SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| HARRY WINGO,<br><br>*Plaintiff*,<br><br>v.<br><br>DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,<br><br>*Defendant*. | No. 2015 CA 6487 B<br>Judge Maurice Ross |

**DISTRICT OF COLUMBIA'S MOTION FOR RECONSIDERATION OF THE COURT'S SUMMARY JUDGMENT ORDERS**

The District of Columbia moves this Court to reconsider its Orders granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment because, even in the light most favorable to plaintiff, the facts do not support his claim that the Board was constituted improperly. And, even if there were such facts, his claim would be barred by the *de facto* officer doctrine and his failure to proceed under a writ of *quo warranto*. Summary judgment should have been awarded to the Board and Intervenors Hanson and Raise the Wage.

The grounds for this Motion are more fully set forth in the accompanying Memorandum of Points and Authorities. A proposed order is attached. As required by Super. Ct. Civ. R. 12-I(a), undersigned conferred with opposing counsel regarding this request. Plaintiff does not consent to the relief requested. The Board of Elections and Intervenors Matthew Hanson and Raise the Wage consent.

Dated: February 11, 2016.

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DISTRICT OF COLUMBIA'S MOTION FOR RECONSIDERATION OF THE COURT'S SUMMARY JUDGMENT ORDERS**

## INTRODUCTION

The Court should reconsider its Orders on the parties' summary judgment motions for three reasons. First, the parties did not provide the Court with essential evidence of the legislative history of the statutes in question. Congress provided for three-year terms for Board members not out of fear that Board members would serve indefinitely but out of concern that, without minimum terms, the independence of the entity regulating elections could be compromised by undue influence from the elected branches. Second, the parties did not bring the *de facto* officer doctrine, which bars plaintiff's claims, to the Court's attention. Third, the sole and exclusive vehicle to challenge the authority of an individual holding office is through a *quo warranto* action. Plaintiff may not, as he attempts here, launch a collateral attack on the composition of the Board through a challenge to its actions. The absence of this evidence and legal argument led to a clear error in the previous Orders, warranting reconsideration.

## STANDARD OF REVIEW

Under Super. Ct. R. Civ. P. 54(b), "reconsideration of an interlocutory decision is available … as justice requires." *United States v. Coughlin*, 821 F. Supp. 2d 8, 18 (D.D.C. 2011) *aff'd,* 527 Fed. Appx. 3 (D.C. Cir. 2013) (internal quotations omitted).[1] This includes cases in which the court "has made an error not of reasoning but of apprehension," or "the movant demonstrates … (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *United States ex rel. Landis v. Tailwind Sports Corp*, 1:10-CV-00976 (CRC), 2016 WL 141615, at *10 (D.D.C. Jan. 12, 2016) (quotation omitted). And "[c]ourts have more flexibility in applying Rule 54(b)" than in determining whether reconsideration is appropriate under Rules 59(e) and 60(b). *Moore v. Hartman,* 332 F. Supp. 2d 252, 256 (D.D.C. 2004); *see also Cobell v. Norton,* 226 F. Supp. 2d 175, 177 (D.D.C. 2002) (citing *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 233-34, (1995)).

## ARGUMENT

### I. Congress Did Not Allow and the Council Did Not Intend to Limit the Holdover Terms of Members of the Board of Elections.

The Constitution gives Congress exclusive legislative authority over the District, Art. I § 8, cl. 17, but that power is delegable. *Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953). In 1973, Congress passed the Home Rule Act partly "to delegate certain legislative powers to the government of the District

[1] The Court of Appeals has held that federal court decisions interpreting Federal Civil Procedure Rule 54(b) may be used as persuasive authority in interpreting the Superior Court Civil Procedure Rule. *Dyhouse v. Baylor*, 455 A.2d 900, 901 n.3 (D.C. 1983).

of Columbia [and thereby] relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a). Much of the Act became part of D.C. law including § 491, 87 Stat. 809-10, which created the Board. However, Congress placed several explicit limitations on what the Council could legislate. D.C. Code §§ 1-203.2, 1-206.1, 1-206.2, and 1-206.3.

### A. The Home Rule Act Limits the Council's Legislative Power And Prohibits the Council From Contravening the Act's Provisions.

It was essential to Congress that the Home Rule Act not suggest that it was disempowering itself, so it imposed three specific limitations on the Council's legislative power beyond that provided by the Constitution. First, it included an explicit denial that Congress was ceding its right to legislate directly for the District. D.C. Code § 1-206.1 ("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 … ."). The second restriction, entitled "Limitations on the Council," includes one general and nine, now ten, areas in which the Council cannot legislate. D.C. Code § 1-206.2. The third restriction, D.C. Code § 1-206.3, deals with financial matters and is not relevant to this case.

#### 1. The Home Rule Act Forbids the Council From Legislating Contrary to the Provisions in the Home Rule Act.

The Home Rule Act as passed by Congress prohibits the Council from passing a law contrary to anything enacted by the Home Rule Act, except through special processes not alleged to have been followed in this case. § 602(a), Pub. L. 93-198, 87 Stat. 813. ("The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act … ."). The D.C. law

creating the Board of Elections and providing that its members should have indefinite holdover terms, D.C. Code § 1-1001.3, was enacted as § 491 of the Home Rule Act. In other words, the indefinite holdover language is protected by § 602(a)'s prohibition against the Council passing any contrary act. Thus, any statute passed by the Council that is contrary to § 1-1001.3's provision of indefinite holdover terms for members of the Board is *ultra vires*. A Council-passed statute that invalidated the indefinite holdover provision would be invalid itself and would not, because it could not, prevent members of the Board from serving their congressionally mandated, indefinite, holdover terms.

**2. The Text of the Home Rule Act As Passed By Congress Supersedes the Version of that Text As Edited In the D.C. Code.**

The prohibition on the Council's authority applies to everything enacted as part of the Home Rule Act, including the holdover provision, irrespective of its location in a particular chapter of the Code. As passed by Congress and enacted into law, the relevant limitation of the Council's legislative power says, "[t]he Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act … ." § 602(a), Pub. L. 93-198, 87 Stat. 813.

As codified at D.C. Code § 1-206.2(a), however, the text reads, "The Council shall have no authority to pass any act contrary to the provisions of this *chapter* except as specifically provided in this *chapter* … ." (emphasis added). The editors' change from the Home Rule Act's "this Act" to "this chapter" is important because they placed the provisions creating the Board and mandating that members hold over in a different chapter of the D.C. Code from the prohibition on passing contrary

laws. Thus, the edits that turned "Act" into "chapter" in § 1-206.2(a) do not control; the prohibition extends to all parts of the Home Rule Act, including those granting Board members indefinite holdovers.

Federal law explains how to address conflicts between the Code and the law. When Congress passes a law, it is "published in chronological order in United States Statutes at Large (Stat.)." Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 Law Libr. J. 545, 546 (2009). For efficiency's sake, the laws are sorted into the United States Code. *Id.* Because "many mistakes find their way into a project as big as a code of all the laws of the United States[, t]he Senate insisted that the new code not be binding, just in case." *Id.* at 549.

Therefore, excepting portions that "have been enacted into positive law," the United States Code is not "legal evidence of the laws therein contained … ." 1 U.S.C. § 204(a). Rather, "[t]he United States Statutes at Large shall be legal evidence of laws … in all the courts of the United States [and of] the several States…." 1 U.S.C. § 112; *see also United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("the Code cannot prevail over the Statutes at Large when the two are inconsistent.").

The D.C. Code is likewise an edited document, compounding laws passed by Congress and the Council, rather than the laws themselves. Federal law establishes that the D.C. Code can only "establish prima facie the laws … relating to or in force in the District of Columbia … ." 1 U.S.C. § 204(b). As with federal law, the D.C. Code cannot prevail over the D.C. Statutes at Large. *Lenaerts v. D.C. Dep't of*

*Employment Servs.*, 545 A.2d 1234, 1236 (D.C. 1988) (citing *Burt v. District of Columbia*, 525 A.2d 616, 619 (D.C. 1987)) ("In cases of conflict between the version published in the D.C. Statutes-at-Large and the codification, the former controls.").

### B. The Council Expressed Its Intent That The Holdover Terms of Members of the Board Would Not Be Limited By § 1-523.01(c).

The Court need not invalidate the Council-passed law, however. The Council explained that it never intended its law to limit the holdover terms of members of the Board. D.C. Code § 1-523.01(c) was enacted as part of the Confirmation Amendment Act of 1998, a Council-passed law setting limits on how long some mayoral appointees could hold over their terms. Law 12-285, 46 DCR 1355 (Jan. 05, 1999) ("No person shall serve in a hold-over capacity for longer than 180 days after the expiration of the term to which he or she was appointed … ."). When the Council enacted § 1-523.01(c), the Committee on Government Relations report on the bill used a member of the Board as its example of an appointment that would *not* be covered by § 1-523.01(c). Report on Bill 12-261, the "Confirmation Amendment Act of 1997" (Sept. 29, 1998) at 6 (180-day limit would apply "unless otherwise provided by law (such as a provision that allows a Board of Elections and Ethics member to serve until his or her successor is in place).").

The Report says that the bill "retains current statutory language" about this exception. *Id.* As introduced, subsection (c) began, "Unless otherwise provided by law" as had the statute it was amending. Report on Bill 12-261 at 14. Plaintiff is correct that this language was dropped from the Amendment in the Nature of a Substitute that was enacted, *id.* at 27. The language was redundant. *See* Historical

and Revision Notes to 31 U.S.C. § 3525 ("the words 'unless otherwise provided by law' are omitted as surplus."). The Council cannot pass provisions that conflict with the Home Rule Act, and the Report makes clear that the Council was aware that the provision of indefinite holdovers for members of the Board was among those unalterable provisions.

Indeed, the Report explicitly noted that, at that time, present Board members had been serving as holdover appointments for more than five years. Report on Bill 12-261 at 4 ("No one had been nominated to serve on the Board between 1992 and 1997."). If plaintiff's reading of the statute were correct, the Council would have effectively ousted the sitting members of the Board before it approved new members. This would have made the Board defunct instead of achieving the Council's expressed intent "to make the appointment process … more efficient and effective," Report on Bill 12-261 at 1, and defeated the congressional intent, discussed below, of protecting the Board from political influence. It would also have brought elections in the District to a cataclysmic halt. Only because each current member would hold over "until his successor has been appointed and qualifies" could the Council allow disapproval to be the default without risking the complete dissolution of the Board and the resultant inability of the District to conduct elections. The Report is clear that § 1-523.01(c) does not apply to Board members.

### C. It Was Reasonable For Congress to Give Indefinite Holdover Terms to Members of the Board.

There are good reasons why Congress mandated that Board members serve as holdovers indefinitely. The three-year term of office for members of the Board is

not a maximum to constrain their powers but *a minimum to expand their independence*. The Mayor and Council cannot readily remove or threaten to remove a member of the Board who still has years of her term to serve. They can, however, combine to replace a member after her term has expired; the Mayor by nominating and the Council by confirming a successor. This removes the Board from a degree of political influence unseemly in the agency responsible for the conduct of elections.

The Board is the independent agency that decides elections. D.C. Code § 1-1001.05(a)(3). Because it oversees elections, the Board needs particular protection from the elected branches of government to avoid the appearance that incumbents are controlling the electoral system. The legislative history of the Home Rule Act demonstrates that Congress particularly was concerned with the independence of the Board, which they believed would be protected by requiring any amendments to the provisions establishing the Board to be carried out through a formal amendment procedure. *See 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*, 93rd Cong. 2nd Sess. (Dec. 31, 1974) (hereafter "Legislative History") at 304. Since the Founding, the United States has always granted protected independence by providing minimum tenures in office for certain officials. The most obvious example is the life tenure of federal judges. Const. Art. I, § 1. *See also* Const. I, § 3 cl. 1 and § 2 cl. 1 (six-year terms for senators, to make the Senate less immediately responsive to the whims of the populace). When a government

official's political independence is important, she is granted a minimum term of office. As Mr. Breckinridge of Kentucky said of the Armory Board, a multi-year term of office protects members of independent agencies from improper influence from the elected parts of the District government. *See* Legislative History at 154 ("If they are of sufficient caliber to occupy that office and disagree with the Mayor, then they should have tenure for a term of years.").

Thus, plaintiff's suggestion that prohibiting the Board's ability to serve beyond 180 days past the expiration of a term "does not 'alter the structure or manner in which [the Board] operates'" (Pl.'s Brief in Opp. to Def.'s Mot. to Alter or Amend Judgment at 7), cannot be maintained. Whereas the D.C. law at issue in *Potomac Elec. Power Co. v. Dist. of Columbia Gov't*, 651 F. Supp. 907, 909 (D.D.C. 1986) was "essentially an effort to clarify the existing statute and did not dramatically expand the power of the OPC," plaintiff would have the Court read the Confirmation Amendment Act to violate Congress's express mandate that Board members hold over indefinitely until a successor is appointed and qualifies.

### D. Indefinite Holdover Provisions Are Common and Legislative Bodies Have Tools to Limit Them When They Wish to Do So.

Indefinite holdover provisions are common for both federal and state commissions, and have been so for centuries. *See Schisler v. State*, 177 Md. App. 731, 738 (Md. Ct. of Spec. App. 2007) (Maryland's Public Service Commission chairman and commissioner); *Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996) ("the absence of any term limit in the [National Credit Union Administration] holdover clause enables holdover members to continue in office indefinitely"); *Fasi v.*

*City Council of City & Cty. of Honolulu*, 823 P.2d 742 (Haw. 1992) (various independent agencies of the Honolulu government); *Collazo v. United States*, 196 F.2d 573, 581 (D.C. Cir. 1952) (grand jury commissioners)[2]; *State ex rel. Standish v. Boucher*, 56 N.W. 142, 145 (N. Dak 1893) (penitentiary trustees) ("The statute in question not only fixes definite terms of office for the terms of two and four years, but also, with equal clearness, annexes to the definite terms another period or term of indefinite duration"). *Cf. People ex rel. Langdon v. Reid*, 6 Cal. 288, 289 (Cal. 1856) (holdover limited to difference between term appointed and constitutionally set maximum of four years); *Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co.*, 650 F.2d 14, 16 (2d Cir. 1981) (EEOC commissioners' holdover would be indefinite but for explicit limitations in 1972 law).

*Sears* is particularly relevant as it shows Congress's awareness, a mere year before the Home Rule Act that, absent express limit, holdovers "until their successors are adopted and qualified" would be indefinite. *See* § 8, Pub. L. 92-261 (1972), 86 Stat. 109. There, Congress explicitly limited the length of holdover positions, whereas there is no such limitation in § 491 of the Home Rule Act. Indefinite holdovers for political appointees were common before and since passage of the Home Rule Act and have been regularly upheld by state and federal courts.

At the adoption of the Confirmation Amendment Act of 1998, indefinite holdovers were also common in D.C. law. They were mandatory for the Real Estate Commission. § 4, D.C. Law 4-209, 30 DCR 390, codified at § 42-1739, since repealed.

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[2] *Collazo* similarly allowed two of the three commissioners to act, though they were "holdovers under their first appointment," when the third was incapacitated.

Indefinite holdovers were allowed for the Sports Commission Board of Directors. § 5(d), D.C. Law 10-152, 41 DCR 4636. The Sex Offender Registration Advisory Council also allowed indefinite holdover for its members. § 4(a)(4), D.C. Law 11-274, 44 DCR 1232, since repealed. Each enacting statute included some variation on the latter's "[a] member may continue to serve after the expiration of that member's term provided no successor has been appointed."

The National Capital Revitalization Corporation Act of 1998, D.C. Law 12-144, 45 DCR 3747, since repealed but passed the same year the Council first passed the Confirmation Amendment Act, is even more instructive because it showed that the Council understood how to limit holdovers if it wanted. That law permitted a "presidentially-designated Board member" to "continue to serve after the expiration of the term until a successor is designated," § 4(c)(1), but prohibited any holdover by a Mayor-appointed member. § 4(c)(2) ("No public citizen Board member may serve after the expiration of the term of office to which that member was appointed.").

The Board of Real Property Assessments and Appeals, as created by Congress in 1974 just after enactment of the Home Rule Act, allowed no holdovers. § 426(a), Pub. L. 93-407, 88 Stat. 1056. A 1994 amendment allowed holdovers, but limited them to three months. § 2(e), D.C. Law 9-241, 40 DCR 629 ("A Board member may continue to serve after the expiration of his or her term until a successor is appointed, but for no more than 3 months.")

The breadth of these different holdover provisions indicates that the Council and the Congress were each fully capable of limiting holdovers when they wished to

do so. This Court should not presume that either intended but failed to do so with regard to the Board. *Schad v. Arizona*, 501 U.S. 624, 637-38 (1991) ("enquiry is undertaken with a threshold presumption of legislative competence"). The Council enacted § 523.01(c) to limit the appointments it could limit without affecting those it could not, like the Board members who have indefinite holdover appointments.

These two provisions can be read harmoniously in a way that gives effect to the Home Rule Act while retaining the authority of the Council over appointments not subject to the Board's congressionally mandated holdover provision. Sec. 523.01(c) was never intended to affect the ability of a Board member to "serve until his successor has been appointed and qualifies." D.C. Code § 1-1001.03(c).

### E. The Home Rule Act Provisions for Emergency Legislation Are Inapplicable to Resolutions.

The Home Rule Act recognizes the need for the Council to take action quickly in some cases by including a provision allowing for emergency legislation, which is effective for a maximum of 90 days. D.C. Code § 1-204.12(a). This emergency provision, however, is specifically limited to "an act" "passed" by the Council, as opposed to "resolutions," which are "adopted" by the Council to express determinations, opinions, or to approve or disapprove of a Mayoral appointment. *Id.* While the Council has adopted the practice of declaring emergencies and passing "emergency resolutions," *see, e.g.*, PR19-0491 – District of Columbia Board of Elections and Ethics Stephen I. Danzansky Confirmation Emergency Declaration Resolution of 2011 (Dec. 20, 2011) *and* PR19-0492 – District of Columbia Board of Elections and Ethics Stephen I. Danzansky Confirmation Emergency Resolution of

2011, only acts actually *require* the emergency declaration or are subject to the 90-day limitation. Indeed, Board members could not be appointed by an act, because acts are legislative vehicles and appointment is an executive action. *Morrison v. Olson*, 487 U.S. 654, 670 (1988). The Council's role in the process is to approve or disapprove of the Mayor's nomination. Thus, an appointing resolution does not "expire" after 90 days under § 1-204.12(a).

## II. The Court Should Uphold the Board's Acceptance of Initiative Measure No. 76 Even if It Finds That the Board Is Not Lawfully Constituted.

### A. The *De Facto* Officer Doctrine Bars Plaintiff's Collateral Attack on the Composition of the Board.

Notwithstanding the legality of the Board's present composition, even if a defect existed, it would not invalidate the Board's actions taken under color of official title as to the public or third parties *e.g.*, the Board's acceptance of Initiative Measure No. 76. "The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles." *Sears*, 650 F.2d at 17; *see also Horwitz v. State Bd. of Medical Examiners of State of Colorado*, 822 F.2d 1508, 1616 (10th Cir. 1987) ("The doctrine holds that collateral attacks pose too great a threat that past actions of the challenged official would be subjected to wholesale invalidation and thus interfere with orderly government."). The doctrine is recognized by virtually every common law jurisdiction, including the District of Columbia:

> Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the

> validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. … The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact.

*Cardoza v. Baird*, 30 App. D.C. 86, 91 (D.C. 1907) (quoting *Norton v. Shelby County*, 118 U.S. 425, 444-45 (1886)); *see also Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n*, 850 N.W.2d 403, 406, 431 (Iowa 2014) (upholding commission's actions notwithstanding that one of its members was not qualified to serve); *Marine Forests Soc. v. California Coastal Comm'n*, 113 P.3d 1062, 1093-96 (Cal. 2005) (*de facto* officer doctrine precluded attack on actions of land use commission on the ground that its composition violated separation of powers).

Application of the doctrine is comprised of two elements: (1) that the official operates under color of authority and (2) the challenged action is within the power of the office. *Cardoza*, 30 App. D.C. at 91; *see also* Kathryn A. Clokey, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 Colum. L. Rev. 1121, 1122-23 (1985). Plaintiff cannot contest either of these elements. First, plaintiff concedes that Board Members Nichols and Danzansky were lawfully appointed to their positions by former Mayor Vincent Gray with the advice and consent of the Council. (*See* Plaintiff's Statement of Undisputed Material Facts And Counterstatement of Material Facts, ¶ 8.) They have continued to operate under color of that authority. *Grooms v. LaVale Zoning Bd.*, 340 A.2d 385, 391 (Md. Ct. Spec. App. 1975) ("Color of right may consist of … holding over after the expiration of a term … ."). And there can be no question that, as to the second element, the Board is vested with the power to accept or refuse initiative measures. D.C. Code § 1-1001.16. The doctrine,

therefore, bars Plaintiff's challenge as the acts of the Board are binding as to third parties, even if Board Members Nichols and Danzansky's terms have expired. *Cardoza*, 30 App. D.C. at 91.

This is a classic case for the application of the *de facto* officer doctrine. Courts around the country have applied it where an official continues to hold office after the expiration of his term, even where unlawful.[3] *See, e.g.*, *Romanoff v. State Comm'n on Judicial Performance*, 126 P.3d 182, 191 (Colo. 2006) ("a commissioner appointed to a term longer than four years, in violation of the statute, becomes a *de facto* officer at the end of four years when the term expires pursuant to statute"); *D'Amato v. S.D. Warren Co.*, 832 A.2d 794, 801-03 (Me. 2003) (notwithstanding the expiration of administrative officer's term, she was a *de facto* officer whose decision was binding); *Grooms v. LaVale Zoning Bd.*, 340 A.2d at 391 ("[A]n elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers of the office until his successor qualifies, whether or not the statute creating the office so provides."); *Fort Osage Drainage Dist. of Jackson Cnty. v. Jackson Cnty.*, 275 S.W.2d 326, 331 (Mo. 1955) (one who remains in office after term expires is a *de facto* officer whose acts are treated as valid); *Bradford v. Byrnes*, 70 S.E.2d 228, 261 (S.C. 1952) (same); *Case v. Michigan Liquor Control Comm'n*, 23 N.W.2d 109, 113 (Mich. 1946) ("[O]fficers holding over after their term

[3] Where state law provides a defined term of office and a holdover provision stating that the incumbent shall remain in office until a successor is appointed and qualifies, as is the case with the Board, *see* Section I.D, an incumbent who remains in office following the expiration of the term limit is not a *de facto* officer, but a *de jure* officer whose status is lawful. *See, e.g.*, *State ex rel. Hartman v. Thompson*, 627 So.2d 966, 969-70 (Ala. Civ. App. 1993) (collecting authorities).

has expired or their authority vacated still are *de facto* officers, and their acts as such are legal.").

In a decision that shares much in common with this case, the U.S. Supreme Court afforded *de facto* validity to past actions of an independent commission whose members were not lawfully in office. *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, several political candidates and other interested parties brought suit challenging the constitutionality of, among other things, the manner in which members of the Federal Elections Commission (FEC) were appointed, which included appointments made directly by Congress. *Id.* at 126-27. The Supreme Court agreed, finding that several members' appointments were contrary to Article II's Appointment Clause, which vested the President with the authority to appoint executive officers. *Id.* at 140.

In light of this holding, the Supreme Court held that the Constitution forbade the FEC from exercising certain enforcement powers going forward. *Id.* at 140-41. But the Supreme Court, drawing on the *de facto* officer doctrine, held that the FEC's actions as of the date of the Court's order remained binding on third parties:

> It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date… . The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan.

*Id.* at 142 (citing *Connor v. Williams*, 404 U.S. 549, 550-51 (1972)).

### B. Plaintiff May Not Bring a Direct Challenge to the Board's Composition.

The existence of the *de facto* officer doctrine does not afford complete immunity to officials who are unqualified to hold office because of a legal defect. It bars collateral challenges like the one plaintiff brings here, but permits a direct challenge to an official's authority through a *quo warranto* action. *See, e.g.*, *Spykerman v. Levy*, 421 A.2d 641, 648 (Pa. 1980) ("the *quo warranto* action is the sole and exclusive method to try title or right to public office"); *Green Mountain Sch. Dist. No. 103 v. Durkee*, 351 P.2d 525, 528 (Wash. 1960) ("The correct and exclusive mode of attacking the composition of the county committee is by *quo warranto*."). "A writ of *quo warranto* is a 'common-law writ used to inquire the authority by which a public office is held.'" *Taitz v. Obama*, 707 F. Supp. 2d 1, 3 (D.D.C. 2010) (quoting Black's Law Dictionary 1371 (9th ed. 2009)).

A writ of *quo warranto* "may be issued from the Superior Court of the District of Columbia in the name of the District of Columbia against a person who usurps, intrudes into, or unlawfully holds or exercises … a public office." D.C. Code § 16-3521(a). The United States Attorney or the Attorney General for the District of Columbia may initiate a *quo warranto* action in their own names or in the name of a third party as relator. D.C. Code. § 16-3522; *see also* Mayor's Order 2004-92 (re-designating the Corporation Counsel as the Attorney General). A private individual may not bring a *quo warranto* action unless the United States Attorney or the Attorney General for the District of Columbia has refused to do so; then the private individual may seek the Court's leave to pursue the writ. D.C. Code § 16-3523.

Plaintiff did not follow this procedure. He did not seek to have the Office of the Attorney General bring a writ of *quo warranto* with respect to the current Board members, nor does he allege that he urged the United States Attorney to act. Instead, plaintiff unilaterally sought a writ of mandamus under D.C. Code § 1-1001.16(e)(1)(A). Plaintiff cannot obtain this relief for three reasons. First, as described above, D.C. Code § 16-3521, *et seq.*, provides the exclusive means to challenge the authority of a public officer within the District. Second, writs of mandamus are not available in the Superior Court of the District of Columbia. Super. Ct. Civ. R. P. 81(b) ("The writ[] of … mandamus [is] abolished."). Third, D.C. Code § 1-1001.16(e)(1)(A) only permits Superior Court jurisdiction to review "the summary statement, short title, or legislative form of the initiative measure"; it does not provide an action to challenge the composition of the Board independent of the *quo warranto* proceedings described in D.C. Code § 16-3521, *et seq.*

Thus, even if plaintiff could demonstrate a defect in the composition of the Board, he is prohibited by the *de facto* officer doctrine from bringing a collateral attack on the Board through his challenge to Initiative Measure No. 76 and prohibited from bringing a direct attack to oust the Board Members by his failure to comply with D.C. Code § 16-3521, *et seq.*

## CONCLUSION

For the foregoing reasons, the District requests that the Court reconsider its ruling on the Motions for Summary Judgment and dismiss Plaintiff's Complaint.

Dated: February 11, 2016. Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

| | |
|---|---|
| HARRY WINGO,<br>Plaintiff,<br>v.<br><br>DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,<br><br>Defendant. | No. 2015 CA 6487 B<br>Judge Maurice Ross |

**ORDER**

Upon consideration of the District of Columbia's Motion for Reconsideration of the Court's Summary Judgment Orders, it is by the Court this _____ day of _____, 2016,

ORDERED that the Motion is GRANTED; and it is

FURTHER ORDERED that plaintiff's Complaint is dismissed with prejudice.

_____
Judge Maurice Ross
Superior Court for the District of Columbia

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## CERTIFICATE OF SERVICE

I certify that on February 11, 2016, I served, by electronic filing, a copy of this document on:

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