).

[14] *See, e.g., Heller v. D.C.*, 670 F.3d 1244, 1251 (D.C. Cir. 2011) (citing *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics,* 441 A.2d 889, 903 (D.C.1981) (en banc) (Council's legislative power "limited only by specified exceptions and by the general requirement that legislation be consistent with the U.S. Constitution and the Home Rule Act")).

[15] *See* HRA §§ 302, 601, 602(a)(3); *see also Noble v. U.S. Parole Com'n*, 82 F.3d 1108, 1113 (D.C. Cir. 1996) (presuming that a Council law may supplant a congressional law in the D.C. Code).

A. Home Rule Act section 717(b) is not a limitation on the Council's authority.

Appellants argue that Home Rule Act section 717(b) prohibits the Council from amending local congressional laws passed post-home rule.[16] This argument is wholly unsupported. Section 717 contains transition provisions, captured under the heading "Status of the District."[17] Subsection (a) provides for the continuation of the District as a corporate body; subsection (b) provides for the continuation of District laws and regulations in force before the effective date of the Home Rule Act, subject to the Council's powers to amend or repeal such laws; and subsection (c) provides for the continuation of the District's geographic boundaries.[18]

Appellants argue that the Court should infer, from the fact that section 717(b) provides that the Council *may* amend local laws that Congress passed pre-home rule, that the Council *may not* amend local laws that Congress passed post-home rule.[19] Such an inference strains statutory construction to an illogical extreme.[20] Section 717(b) states, in pertinent part: "No law or regulation which is

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[16] Appellants' Br. 52.

[17] HRA § 717. As Appellants point out, "[t]he heading of a statutory provision is a 'familiar interpretive guide[].'" Appellants' Br. 30 (quoting *Yates v. United States*, 135 S.Ct. 1074, 1083 (2015)).

[18] HRA § 717.

[19] Appellants' Br. 5.

[20] *See D.C. v. Carter*, 409 U.S. 418, 432 (1973) ("[W]e [are] not at liberty to recast [a] statute to expand its application beyond the limited reach Congress gave it.").

in force on the effective date of title IV of this Act shall be *deemed* amended or repealed by this Act . . . but any such law or regulation may be amended or repealed by act or resolution as authorized in this Act, or by Act of Congress."[21] The natural reading is that all laws or regulations in force as of the effective date would remain in force unless amended or repealed by the Council or Congress. The word "deemed" in the first clause of section 717(b) creates a conclusive presumption that then-existing District laws would remain unchanged.[22] Congress delegated to the Council legislative authority to amend and repeal congressional enactments in section 404(a). It therefore needed to clarify that the first clause of section 717(b) does not prohibit the Council from exercising the authority granted to it in section 404(a) to amend or repeal local laws.[23] The Court must refrain from inferring a limitation on Congress's broad delegation of legislative authority to the Council in section 404(a) from section 717(b)'s reference to that delegation.[24] Home Rule Act sections 302 and 404(a) expressly cross-reference the limitations on the Council's power in title IV. Neither references section 717(b).

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[21] HRA § 717(b) (emphasis added).

[22] *See, e.g,. Ohio Power Co. v. FERC*, 954 F.2d 779, 783 (D.C. Cir. 1992).

[23] *See Loving v. I.R.S.*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) ("[L]awmakers . . . sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure.").

[24] *Maryland & District of Columbia Rifle & Pistol Ass'n, Inc. v. Washington*, 442 F.2d 123, 127 (D.C. Cir. 1971) ("An intention to whittle down a law broadly written is hardly to be inferred where a natural construction is neither ludicrous nor obviously contrary to the statutory objective.").

Contrary to Appellants' assertions, nothing in the text of the Home Rule Act distinguishes between the Council's authority to amend local congressional laws depending on whether they were passed pre- or post-home rule.

B. The Council's power to pass and amend local laws is subject to congressional withdrawal and disapproval.

Contrary to Appellants' assertions, the fact that Congress retains plenary authority over the District does not mean that every time it acts as the District's local legislature it effectively sidelines the Council. Such a "conclusion would run contrary to the very purpose of the Home Rule Act" and saddle the District with immutable, potentially unworkable laws pending future congressional action.[25] Rather, Congress's reservation of power in section 601 means that, in addition to legislating for the District, Congress may, at any time, revise, alter, or revoke, *i.e.* withdraw, the legislative authority granted to the Council under section 404(a).[26] Congress further exercises its plenary authority over the Council through disapproval of specific acts, either by exercising its section 602(c) disapproval authority or by amending or repealing Council laws pursuant to section 601. Under this framework, the Council may pass any local law, even one that amends a

[25] Dist. Ct. Op., JA 131.

[26] *John R. Thompson Co.*, 346 U.S. at 109.

congressional law; provided, that Congress has not withdrawn the Council's authority to do so, and subject to congressional disapproval.

The legislative history of the Home Rule Act and post-home rule congressional practices support this framework for analyzing the validity of Council action. During congressional debate on the Home Rule Act, proponents explained that the Council remained "subordinate to congressional disapproval of local legislation."[27] Opponents of expansive Council authority warned that if Congress exercised its disapproval authority a "legislative dance" could ensue between Congress and the Council, which "could be terminated only by Congress specifically forbidding the Council to pass any act on such subject again."[28] This did not concern proponents, who explained that Congress could override wayward Council actions by passing a new statute and making that statute unamendable.[29] This explanation demonstrates that Congress contemplated legislating for the District post-home rule, and understood that it could disapprove a particular Council action, but in order to *permanently* prohibit the Council from amending a

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[27] HRA Legis. History 1644 (Committee response to dissenting position) (ECF No. 45-4).

[28] *Id.* at 1561; *see also id.* at 1773-74 (statement of John Hogan, House Minority Counsel) (". . . .[Y]ou would have this back and forth between the Congress and the local government until one or the other either gave up or the Congress put a provision in the law that they passed that no longer could the city government act in a particular area.").

[29] *Id.* at 620.

local congressional enactment, it must affirmatively withdraw the Council's authority under the Home Rule Act.

Congress has exercised its disapproval authority over the last half century and occasionally withdrawn Council authority. For example, Congress has twice disapproved Council efforts to impose a residency requirement on all District employees.[30] It has amended the District's Human Rights Act to exempt religiously affiliated universities from that law's prohibition against discrimination on the basis of sexuality.[31] Congress repeatedly attaches riders to its appropriations laws that prohibit various District laws from taking effect or being implemented, which disapprove a particular law but also have the cumulative, practical effect of withdrawing Council authority to act in an area.[32] In the District of Columbia Financial Responsibility and Management Assistance Act of 1995("FRMAA"), Congress prohibited the Council from amending that law by adding to the list of express limitations on the Council's authority in Home Rule Act section 602(a) and also implicitly amended the Council's budgetary authority under Home Rule

[30] *See* Pub. L. No. 100-462 § 141, 102 Stat. 2269 (1988) (conditioning District appropriations on Council amendments to D.C. Law 2-139 (1978)); Pub. L. No. 105-277 § 153, 112 Stat. 2681-146 (1998) (repealing D.C. Law 12-138 (1998)).

[31] Pub. L. No. 101–168 § 141, 103 Stat. 1284 (1989).

[32] *See, e.g.*, Pub. L. No. 106-113 § 167(b), 113 Stat. 1530 (1999) ("The Legalization of Marijuana for Medical Treatment Initiative of 1998 . . . shall not take effect."); Pub. L. No. 114-113 § 809(b), 129 Stat. 2489 (2015) (prohibiting the District from using appropriated funds to "enact any law, rule, or regulation to legalize . . . the possession, use, or distribution" of controlled substances).

Act section 446.[33]

C. Preemption principles do not govern the validity of Council action vis-à-vis local congressional action.

Appellants argument that section 2401's funding formula is the exclusive mechanism for funding DCPS and charter schools loosely approximates an argument of field preemption. The district court rejected this argument, but drew on preemption principles this Court enunciated in pre-home rule cases to uphold the District's actions. Both analyses are incorrect. Under the regime described above, the question is not whether section 2401 preempts subsequent Council action but whether Congress has withdrawn the Council's authority to amend that law.

Historically, this Court applied preemption principles to determine the validity of District *regulations* in the face of congressional enactments, analogizing the District to a municipality without home rule and Congress to a parent state.[34] In those cases, the question was whether the District's enactment conflicted with Congress's.[35] Drawing on principles of agency deference, this Court concluded

[33] Pub. L. No. 104-8 § 108(b), 109 Stat. 107 (1995) (amending HRA § 602(a)); *id.* § 202(c)(2) ("Notwithstanding the first sentence of section 446 of the District of Columbia Self-Government and Governmental Reorganization Act . . . "); *see Shook v. District of Columbia Fin. Responsibility and Mgmt. Auth.*, 132 F.3d 775, 780 (D.C. Cir. 1998).

[34] *See Rifle & Pistole Ass'n*, 442 F.2d at 129-30.

[35] *See id.* at 130; *Firemen's Ins. Co. of Wash., D.C. v. Washington*, 483 F.2d 1323, 1329 (D.C. Cir. 1973). Even under this analysis, this Court rejected Appellants' argument that congressional

that the District may legislate interstitially to fill the gaps in Congress's statutory scheme.[36] This is the reasoning that the district court adopted below.[37] Although the Council agrees with the district court's conclusion, its reliance on pre-home rule act cases was misplaced. There was a time when the District functioned much like a non-home rule municipality or an executive agency as an implementer, rather than maker, of District laws. The Home Rule Act changed that. It vested the Council with *lawmaking* authority.[38] There is no room for a preemption analysis under the local legislative power-sharing relationship the Home Rule Act established between Congress and the Council.[39] Rather, the relevant analysis is whether a local congressional enactment withdraws the Council's *legislative* authority.

Congress recognizes that preemption principles no longer control its relationship with the Council post-home rule. In the FRMAA, Congress amended

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action on a subject matter precludes District regulation on the same subject. *See Rifle & Pistole Ass'n*, 442 F.2d at 130.

[36] *Compare Firemen's Ins. Co.*, 483 F.2d at 1329 (authorizing District to fill congressional gaps) *with Zuni Public School Dist. No. 80 v. Dep't of Ed.*, 550 U.S. 81, 90 (2007) (explaining agency's gap-filling authority).

[37] Dist. Ct. Op., JA 1021-22.

[38] *See, e.g, Convention Ctr. Referendum Comm.*, 441 A.2d at 910 (explaining that the District has two local legislatures, the Council and Congress and "the Council's ordinary legislation is no less 'legislative' because of the congressional layover required").

[39] The Council does not challenge application of preemption principles when a Council law conflicts with a *federal* law. *See* HRA § 602(a)(3); *Don't Tear It Down, Inc. v. Penn. Ave. Dev. Corp.*, 642 F.2d 527, 533-34 (D.C. Cir. 1980).

Home Rule Act section 602(a) to prohibit the Council from taking any action with respect to the congressionally created Control Board.[40] Congress also amended the School Reform Act to nullify conflicting provisions of a Council-passed charter school law.[41] If preemption principles continued to govern, these actions would have been superfluous. Moreover, application of preemption principles to Council laws would invalidate Council amendments to post-home rule congressional enactments in areas ranging from discrimination against LGBTQ individuals,[42] to the qualifications of the D.C. Inspector General,[43] to the hiring of District employees.[44] The Supreme Court has recognized the singular nature of the District among our nation's government structures.[45] Accordingly, Council action must be measured against the authority granted to it and the limitations placed on it under the Home Rule Act, not cases and analogies that pre-date that law.

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[40] FRMAA § 108(b)(2).

[41] Pub. L. No. 106-522 § 120(b), 114 Stat. 2462 (2000) (prohibiting inconsistencies with the SRA involving "the establishment, administration, or operation of public charter schools" but not school budgets); *see* H.R. Rep. No. 106-786, at 68 (2000).

[42] *See* D.C. Law 20-266 § 3(a) (2015) (repealing Pub. L. No. 101–168 § 141, 103 Stat. 1284 (1989)); *see also Clarke v. U.S.*, 915 F.2d 699, 700 (D.C. Cir. 1990) (documenting "legislative dance" over District's Human Rights Act).

[43] *See* D.C. Laws 15-26 (2003) & 20-237 (2015) (amending § 208(a)(1)(D) of D.C. Law 6-85 (1986), which was added by FRMAA § 303(a)).

[44] *See* D.C. Law 17-108 § 203(d)(1)(B) (increasing the length of a District employee residency requirement from 5 years, as added by Pub. L. No. 101-168 § 110B(b), 103 Stat. 1277 (1989), to 7 years).

[45] *See D.C. v. Carter*, 409 U.S. at 432; *Firemen's Ins. Co.*, 483 F.2d at 1328.

II. Section 2401 did not withdraw the Council's authority to amend that law or to pass supplemental budgetary measures exclusively for DCPS.

Appellants concede that section 2401 left the task of creating a schools funding formula to the District.[46] Pursuant to section 2401 and Home Rule Act section 404(a), the Council passed the UPSFF Act, which created a uniform formula for establishing schools' annual operating budgets on a per-student basis.

A. The Council passes schools budgets pursuant to the UPSFF Act and its Home Rule Act authority.

As Appellees' brief details, the UPSFF Act permits teachers' retirement and facilities maintenance to be budgeted outside the funding formula.[47] The UPSFF Act became effective March 26, 1999, following the 30-day congressional review period, during which Congress took no action to disapprove the law. The District has formulated DCPS and charter school budgets under the UPSFF Act for nearly 20 years. It has made numerous amendments to the law to better tailor it to the specific needs of the District's schools. During this time, Congress has had ample

[46] Appellants' Br. 11.

[47] *See* Appellees' Br. 52; D.C. Law 12-207 § 103(b) ("[The formula] shall not apply to funds . . . appropriated to other agencies and funds of the District government.").

opportunity to exercise its disapproval authority in relation to the UPSFF Act and schools' budgets formulated thereunder, but has done so only once.[48]

The Council approved mid-year supplemental appropriations for DCPS without complementary funding to charter schools according to its Home Rule Act and congressionally authorized budgetary authority. Sections 442(c) and 446 of the Home Rule Act authorize the District to seek additional mid-year appropriations from Congress through supplemental budget requests. In 1995, before passage of the School Reform Act, Congress amended the Home Rule Act to define the District's authority to reprogram funds from one agency to another mid-fiscal year.[49] Beginning in the early 2000s, Congress granted the District greater appropriations flexibility and eventually authorized the District to increase its annual congressional appropriation consistent with local revenue collections or the prior year's surplus and to obligate and expend such additional sums in accordance with Council laws.[50] The Council took the supplemental funding

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[48] H.R. Rep. No. 108-214, at 24 (2003) (rejecting District's annual budget request to increase DCPS teacher salaries "outside the per pupil allocation funding formula" and achieve a proportional increase for charter school teachers through federal funds).

[49] *See* FRMAA § 301(b).

[50] *See*, *e.g.*, Pub. L. No. 107-96, 115 Stat. 933 (2001); Pub. L. No. 108-335 § 331, 118 Stat. 1345 (2004); Pub. L. No. 111-8 §§ 816-17, 123 Stat. 669 (2009).

actions of which Appellants complain with congressional approval and pursuant to the Home Rule Act and foregoing congressional authorizations.[51]

The School Reform Act is a local District law. The UPSFF Act is a local District law, passed after the School Reform Act. To the extent there is conflict, under traditional principles of statutory construction, the UPSFF Act should control as the later-in-time, more specific enactment.[52] However, Appellants contend that payment of teachers' retirement and facilities maintenance outside the funding formula, as authorized by the UPSFF Act, violates the section 2401 and its purported mandate of absolute funding parity between DCPS and charter schools. They also contend that the Council's approval of mid-year supplemental appropriations to DCPS without complementary funding to charter schools section 2401.

Appellants do not argue that Congress has ever disapproved the Council actions of which they complain. Thus, for Appellants' propositions to be true, the Court must conclude that section 2401 expressly or implicitly withdrew the Council's legislative authority to pass the allegedly conflicting UPSFF Act (effectively amending the School Reform Act); and that Congress intended section 2401 to withdraw the Council's authority to pass the offending supplemental

[51] *See, e.g.*, D.C. Act 19-382 § 2 (2012).

[52] *See Driscoll v. George Washington Univ.*, 938 F. Supp. 2d 19, 23 (D.D.C. 2013).

budgetary measures. For the reasons that follow, the Court must reject this conclusion.

B. Section 2401 did not implicitly amend the Council's Home Rule Act authority.

Appellants assert that "Congress intended [the] uniform funding mechanism [in section 2401] to [be] mandatory, exclusive, and comprehensive."[53] But section 2401 does not expressly amend the Council's authority under the Home Rule Act to pass or amend local laws. Thus, for Appellants to be correct, the Court must interpret section 2401 as an implicit withdrawal of the Council's delegated legislative authority. This Court should not lightly assume that Congress intended this effect.

The Home Rule Act is the District's equivalent of a state constitution.[54] Although this Court has held that Congress may implicitly amend that law, its intent to do so must be clear and manifest.[55] Indeed, the Supreme Court has explained that Congress does not alter the fundamental details of a delegation of legislative power "in vague terms or ancillary provisions."[56] In *Shook v. District of*

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[53] Appellants' Br. 22.

[54] *Shook*, 132 F.3d at 776.

[55] *See id.* at 781; *Agri Processor Co., Inc. v. N.L.R.B.,* 514 F.3d 1, 4 (D.C. Cir. 2008) (quoting *Rodriguez v. United States,* 480 U.S. 522, 524 (1987)).

[56] *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 465, 468 (2001).

Columbia Financial Responsibility and Management Assistance Authority, this Court determined that Congress's intent to limit the Board of Education's power under the Home Rule Act was "certainly implied" from the text of the relevant FRMAA provision and the legislative history and context in which Congress enacted that law.[57] Contrary to Appellants' assertion here, neither the relevant statutory text, legislative history, nor context in which Congress enacted the School Reform Act clearly demonstrates that Congress intended its direction to establish a funding formula in section 2401 to permanently withdraw the Council's authority under the Home Rule Act to pass the offending provisions of the UPSFF Act or to supplement only DCPS's budget.

1. The text of section 2401 does not clearly demonstrate Congress's intent to withdraw the Council's legislative authority.

Appellants argue that the plain meaning of section 2401 indicates Congress's intent that the law be the mandatory and exclusive mechanism for funding District public schools.[58] But nothing in the text of the section indicates that Congress even contemplated affecting the Council's powers under the Home Rule Act. The section provides that the Mayor "shall make annual payments from the general fund . . . in accordance with the formula" and that the Mayor and

[57] *Shook*, 132 F.3d at 781.

[58] Appellants' Br. 28.

Council "shall" establish a formula for determining "the annual payment" for the "operating expenses" of DCPS and charter schools based on a "uniform dollar amount" multiplied by their respective student enrollments.[59] Appellants insist that Congress clearly indicated its intent to strip the Council of its authority to function as the District's local legislature simply by using the word "shall." That is a mighty slender reed upon which to predicate the implicit withdrawal of the Council's legislative authority.

Given the legislative power-sharing relationship between Congress and the Council on local matters, mere use of the term "shall" in a local congressional law does not clearly indicate a binding mandate against the Council.[60] Indeed, Congress has repeatedly used "shall" in post-home rule laws to direct a variety of matters, which the Council has subsequently amended.[61] Moreover, as detailed in the Council's amicus brief in support of the District's motion for summary judgment, Congress lifted both the directive to create a funding formula and the directive to make payments in accordance with the formula from the Council's

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[59] SRA § 2401(a).

[60] The district court recognized as much. *See* JA 135; *see also Richbourg Motor Co. v. U.S.*, 281 U.S. 528, 387 (1930) (explaining that "'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action").

[61] *See supra* notes 42-44; *infra* note 89.

committee print for the District of Columbia Charter Schools Act of 1995.[62] The Council certainly did not intend to forever bind itself to a 1995 law when it stated "[t]he Mayor and the Council . . . shall establish a funding formula. . . ."[63] The term "shall" obviously does not take on a new meaning when Congress copies the Council's language.

By contrast, in *Shook*, the Court identified a number of FRMAA provisions that amended the Council's authority under the Home Rule Act.[64] Only one did so implicitly.[65] In that instance, Congress clearly indicated its intent to amend the Council's budgetary authority by stating, "Notwithstanding the first sentence of section 446 of the [Home Rule Act]. . . ."[66] The fact that Congress used notwithstanding language in the FRMAA to communicate its intent to implicitly amend the Council's authority under the Home Rule Act casts significant doubt on the proposition that *the same congress, one year later*, would use the word "shall," without any reference to the Home Rule Act, to effectuate an additional limitation on the Council's powers.

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[62] *See* Council of the District of Columbia's Amicus Curiae Br. in Supp. Defs.' Opp. & Cross-Mtn. for Sum. J. ("Council Dist. Ct. Br.") 7-12 & n. 41 (ECF Nos. 45, 45-6).

[63] *Id.* n. 41 (ECF No. 45-6).

[64] 132 F.3d at 780 (listing FRMAA provisions).

[65] *See* FRMAA § 202(c)(2).

[66] *Id.*

2. The legislative history of the School Reform Act does not reveal congressional intent to limit the Council's authority.

As the district court observed, Congress did not seek to set aside principles of home rule by enacting the School Reform Act.[67] Rather, the law's legislative history reflects that Congress crafted legislation that allowed for local legislative discretion out of respect for those principles.[68] Indeed, Congress contemplated "interven[ing] more directly to redesign the governance arrangement for public education in the District," but chose instead to monitor Council and District implementation of the law's reforms.[69] The text of section 2401 must be interpreted in context with this expression of congressional restraint.[70] Congress could have fundamentally altered the Council's legislative authority in the School Reform Act, just as it fundamentally altered District governance and budgetary structures, including the Council's powers, in the FRMAA.[71] However, unlike the legislative history of the FRMAA,[72] the legislative history of the School Reform Act shows that Congress intentionally decided against this option.

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[67] *See* Dist. Ct. Op., JA at 138 (quoting House and Senate committee reports); *see also* 141 Cong. Rec. H11723 (daily ed. Nov. 2, 1995).

[68] 141 Cong. Rec. H11723; H.R. Rep. No. 104-455, at 142 (1996) (Conf. Rep.).

[69] *See* 141 Cong. Rec. H11723.

[70] *See U.S. v. Wilson*, 290 F.3d 347, 354 (D.C. Cir. 2002).

[71] *See Shook*, 132 F.3d at 779 & n. 2.

[72] *See id.* 780.

3. Congress did not intend to upend the District's budgetary framework with section 2401.

Appellants arduously maintain that section 2401's funding formula provisions require absolute funding parity between DCPS and charter schools, but accepting that interpretation would require a finding that section 2401 implicitly amends Home Rule Act budgetary provisions. There is no support for the argument that Congress even considered upending the District's existing budgetary framework under the Home Rule Act, or the Council's authority to pass budgetary measures in conformance with that framework, when it passed section 2401.

The Court must interpret section 2401 in light of the institutions and budgetary framework existing at the time of its enactment.[73] Every budgetary measure the Council passes must maintain a balanced budget.[74] To that end, section 453(a) of the Home Rule Act permits the Mayor to make mid-year reductions to "amounts appropriated or otherwise made available to independent agencies" in order to maintain a balanced budget.[75] When Congress passed the School Reform Act, the Board of Education was an independent agency covered by section 453.[76]

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[73] *See Wilson,* 290 F.3d at 353.

[74] *See* HRA § 603(c)-(d).

[75] HRA § 453(a).

[76] *See Shook*, 132 F.3d at 776-79. The Council abolished the Board of Education in 2007.

Appellants' parity-at-all-costs theory would require the Court to conclude that Congress intended to amend section 453 to prohibit mid-year spending *reductions* to DCPS's budget. Either that or the Court must conclude that section 2401 does *not* require absolute funding parity. The district court correctly determined that Congress did not intend section 2401 to require absolute parity of funding, characterizing the interpretation as constituting "a rather extreme restriction of the District's ability to manage its budget process with respect any and all to educational spending."[77]

Appellants ask the Court to construe the term "uniform" in section 2401 to require the Council to approve a proportional amount of supplemental funding to charter schools whenever the District supplements DCPS's budget, regardless of charter schools' need and the District's overriding obligation to maintain a balanced budget.[78] If Appellants' interpretation were accepted, the inescapable impact would be that funding for DCPS would be divorced from the budgetary framework set forth in the Home Rule Act.[79] It would mean that every time the District faces spending pressures and seeks to cure a potential federal Anti-Deficiency Act ("ADA") violation for DCPS through its supplemental budget

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[77] Dist. Ct. Op., JA 1013.

[78] Appellants' Br. 27.

[79] *See*, *supra*, Part II.A.

authority,[80] it needs to come up with nearly double that sum to accommodate charter schools. If the aim of section 2401 were parity, Congress could not have intended the anomalous scenario in which the Council is prohibited from exercising its budgetary authority under the Home Rule Act unless charter schools receive windfalls. Nevertheless, Appellants would have the District sacrifice necessary funds for DCPS or violate the Home Rule Act. Congress could not have intended this Sophie's Choice.

Despite acknowledging that the intent of Congress was "to establish a uniform *and efficient* formula for funding public education,"[81] Appellants turn a blind eye to these inefficiencies and budgeting realities. It certainly is not efficient to provide windfalls to charter schools whenever DCPS requires supplemental funding during a fiscal year to avoid ADA violations and maintain a balanced budget. DCPS is a large school system for which budgeting is exponentially more difficult than for an individual charter school. Budget shortfalls for government agencies of this size are not uncommon.

Appellants' version of funding parity essentially is a playing field that is level or tilts in favor of the charter schools. The fact that Appellants do not ask this

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[80] The District must comply with the federal ADA, 31 U.S.C. § 1341, which prohibits a District agency from spending money that Congress has not appropriated or authorized for a particular use. *See* HRA § 603(e).

[81] Appellants' Br. 31 (emphasis added).

Court to claw back the $19 million the Council authorized in mid-year supplemental funding to charter schools without a proportional authorization to DCPS further belies their argument that section 2401 demands funding parity between DCPS and the charter schools.[82]

As Appellees' astutely argue, a more reasonable interpretation of section 2401 is that Congress intended the funding formula as a tool to facilitate uniformity between the sectors in the annual budget process, not as a yardstick against which to measure end-of-year spending.[83] This interpretation requires no finding that section 2401 amended, *sub silentio*, the Council's legislative authority or the District's budgetary framework under the Home Rule Act and squares with the Supreme Court's guidance that Congress does not hide elephants in mouseholes.[84]

The foregoing demonstrates that section 2401's "uniform funding mandate" does not clearly imply an intent to withdraw the Council's powers to amend section 2401 or to pass budgetary measures to exclusively supplement DPCS's budget. A contrary conclusion would lead to quixotic, if not absurd, results.

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[82] *See* Notice of Reprogramming Request for $19,000,000 of Local Funds Budget Authority from Non-Public Tuition to Public Charter Schools, REPROG20-36 (2013), *available at* http://lims.dccouncil.us/Legislation/REPROG20-0036?FromSearchResults=true.

[83] Appellees' Br. 26-33.

[84] *Whitman*, 531 U.S. at 468.

Appellants sky-is-falling warning that upholding the Council's supplemental funding of DCPS could result "in blatantly unequal funding" for charter schools,[85] ignores the reality that charter schools are a vital component of the District's public education system. Appellants would have this Court believe that the District's elected officials are willing to abandon nearly half of the District's students in a scheme to make charters fail. The Court must refrain from assuming such bad faith on the part of the Council.[86] Moreover, the reality that the charter sector is thriving, despite the District's alleged best efforts to underfund it over the last 20 years, refutes Appellants' warning.[87]

III. The Court should resolve any doubts about the validity of Council action in the Council's favor.

Providing primary and secondary education is a quintessential and vital function of local government.[88] A finding that section 2401 preempts Council action or impliedly withdraws the Council's legislative authority would jeopardize two decades of District-led efforts to build public schools responsive to local needs and endanger future reform efforts. It would also undermine the Home Rule Act's

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[85] Appellants' Br. 34.

[86] *Cf. Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997) (explaining pervasiveness of presumption that legislatures are not motivated by manipulative purpose).

[87] See Amicus Br. of Washington Lawyers' Committee for Civil Rights and Urban Affairs et al.

[88] *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

tandem objectives of granting local self-government to District residents and relieving Congress of the burden of legislating upon essentially local District matters.

A. Finding for Appellants' would invalidate all amendments to the School Reform Act.

The Council has amended the School Reform Act to reflect changes in the District's educational landscape and to make the law more responsive to challenges facing its students and schools.[89] To that end, it has amended every section on which Appellants rest their case,[90] including amendments to authorize supplemental funding outside the funding formula for special education services;[91] revise the method for calculating and verifying student enrollment;[92] and place limitations on reprogramming excess funds placed in escrow for public charter schools.[93] It has also amended the portion of the law that established charter schools, including adding a process for the dissolution of charter schools and the

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[89] *See also* Council Dist. Ct. Br. 23-25 & App'x A-B (ECF Nos. 45, 45-1, 45-2).

[90] *See* SRA §§ 2401-2403.

[91] *See* D.C. Law 17-20 § 4032 (2007) (adding subparagraph (D) to SRA § 2401(b)(3)); D.C. Law 18-370 § 403 (2010).

[92] *See* D.C. Law 15-348 § 102(b) (2005); D.C. Law 18-223 § 4092 (2010); D.C. Law 22-33 § 4152(a) (2017).

[93] D.C. Law 21-36 § 4162 (2015).

distribution of their assets,[94] providing a detailed framework for DCPS facilities disposition to better meet the facilities needs of charter schools,[95] and limiting conflicts of interest between school fiduciaries and third-party vendors.[96] These reforms would be invalid under Appellants' theory that the Council may not amend post-home rule local congressional enactments.

B. Finding for Appellants would deny the Council flexibility to address school-specific needs.

Appellants' theory that the Council is limited to funding schools solely through the four corners of section 2401 would invalidate Council-created grant programs that target money to schools outside the UPSFF Act based on need. Such programs include funding for high school career and technical education;[97] schools that demonstrate they have incurred special education costs above their UPSFF Act allocation;[98] and schools to reduce the use of out-of-school

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[94] D.C. Law 16-268 § 4 (2007). *See* Bill 16-0642 Comm. Rep., at 4-10 (2006) (describing need for legislation and problems arising with closure of public charter schools), *available at* http://lims.dccouncil.us/Download/1206/B16-0624-COMMITTEEREPORT.pdf.

[95] *See* D.C. Law 20-114 § 2 (2014); Bill 20-0313 Comm. Rep., at 3-4 (2013) *available at* http://lims.dccouncil.us/Download/29469/B20-0313-CommitteeReport.pdf.

[96] *See* D.C. Law 21-153 (2016).

[97] *See* D.C. Law 20-87 (2014).

[98] *See* D.C. Law 20-196 § 202(c) (2015).

suspensions and expulsions.[99] Despite Appellants' claims that such supplemental funding is *ultra vires*, they have testified in support of them.[100]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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[99] *See* D.C. Act 22-442 § 4062(b) (authorizing the Superintendent of Education to support implementation of student discipline policies through competitive grants to schools).

[100] *See, e.g.,* Bill 20-725 Comm. Rep., at 361 (2014) available at *available at* http://lims.dccouncil.us/Download/31381/B20-0725-CommitteeReport1.pdf.

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 6,495 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14 point.

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