ORAL ARGUMENT SCHEDULED FOR OCTOBER 17, 2014

No. 14-7067

United States Court of Appeals for the D.C. Circuit

COUNCIL OF THE DISTRICT OF COLUMBIA,

Plaintiff-Appellant,

v.

VINCENT C. GRAY, in his official capacity as Mayor of the District of Columbia, and JEFFREY S. DEWITT, in his official capacity as Chief Financial Officer for the District of Columbia,

Defendants-Appellees.

SUPPLEMENTAL BRIEF ON STANDING FOR PLAINTIFF-APPELLANT COUNCIL OF THE DISTRICT OF COLUMBIA

On Appeal from the U.S. District Court for the District of Columbia, No. 14-cv-655 (Emmet G. Sullivan, District Judge)

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CFO	Chief Financial Officer
JA	Joint Appendix

SUPPLEMENTAL BRIEF ON STANDING FOR PLAINTIFF-APPELLANT COUNCIL OF THE DISTRICT OF COLUMBIA

When the Council filed this action in Superior Court, the branches of the District government were at an impasse. The Home Rule Act requires the Council to work with and obtain information from the Mayor and the CFO as it discharges its obligation to pass the District's annual budget. But because the parties were operating under different budgetary schemes with different timetables, the conflict necessitated judicial intervention. The Council filed a complaint in Superior Court and the Mayor and CFO immediately removed this case to federal court.

Under the Budget Autonomy Act, the Council has 70 days from the date on which the Mayor proposes a budget to read, revise, and approve the budget at two legislative meetings separated by at least 13 days. *See* Budget Autonomy Act § 2 (amending D.C. Code §§ 1-204.12, .46). Before approving the final budget, the Council must review a fiscal impact statement prepared by the CFO (D.C. Code §§ 1-204.24d(25), 1-301.47a(1)), and must assure itself (on the basis of that statement) that its budget is balanced (*id.* § 1-206.03(c)).

The Mayor transmitted his proposed budget for Fiscal Year 2015 to the Council on April 3, 2014. On April 7, the Council set a schedule for 42 hearings on that proposal, to culminate in a final vote on June 11, 2014. *See* 61 D.C. Reg. 3761-70 (Apr. 11, 2014). On April 11, Mayor Gray announced that he would thwart the Council's efforts to comply with its statutory obligations. Opining that

the Budget Autonomy Act is a "legal nullity" (JA37), he advised the Council that he would treat the Council's *draft* budget as it stood on May 29 as final legislation, and that he would transmit "to the Congress and President the full District budget as it stands" on that date, even though it would not have been passed by the Council. JA38.

The CFO issued a similar letter that same date, announcing that, absent judicial intervention, he would treat the Budget Autonomy Act as having "no legal validity." JA41. His refusal to treat the Budget Autonomy Act as valid would make it impossible for the Council to pass its required budget. And even if the Council somehow succeeded, the CFO announced that he would disregard any such budget and would refuse to discharge his responsibilities to authorize contracts and cut checks. JA42; *see, e.g.*, D.C. Code § 1-204.24d(14), (16).

To satisfy the dictates of Article III, a plaintiff "must show: (1) 'an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)).

Based on its right and responsibility to pass the District's budget (and the Mayor's threat to usurp the Council's role as the District's legislature, *see* D.C. Code § 1-204.04(a)), the Council has standing under three independent theories, each of which satisfies Article III. Accordingly, although the case was not subject to removal because federal-question jurisdiction is unavailable, the dictates of Article III standing do not separately necessitate remand to Superior Court.[1]

A. The Council Has Standing To Challenge The Mayor's Determination To Treat As Final The Council's Unenacted Budget.

The Council has "legislative standing" under *Coleman v. Miller*, 307 U.S. 433 (1939), as construed by *Raines v. Byrd*, 521 U.S. 811 (1997), and its progeny.

Coleman involved a dispute over legislative process. The Kansas Senate split 20-to-20 on the question of ratifying an amendment to the U.S. Constitution. The Secretary of the Kansas Senate deemed the amendment ratified after the Lieutenant Governor purported to cast a tiebreaking vote. But those who cast the twenty nay votes (and one other senator) filed suit to force the Secretary to erase his endorsement that the ratification vote had succeeded. The Supreme Court

[1] If this Court were to find a lack of standing, remand to Superior Court would be required. *See* 28 U.S.C. § 1447(c); *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991); *McGee v. Solicitor Gen. of Richmond Cnty.*, 727 F.3d 1322, 1326 (11th Cir. 2013).

recognized that the senators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. at 438.

In *Raines*, the Supreme Court clarified the landscape for legislative standing, while expressly leaving *Coleman* in place. In recognition of the separation-of-powers concerns that motivate the political question doctrine—a doctrine that has not been applied to disputes among District officials—the Supreme Court held that legislators do not have a *per se* right to challenge the implementation of their legislation. To distinguish *Coleman*, the Court relied on three characteristics of the *Raines* plaintiffs' challenge to the Line Item Veto Act: (a) they were not challenging their votes as to a particular bill changed by the Line Item Veto Act; (b) their votes against the Line Item Veto Act were, in fact, given full effect; and (c) they retained other legislative remedies (for example, repealing the Line Item Veto Act). *Raines*, 521 U.S. at 824.

This Court has confirmed the continuing vitality of *Coleman* (*see, e.g.*, *Campbell v. Clinton*, 203 F.3d 19, 21 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999)), emphasizing that legislators have a cognizable legal interest "'in maintaining the effectiveness of their votes.'" *Campbell*, 203 F.3d at 21 (quoting *Coleman*, 307 U.S. at 438). Thus, "'legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect)

on the ground that their votes have been completely nullified.'" *Chenoweth*, 181 F.3d at 116 (quoting *Raines*, 521 U.S. at 823).

Here, the unanimous Council filed suit because of the imminent threat that the Mayor would nullify the Council's votes and render its act of voting ineffective by certifying as final the Council's draft budget. The Council had no remaining legislative remedy to vindicate its budgetary authority. Much as the *Coleman* plaintiffs had standing to argue that the Secretary of the Kansas Senate could not endorse a resolution that had not passed, the Council has standing to argue that the Mayor cannot endorse a Council bill that has not passed. Similarly, the Council has standing to uphold its authority to read, revise, and approve the Fiscal Year 2015 budget on the second reading. The harms experienced by the Council are attributable to the Mayor and can be redressed by the relief sought by the Council.[2]

Nothing in *Raines* undermines the applicability of *Coleman* here. Nor is the Council's legislative standing undermined by this Court's precedents. Contrary to *Chenoweth*, the Council can and does claim that its votes have been "effectively

[2] "For the purposes of determining standing, [this Court] assume[s] the validity of a plaintiff's substantive claim." *Swan v. Clinton*, 100 F.3d 973, 976 (D.C. Cir. 1996) (internal quotations omitted). Here, we contend that the Budget Autonomy Act and its amendments to the Home Rule Act are valid. Our position necessarily assumes that the Budget Autonomy Act has superseded any prior budget procedures.

nullified by the machinations" of the Mayor. 181 F.3d at 117. Unlike in *Campbell*, the Council can and does point to an instance in which the Mayor imminently threatened to "treat[] a vote that did not pass as if it had." 203 F.3d at 22. And contrary to *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), and *AFL-CIO v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982), the Council's "stake as a legislat[ure]" here is not "merely an interest in having laws executed properly" (*AFL-CIO*, 697 F.2d at 305). Rather, it is an interest in exercising the legislative power that the Council possesses by law. *See id*. at 205 (ruling that legislator had standing where Secretary of Housing and Urban Development had "depriv[ed] him of [a] specific statutory right to participate in the legislative process").

B. The Council Has Standing To Challenge The CFO's Failure To Discharge Its Responsibilities In The Budgetary Process.

Alternatively, the Council possesses standing based on the CFO's announced failure to discharge his statutory responsibilities. The District's budgeting process is designed to be collaborative. To satisfy its statutory obligation to enact a balanced budget, the Council must rely on materials generated by the CFO. In particular, the budget must "be accompanied by a fiscal impact statement before final adoption by the Council." D.C. Code § 1-301.47a(1). That fiscal impact statement must be prepared by the CFO. *Id.* § 1-204.24d(25). The

Council must review the CFO's fiscal impact statement to assure itself that its budget is balanced before it is submitted to Congress. *Id.* § 1-206.03(c).

Where a plaintiff has a concrete interest in information that a defendant is required by statute to provide, Article III is satisfied. *See FEC v. Akins*, 524 U.S. 11, 21 (1998); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008). Here, the Council is both entitled to information from the CFO and requires such information to perform its own statutory duties. The CFO's decision to treat the Budget Autonomy Act as having "no legal validity" (JA74) therefore inflicts injury on the Council that is traceable to the CFO and that would be redressed by the judicial intervention sought by the Complaint. *Shays*, 528 F.3d at 923.

C. The Council Has Standing To Seek Redress For Its Economic Injuries.

Separate and apart from the preceding bases of standing, the Council has standing because the Mayor and the CFO announced that they would take actions that impose costs on the Council as an institution. Among other things, the District's budget funds the Council's operations. The Mayor and the CFO promised conduct that would prevent the Council from making provisions for its own financial needs. In the absence of sufficient funding, the Council will not be able to perform *any* of its legislative tasks. This substantial economic injury—which is a direct and imminent consequence of the Mayor's and CFO's threatened

actions—is more than sufficient to confer standing. *See Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 454 (D.C. Cir. 2004) (citing *Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 439 U.S. 331, 366 (1990), for the proposition that "threat of relatively small financial injury [is] sufficient to confer Article III standing").

To be sure, Congress may ultimately decide to exercise its plenary authority over the District to override the Council's budget. But that prospect does not undermine the validity of the Council's economic injury as a basis for standing. Indeed, in *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004), the district court ruled that the Council had standing to challenge Congress's commuter-tax prohibition even though it acknowledged it was "highly unlikely" that Congress would permit the District to enact such a tax, because "the possibility that a coordinate branch might subsequently negate or undermine the Court's relief does not necessarily destroy standing." *Id.* at 8-9 (citing *Swan v. Clinton*, 100 F.3d 973, 980-81 (D.C. Cir. 1996)). Without expressly addressing standing, this Court affirmed. *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005).

CONCLUSION

Article III is satisfied, but this Court otherwise lacks jurisdiction. This Court should vacate with instructions to remand to Superior Court or reverse on the merits.

Dated: October 15, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on October 15, 2014, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: October 15, 2014

/s/ Brian D. Netter
Brian D. Netter