UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff v. VINCENT C. GRAY and JEFFREY S. DEWITT, Defendants.	Civil Action No. 14-00655 (EGS)

DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

When Congress passed the Home Rule Act ("HRA") in 1973, it did so with the care befitting a substantial piece of legislation altering federal law and practices that had existed for over one hundred years. Reflecting a critical compromise without which Home Rule would not have passed and cognizant of its exclusive constitutional duty to regulate the affairs of the nation's capital, Congress gave the D.C. Council broad legislative authority, but placed express limits on that authority. As California Democratic Congressman Thomas Rees, then-Chairman of the House Appropriations District of Columbia Subcommittee, noted at the time, the "major compromise" that allowed the bill to pass the House of Representatives was that there be "no change at all on budgetary control . . . of the District of Columbia." 119 Cong. Rec. 33390–91 (Oct. 9, 1973).

Specifically, Congress prohibited the Council from enacting legislation (including Charter amendments) that alters the "functions" of the federal government. D.C. Code § 1-206.02(a)(3). It also made clear that the Council may not modify the role that Congress or the President has long played in the District's budget and appropriations process. *See id.* § 1-206.03(a). And it specified that employees of the District government were to remain subject to the Anti-Deficiency Act (ADA), *i.e.*, they could not spend any money that had not been specifically appropriated by an Act of Congress. *See id.* § 1-206.03(e). These limitations all sound a consistent theme: The Council under the law in place for the last four decades may not interfere with the workings of the federal government or otherwise intrude into the federal sphere, and in particular may not assume Congress's fundamental power of the purse, including by displacing federal officials' role in crafting and passing by federal legislation the entire D.C. budget.

The Budget Autonomy Act (BAA) violates each of these proscriptions. The BAA purports to change Congress's function in the "local portion" of the D.C. budget process from an active one (the budget becomes law only if Congress affirmatively enacts it) to a passive one (the Council's budget becomes law unless Congress objects and overrides it). And it cuts the President out of that process altogether. The BAA also permits District government employees to spend funds that have not been appropriated by Congress, in violation of both the ADA and the HRA provision incorporating it. For these reasons—indeed, for any one of them alone—the BAA cannot stand, the Mayor and CFO are fully justified in refusing to implement the BAA in light of its invalidity, and this Court should declare it null and void.

The Council's contrary arguments lack merit. In particular, its defense rests on two flawed premises. First, the Council argues that Congress, by placing in the HRA a number of budget-related provisions in the District's Charter and by granting the Council the authority to amend the Charter, permitted the Council to make fundamental changes to federal and local responsibilities embodied in the BAA. Congress did not, however, grant the Council unlimited authority to amend its Charter. Rather, as noted, Congress imposed carefully delineated restrictions on the Council's authority. As both the text and legislative history of the HRA demonstrate, chief among them was a permanent prohibition (until and unless further altered by Congress) on changing the federal government's role in the District budget process.

Second, the Council argues that Congress permanently appropriated the local portion of the District's budget when it established the D.C. General Fund, thus satisfying the ADA (and the Budget and Accounting Act), and allowing the Council to spend those funds without affirmative Congressional approval. That premise is likewise wrong. Under well-settled principles, a permanent appropriation occurs only when Congress clearly states both that funds

may be deposited in a separate account *and* that an agency may use those funds for a specified purpose. In this case, Congress has both *not* stated that the District could use the funds deposited in the General Fund for a particular purpose, and has expressly *barred* the District from expending those funds, for any purpose, without further congressional approval. *See* D.C. Code § 1-204.46 (1973) ("No amount may be obligated or expended by any officer or employee of the District of Columbia unless such amount has been approved by Act of Congress."). The General Fund is thus not an appropriation, permanent or otherwise, and no one has claimed it to be one until now.

The Council's brief concedes that the legislative history is clear that in 1973 Congress intended to retain appropriations authority over the entire District budget, and indeed that the Home Rule Act would not have passed without that condition. What sense then would it have made for Congress to pass this legislation on that condition, yet leave it to the Council shortly after passage to change the law so that it took away appropriations authority from Congress? And why, if the Council always had this authority, did the Council and the Congress for 40 consecutive years since passage of the law operate under the terms of HRA section 446, with Congress making an annual appropriation from the section 450 fund for the District's budget? And why did Councilmembers, Mayors, and other District officials repeatedly for decades urge Congress to amend this law to give the District budget autonomy if the Council had the power all along to amend the Charter and take it for itself? Common sense answers all of these questions—Congress and the Council well knew that the Charter did not permit such a unilateral seizure of authority.

Because the Budget Autonomy Act violates specific prohibitions of the HRA, the Council did not have the authority to pass the BAA and even if it did, the BAA violates federal

budget statutes and is invalid under the Supremacy Clause of the U.S. Constitution. Accordingly, the law is null and void, as the General Accounting Office (GAO) found, and this Court should strike it down.[1]

ARGUMENT

I. This Court Has Jurisdiction.

The Council renews its argument that the Court should remand this case to the Superior Court for lack of jurisdiction. *See* Pl.'s Opp. & Reply (P.R.R.) at 29. That argument fails.

As our opening brief established (at 8), federal-question jurisdiction exists here because the Council's claim for a declaration upholding its action necessarily depends on a question of federal law. The Council mischaracterizes this as an argument "that *all* causes of action arising under the Charter are federal." P.R.R. 29. Defendants' argument is that the specific nature of the Council's claim—seeking authorization for its changes to the functions and operations of the President of the United States and the Congress—raises a federal question. The Council claims that it had the power to enact a law that altered Congress's reserved right to appropriate the District's budget by legislation (by, among other things, changing its active legislation to passive review as to the "local portion" of the budget). Under D.C. Circuit precedent, that claim creates a federal question. Indeed, the Circuit has deemed it "self-evident" that "questions regarding Congress's reserved right to review District legislation before it becomes law concern[] an exclusive federal aspect of the [HRA]." *Bliley v. Kelly*, 23 F.3d 507, 511 (D.C. Cir. 1994); *see also Banner v. United States*, 428 F.3d 303, 311 (D.C. Cir. 2005) (*per curiam*) (Congress's

[1] While defendants believe that the BAA is invalid, they wholeheartedly agree as a policy matter with amici Rivlin et al. both that "[t]here is . . . no policy reason today to deny the District its right to manage its own finances," and that "budget autonomy . . . would significantly enhance the efficiency and proper function of the local government." Rivlin Br. 6. But that policy decision must come from Congress. Furthermore, nothing in amici's brief warrants a change to the applicable legal standards so that the BAA could only be set aside upon "a compelling showing of legal invalidity." *Id.* at 10; *accord id.* at 3. But even if that were the standard, defendants have made that showing.

authority over District finances is not a purely local matter because "in financing the District, Congress necessarily faces a choice between using revenues from local taxation and general revenues, *i.e.*, revenues largely derived from the states").

The Council dismisses *Bliley* as "simply inapposite" because "that case arose under . . . 42 U.S.C. § 1983." P.Mem. 44. That is unavailing. The issue here is whether the portions of the HRA on which the Council's claim rests are properly considered federal law or local law. *Bliley* addressed that same issue: The court there had to decide whether it needed to defer to a D.C. Court of Appeals (DCCA) interpretation of the HRA. The answer to that question depended on whether the issue involved "purely local law" or was instead a "matter[] of federal law." *Bliley*, 23 F.3d at 511. Based on its view (quoted above) about the "self-evident" federal nature of Congress's reserved right to review District legislation, the Circuit held that the matter was one of federal law. *See id.* That holding mandates the conclusion that the Council's claim of authority to modify "Congress's reserved right to review District legislation before it becomes law," *id.*, is likewise one of federal law. The fact that the issue—whether changes to Congress's reserved right concern local or federal law—arises here in the context of jurisdiction while in *Bliley* it arose in the context of deference to the DCCA is immaterial. It is still the same issue. Subsequent circuit case law confirms that *Bliley* cannot be brushed aside as the Council would have it.[2]

[2] In *Noble v. U.S. Parole Commission*, 82 F.3d 1108 (D.C. Cir. 1996), the D.C. Circuit certified a question to the DCCA. The Parole Commission, citing *Bliley*, had opposed certification on the ground that "this case raises a significant federal question." *Id.* at 1112. The court disagreed, explaining that in *Bliley* it was "called upon . . . to interpret the Home Rule Act itself," on the question of whether "the D.C. Council was required to resubmit an act to Congress." *Id.* at 1113 (citing *Bliley*, 23 F.3d at 510). By contrast, the court continued, *Noble* "involve[d] the interpretation of a section of the D.C. Code that is not part of the Home Rule Act." *Id.* Here, this Court must similarly "interpret the Home Rule Act itself" rather than "a section of the D.C. Code that is not part of the Home Rule Act." *Id.* And the question is one that—like the question of whether "the D.C. Council was required to resubmit an act to Congress," *id.*—implicates just how much authority Congress delegated in the HRA, and how much it retained for itself. Under *Bliley* and *Noble*, that is a question of federal law.

II. The Budget Autonomy Act Is Invalid.

A. The Budget Autonomy Act Violates The HRA And Other Federal Statutes.

The BAA transgresses three separate limitations that Congress included in the HRA, and also runs afoul of the ADA and the Budget and Accounting Act. Each of these violations independently requires that the BAA be invalidated.

HRA section 302 grants the Council legislative power "[e]xcept as provided in [D.C. Code] §§ 1-206.01 to 1-206.03 [HRA sections 601–603]." D.C. Code § 1-203.02. Sections 601 to 603, in turn, set forth specific limitations on the Council's authority, including:

- a functions limitation, which prohibits the Council from passing an act concerning "the functions . . . of the United States," HRA section 602(a)(3) (D.C. Code § 1-206.02(a)(3));
- a congressional reservation of budget authority, which prevents the HRA from making any change to the "basic procedure and practice" concerning the role of Congress, the President and enumerated federal agencies in the District's budget process, HRA section 603(a) (D.C. Code § 1-206.03(a)); and
- an ADA limitation, which precludes any law "affecting the applicability" of the ADA to the District, HRA section 603(e) (D.C. Code § 1-206.03(e)).

These limitations on the Council's general legislative authority also apply to its power to amend the Charter. HRA section 303(d) provides that the Council may not use the Charter-amending process to enact or affect "any law with respect to which the Council may not enact any act . . . under the limitations specified in §§ 1-206.01 to 1-206.03 [sections 601 to 603]." D.C. Code § 1-203.03(d). The BAA violates three of those restrictions, as well as the ADA and the Budget and Accounting Act. It is therefore invalid.

1. The BAA Violates Section 602(a)(3).

HRA section 602(a)(3) provides that "[t]he Council shall have no authority to . . . [e]nact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions . . . of the United States." D.C. Code § 1-206.02(a)(3). There is no doubt that the BAA runs afoul of this prohibition.

Budgeting and appropriations are unquestionably "functions" of Congress. *See, e.g.*, *Gross v. Winter*, 876 F.2d 165, 171 n.10 (D.C. Cir. 1989) (referring to "traditional legislative functions like budget decisions"); *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 17 (D.C. 1991) (*en banc*) (referring twice to the "appropriation functions"); *id.* at 11 n.18 ("An essential function of a governing body is the management of the financial affairs of the . . . government, which involves the fixing of a budget[.]"). And the BAA "concerns" these functions in that it changes the role of Congress (and the President and others) in the appropriations and budget process. In particular, in regard to the "local portion" of the D.C. budget, it gives the Council rather than Congress the power to authorize obligations and expenditures, and it removes the President entirely. That is exactly the type of change to a federal function, *i.e.*, a change to how responsibilities are divided between federal and local officials, that the limitation was intended to guard against—particularly when the change involves local authorities' attempt to assume additional power. *See In re Crawley*, 978 A.2d 608, 615 (D.C. 2009) (discussing legislative history of section 602(a)(3) and quoting Rep. Harsha's statement that "'[u]nder section 602(a)(3) . . . the Council could not enact legislation *affecting the balance of . . . responsibilities* between the U.S. Attorney and the Corporation Counsel [now Attorney General] because it would be altering a "function" of the United States'" (emphasis added)). By "affecting the balance" of budget and appropriations responsibilities between the Congress and the Council, the BAA alters a function of the United States.

The Council responds to this straightforward argument by asserting that whether an act violates section 602(a)(3) actually turns on whether "a law of national application is repealed or amended." P.R.R. 19. That is incorrect.

Section 602(a)(3) provides in full that the Council may not "[e]nact any act, or enact any

act to amend or repeal any Act of Congress, which concerns the functions or property of the United States *or* which is not restricted in its application exclusively in or to the District." D.C. Code § 1-206.02(a)(3) (emphasis added). The limitation thus creates two separate categories of laws that the Council may not enact: (1) those that "concern[] the functions or property of the United States," and (2) those that are "not restricted in [their] application exclusively in or to the District," or that amend federal law not so restricted *Id.* Each category must have separate meaning. *See e.g.*, *United States v. Woods*, 134 S. Ct. 557, 567 (2013) ("[T]he operative terms are connected by the conjunction "'or.'" . . . [That word's] ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))); *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 451 (D.C. Cir. 2012) (same). The meaning of 602(a)(3) proposed by the Council—whether "a law of national application is repealed or amended" (P.R.R. 19)—fairly covers laws in the second category. But it writes the first category out of the statute, in derogation of the cases just cited as well as of courts' "duty, if possible, to give effect to every clause and word of a statute." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1754 (2011).[3]

In support of its position, the Council cites a number of cases from this Court and the DCCA, principally *District of Columbia v. Greater Washington Central Labor Council*, 442 A.2d 110 (D.C. 1982). But those cases do not justify a disregard of the (much more recent and governing) Supreme Court and D.C. Circuit authority discussed above.

Greater Washington can be read as the Council suggests, *i.e.*, as interpreting section 602(a)(3) so as to effectively read the functions category (*i.e.*, what appears before the "or") out of the statute. *See* 442 A.2d at 116. But if the Court did so, that would directly conflict with the

[3] Honoring that duty is certainly "possible" here: By giving the separate first category its plain meaning, namely that the Council cannot pass laws that alter any federal government function, even if they do not pertain to "law[s] of national application" (P.R.R. 19).

cases discussed above—which, unlike the Council's authorities, are actually binding on this Court. Those authorities command that independent meaning be given to the functions category.

While that point alone is sufficient to dispose of the Council's cases, those cases are factually distinguishable. For example, this case is nothing like *Greater Washington*, which involved the District's repeal of the 1928 Workmen's Compensation Act, a "local law enacted by Congress" to extend workmen's compensation coverage to private employees in the District, "which was restricted in its application 'exclusively in or to the District.'" 442 A.2d at 116. As the DCCA made clear in determining that the District's repeal of the law did not impermissibly affect a "function[] . . . of the United States," the Secretary of Labor's "function . . . in the administration of [the act] [wa]s a purely local one." *Id.* at 117 & n.2. While the Council asserts that this case is "legally indistinguishable" from *Greater Washington* (P.R.R. 19), in reality the Secretary's administration of a "purely local" program, 442 A.2d at 117, is entirely different from the Council's arrogation to itself of Congress's quintessential appropriations power.[4]

Still farther afield are this Court's decision in *CSX Transportation, Inc. v. Williams*, 2005 WL 902130 (D.D.C. Apr. 18, 2005) (Sullivan, J.), *rev'd on other grounds*, 406 F.3d 667 (D.C. Cir. 2005) (*per curiam*), and *American Council of Life Insurance v. District of Columbia*, 645 F. Supp. 84 (D.D.C. 1986). Both involved whether a Council-enacted law had an impermissible extraterritorial reach, *not* whether it concerned a function of the United States. In any event, as the Council notes (P.R.R. 19), the Court in *CSX* identified "a distinction, for [HRA] purposes, between the incidental effects of local regulation and direct regulation of external conduct," 2005

[4] Much the same is true of *Techworld Development Corp. v. D.C. Preservation League*, 648 F. Supp. 106 (D.D.C. 1986)—a case that in any event is particularly tenuous authority given that it was vacated by the D.C. Circuit, *see* P.R.R. 19. *Techworld* involved "[t]he closing of a small street in Northwest Washington," 648 F. Supp. at 115, a matter that has a strong local flavor—"[a]uthority over the streets of a city is a paradigmatic municipal function," *id.* at 111—and does not encroach on quintessential congressional functions like budgeting and appropriations. With congressional acquiescence, the District handled local street closings for 50 years before *Techworld*. In marked contrast, the Congress has been appropriating the District's budget for at least the last 140 years.

WL 902130, at *22–23. The BAA certainly involves "direct regulation of external conduct": It takes away Congress's and the President's active role in shaping the entire District budget.

Holding that the BAA violates the functions limitation would not "gut the Council's legislative authority." P.R.R. 21. In particular, it would not deprive the Council of the ability to cut taxes or to amend the criminal code, or indeed to make substantive civil and regulatory law, as it does on a regular basis. *See id.* While either of those steps might alter the background against which federal officials act, neither would change federal officials' *functions*, *i.e.*, those officials' roles, tasks, or responsibilities. Cutting taxes, for example, would not deny Congress the same role (*i.e.*, function) in creating the District's budget, namely to affirmatively enact the Council's proposed budget and any and all appropriations. Similarly, changing the criminal code would not alter the U.S. Attorney's responsibility (*i.e.*, function), which is to prosecute crimes. In fact, a better analogy to the BAA would be a Council-passed law that transferred prosecutorial authority from the federal official that Congress designated—the U.S. Attorney—to its local counterpart—the Attorney General. As noted above, the DCCA has held that such a law violates section 602(a). *See Crawley*, 978 A.2d at 620. While one can conjure hypotheticals about laws closer to the permissible-impermissible line, the BAA presents an easy case of patent violation: Budgeting and appropriations are quintessential congressional "functions," and the BAA intrudes upon (and thus "concerns") those functions by taking away Congress's active role in budgeting and appropriations for the entire District budget.[5]

2. The BAA Violates Section 603(a).

HRA section 603(a) provides:

Nothing in this Act shall be construed as making any change in existing law,

[5] As argued in our opening brief (at 28–29), the BAA separately violates section 602(a)(3) because it conflicts with the ADA, a law that is "not restricted in its application exclusively in or to the District." *See, e.g.*, *McConnell v. United States*, 537 A.2d 211, 215 (D.C. 1988).

> regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States . . . in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

D.C. Code § 1-206.03(a). The BAA violates this provision as well.

As an initial matter, there is no serious argument, and in fact the Council does not even attempt to argue, that the BAA does *not* "change . . . the respective roles of Congress [or] the President," in preparing and passing the total District budget. P.R.R. 26. Instead, the Council contends that section 603(a) is not a "limitation" on the Council's authority at all, but merely a "rule of construction" that explains how the 1973 version of the HRA "was to be construed." *Id.* at 25. That argument fails.

The Council's semantic effort to draw a meaningful distinction between a limitation and a rule of construction is unavailing. A rule of construction, particularly one enacted as statutory text, *is* a limitation, a limitation on how a statute or other legal document may be read—with all the consequences that flow from that limitation or prohibition. In fact, the type of proscriptive language found in section 603 has long been regarded as imposing a substantive limitation. The Eleventh Amendment, for example, provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by citizens of another state[.]" Yet it is firmly established that this amendment substantively limits the power of the federal government. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78 (2000) ("[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").[6] Similarly here, section 603(a) imposes a substantive limitation not only on courts (which cannot interpret the Act as making any of the specified changes to the roles of

[6] *See also Nevada v. Hall*, 440 U.S. 410, 420 (1979) ("[T]he Eleventh Amendment . . . places explicit limits on the powers of federal courts to entertain suits against a State.").

Congress, the President, etc.), but also on the Council itself, which cannot pass amendments that would result in the Act making any such change.[7]

The conclusion that Congress intended section 603(a) to serve as a substantive limitation on the Council also finds support in the legislative history of another of the HRA's limitation provisions, section 602(b). That section, which was in bills before section 603(a) was added, uses the same "[n]othing in this chapter shall be construed as" phrasing as section 603(a), providing that "[n]othing in this chapter shall be construed as vesting in the District government any greater authority over [various matters such as the National Zoo and the National Guard] . . . than was vested in the Commissioner prior to January 2, 1975." And the legislative description and explanation of that section makes clear that Congress intended it to impose a prohibition on the Council's authority. *See, e.g.*, H.R. Rep. No. 93-482, at 37 (1973) ("Subsection (b) *prohibits* the Council from exceeding its present authority over the National Zoological Park, the District National Guard, the Washington Aqueduct, the National Capital Planning Commission, or any other Federal agency." (emphasis added)); 4 *Staff of H. Comm. on the District of Columbia, 93d Cong., Home Rule for the District of Columbia: Background and Legislative History* 3031 (hereinafter HOME RULE HISTORY) (Rep. Diggs on District of Columbia Home Rule Conf. Rep.) (The HRA "prohibits the local Council from, among others, enacting a tax on nonresidents, increasing the height limitation on buildings, . . . or increasing the Council's authority over the Washington Aqueduct, the National Guard, the National Zoological Park, or any federal agency."). Because Congress used the same phrasing in section 603, that section is also properly read as a substantive prohibition. *See, e.g., Robers v. United States*, ___ S. Ct. ___, 2014 WL 1757835, at *3 (May 5, 2014) ("Generally, identical words used in different parts of the same

[7] In contrast, Congress can always repeal or otherwise make an explicit exception to the "[n]othing . . . shall be construed" limitation.

statute are . . . presumed to have the same meaning." (omission in original) (internal quotation marks omitted)).

As a fallback, the Council argues that section 603(a) pertains only to the Act *as passed in 1973*, and not to any subsequent amendments (such as the BAA). That argument also lacks merit, as other legislation containing similar language has been authoritatively construed to apply to later amendments. Specifically, decades before it enacted the HRA Congress provided in the McCarran-Ferguson Act that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The Supreme Court has interpreted this "shall be construed" language to apply to all federal statutes, including those "not identified in the Act *or not yet enacted*." *Humana Inc. v. Forsyth*, 525 U.S. 299, 306 & n.7 (1999) (emphasis added); *see also Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 260 (3d Cir. 2007) ("Congress was attempting to control the interplay between the federal and state laws not yet written."). The same reading of section 603 is required here.

The Council's argument also rests on its misstatement of the HRA's definition of the term "Act." The Council asserts both that "this Act" is expressly defined as "the 1973 Act," P.R.R. 23, and that "Congress . . . defined the term 'Act' 'to refer to *this Act*' and *not to subsequent amending legislation*," P.Mem. 30 (second emphasis added). In fact, the provision the Council cites defines the term "act" to "include[] *any legislation* passed by the Council, except where the term 'Act' is used to refer to this Act or other Acts of Congress herein specified." HRA section 103(7) (D.C. Code § 1-201.03(7)) (emphasis added). That definition does not exclude later amendments by the Council from the "Act"; indeed, upon enactment, such amendments become part of the Charter set forth in title IV of the Act. *See* HRA section 303(a)

(D.C. Code § 1-302.03(a)); 1A Singer & Singer, *Sutherland Statutory Construction* § 22.35 (7th ed. 2009) ("The original section *as amended* and the unaltered sections of the act, code, or compilation of which it is a part . . . are read together." (emphasis added)); *cf. id.* ("The phrase 'this act' in a section as amended generally refers to the whole act, and not merely the amending act.").[8]

In short, because the BAA purports to amend the HRA so as to change the role of Congress, the President, and the other enumerated federal entities in the D.C. budgeting process, it transgresses section 603(a), and is therefore invalid.

3. The BAA Violates Section 603(e), And Thus Also The Anti-Deficiency Act.

As enacted, HRA section 603(e) provided that "[n]othing in this Act shall be construed as affecting the applicability to the District government of" the ADA. D.C. Code § 1-206.03(e). The ADA, in turn, precludes "[a]n officer or employee . . . of the District of Columbia government" from spending public dollars unless Congress makes the "amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a). The BAA runs afoul of the ADA, and hence of section 603(e) as well.

As explained in defendants' opening brief, HRA section 446 (until purportedly amended by the BAA) provided the mechanism for the District to comply with the ADA.[9] That provision required the District to submit its budget to Congress and prohibited any "amount [from] be[ing]

[8] The Council argues that the term "this Act" in Section 603(a) is analogous to a "cross-reference incorporat[ing] a statute by reference," which would not "include subsequent additions or modifications by the statute." P.R.R. 25 (internal quotation marks omitted). That principle is inapplicable. The cases the Council cites involved "one statute [or section] adopt[ing] the particular provisions of another by specific and descriptive reference." *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (internal quotation marks omitted). There is no such cross-reference in section 603(a). Its directive that "this Act" shall not be construed to alter federal officials' role in the D.C. budget process is a term defined to refer to the entire act or chapter, which includes the Charter and any amendments to it.

[9] The *en banc* DCCA, in a case the Council does not address, interpreted section 446 to mean that "the Council cannot authorize the spending of local revenues; only Congress can." *Hessey*, 601 A.2d at 8. As discussed in the text, there is good reason for that requirement: compliance with the ADA. The *Hessey* Court never suggested that the Council had the authority to change this power of Congress.

obligated or expended" until "such amount ha[d] been approved by Act of Congress." D.C. Code § 1-204.46 (2012). The Council does not dispute that complying with section 446, as originally enacted, satisfied the requirements of the ADA. According to the Council, however, section 446 is (and was) expendable because section 450 alone fully satisfied the ADA's requirements by permanently appropriating all local revenue into the District's General Fund. *See* P.R.R. 5–6. This "permanent appropriation" theory (first devised for this litigation and never mentioned by the Council in the legislative history of the BAA) is essential to the Council's case; without it, the BAA—which revised section 446 to remove Congress from the local-funds budget process—provides no mechanism for complying with the ADA. *See* D.C. Law 19-321, § 2(e), amending D.C. Code § 1-204.46(a). As explained below and in our opening brief (at 19–25), however, the Council's lately manufactured permanent appropriation theory is fatally flawed.

To qualify as a permanent appropriation, a statute must "authorize both [1] the deposit and [2] the expenditure of a class of receipts." GAO, B-324987 at 10 (Jan. 30, 2014); *see also* GAO, 1 *Principles of Appropriations Law*, at 2-16 (an appropriation exists only "[i]f the statute contains a specific direction to pay and a designation of the funds to be used"). Moreover, authorization must be clear. "A law may be construed to make an appropriation . . . only if the law specifically states that an appropriation is made . . . ." 31 U.S.C. § 1301(d); *see also AFGE Local 1647 v. FLRA*, 388 F.3d 405, 410 (3d Cir. 2004) ("Congress itself signaled how jealously it guards the appropriations prerogative, by imposing a 'clear statement' rule regarding when a court may find that an appropriation has been made."). Although no "magic words" are required (P.R.R. at 5), "[a]n appropriation cannot be inferred or made by implication," 1 *Principles of Appropriations Law*, at 2-16. "This principle is even more important in the case of . . . permanent appropriation[s] . . . 'which remove from annual scrutiny of Congress the use of public money' "

and thus, "'as a general rule, are against the spirit of the Constitution.'" GAO, B-114808, 1979 WL 12213 (Comp. Gen. Aug. 7, 1979) (quoting 1 First Comp. Dec. 141, 144 (1880)).

Such a clear-statement requirement follows inexorably from the paramount importance of Congress's authority over appropriations. *See, e.g.*, *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir 2012) ("The power over the purse was one of the most important authorities allocated to Congress[.]"). Courts should not presume that Congress has surrendered any aspect of this power unless it makes that intention clear.

Section 450 contains no authorization for the expenditure of funds, much less the requisite clear authorization. Although section 450 authorizes the deposit of local funds into the General Fund, it says nothing about the authority to expend those funds. Indeed, when Congress enacted section 450 in 1973, it made clear that it was *withholding* that authority. Prior to passage of the BAA, section 446—which, unlike section 450, contains the mechanism to authorize expenditures—was entitled "Enactment of Appropriations By Congress" and stated unequivocally: "No amount may be obligated or expended by any officer or employee of the District of Columbia unless such amount has been approved by Act of Congress." D.C. Code § 1-204.46 (2012). As the GAO correctly concluded, "Congress could not have intended to provide a permanent appropriation to the District in the Home Rule Act where, in the very same act, it provided that funds would be available only with the approval of an act of Congress." GAO, B-324987 at 10.[10]

[10] The Council argues (P.R.R. 8) that defendants' position "renders Section 446 . . . entirely superfluous," and "[t]hat alone proves that Defendants' interpretation cannot be correct." That is meritless. Even if defendants' interpretation created surplusage (which it does not), "[t]he canon against surplusage is not an absolute rule." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (citing *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 n.1 (2006), and *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting[.]")); *see also Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("[Congress] sometimes drafts provisions that appear duplicative of others—simply, in Macbeth's words, "to make assurance double sure."). While defendants would give effect to both

In this circuit, no other conclusion is possible in light of *Nevada v. Department of Energy*, 400 F.3d 9 (D.C. Cir. 2005), which rejected the argument that a statute materially indistinguishable from the HRA could be considered a permanent appropriation. Like section 450, the statute at issue in *Nevada* established a segregated fund with a dedicated revenue stream—there, a Nuclear Waste Fund financed by payments made by generators and owners of nuclear waste. *See* 42 U.S.C. §§ 10222(c), 10131(b)(4) (2005). And like HRA section 446, another provision of the statute in *Nevada* provided that expenditures from the segregated Fund were "subject to appropriations." *Id.* § 10222(e)(2) (2005). Relying on yet a third provision (*id.* § 10136(c)(5) (2005)), which stated that "the Secretary shall make grants to the State of Nevada . . . out of amounts held in the Waste Fund," Nevada argued that the Fund was a permanent appropriation and that payments therefore could be made to the State out of the Fund absent any further appropriation by Congress. The D.C. Circuit rejected that contention, explaining in language equally applicable here that no "continuing appropriation exists when Congress creates a special fund but makes spending from it 'subject to appropriation.'" 400 F.3d at 14.[11]

No authority supports the Council's contention that a permanent appropriation requires only that Congress direct money to a fund outside the Treasury, regardless of whether it also authorizes expenditures from that fund. The well-established test requires that "[b]oth elements . . . must be present." 1 *Principles of Appropriations Law*, at 2-17; *see also id.* ("The designation of a source of funds without a specific direction to pay is . . . not an appropriation."); 67 Comp.

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provisions, plaintiff would give effect to *neither*.

[11] The Council attempts (P.R.R. 6 n.3) to distinguish *Nevada*, but neither of its arguments is persuasive. *First*, nothing in *Nevada* suggests that the court's analysis would have changed had the fund been located outside the Treasury. To the contrary, that factor is as irrelevant to the issues in that case as it is to the issues here. *See infra* at 17. *Second*, *Nevada* controls the ADA issue here not because it says anything directly about the ADA (it does not), but rather because it definitively disposes of the subsidiary question on which the Council's ADA defense depends—namely, whether HRA section 450 is a permanent appropriation. *Nevada* establishes that it is not.

Gen. 332, 334 (Mar. 10, 1988) (a statute that "does not provide any specific direction to pay" does not create a permanent, indefinite appropriation). That two-part requirement is sensible. As recognized in *Nevada*, Congress segregates accounts for many reasons other than permanent appropriation. For example, Congress may wish to "ensure a consistent source of funding" for a particular program even while intending to retain annual control over how that funding is spent. *Nevada*, 400 F.3d at 15. Focusing solely on whether Congress has set up a fund thus fails to distinguish a permanent appropriation that would satisfy the requirements of the ADA from statutes that, like the one at issue in *Nevada* (and here), create a fund without divesting Congress of the authority to authorize expenditures from that fund.

Nor does the analysis (or ultimate conclusion) change simply because the fund is set up outside the Treasury, rather than in it. The GAO long has applied the same test for determining whether Congress has made a permanent appropriation regardless of where Congress has located the fund. *Compare* 59 Comp. Gen. 215 (Jan. 15, 1980) (mobile home inspection fees held in the Treasury), *with* 64 Comp. Gen. 756 (Aug. 8, 1985) (Tennessee Valley Authority set up outside the Treasury). The rationale for the test likewise does not depend on the fund's location. As the original HRA illustrates, establishing a fund outside the Treasury hardly means that Congress is prepared to relinquish control over how that fund is spent.

The Council focuses its argument to the contrary (P.R.R. 4–8) on the Appropriations Clause's command that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Council contends (P.R.R. 4) that "if money has left the Treasury, it necessarily has been appropriated." Hence, because money in the District's General Fund is outside the Treasury, it has already been appropriated within the meaning of the Appropriations Clause. P.R.R. 5–6. Yet even if that is true, it is not sufficient—

contrary to the Council's assertions (*id*. at 6)—to satisfy the ADA. Unlike the Appropriations Clause, the ADA does not mention "the Treasury," and thus a formalistic inquiry into the location of particular funds is irrelevant to determining whether the Act's mandate has been satisfied. Rather, the touchstone inquiry of the ADA is whether Congress has specifically and clearly indicated its decision to make "an amount available . . . for . . . expenditure or obligation," 31 U.S.C. § 1341(a), language that requires an inquiry into Congress's intent when it passed a particular statute.[12] The fact that money was appropriated (for purposes of the Appropriations Clause) when Congress directed it to a fund outside the Treasury does not mean that Congress intended to make the same money permanently "available" for expenditure without any further congressional involvement. If the Council were correct that Congress's initial decision to locate funds outside of the Treasury is sufficient to satisfy the ADA, *every* fund established by Congress would be a permanent appropriation, a proposition for which there is no legal authority. That cannot be correct. *See supra* at 17–18 (discussion of GAO guidance and *Nevada*).

In any event, the entire discussion of the Appropriations Clause of the Constitution is irrelevant to this action. The decision by Congress to reserve to itself the power of appropriations of the entire District budget did not derive from the Appropriations Clause but from the provision of the Constitution that gives Congress exclusive plenary authority over the District. U.S. Const. art. I, § 8, cl. 17. Thus, its powers of appropriation and its application of the ADA to the District do not depend upon the parsing of the language of the Appropriations Clause.

Finally, the Council attempts to analogize section 450 to other statutes that have long been recognized as creating permanent appropriations. But these examples simply highlight the

[12] The Council elides the word "available" in asserting that the "Anti-Deficiency Act is satisfied whenever there is an 'appropriation or fund.'" P.R.R. 7 (emphasis omitted).

gap in the Council's analysis. All of those cases involve specific language authorizing both the deposit of funds in a separate account and the specified expenditure of funds from that account. *See* 59 Comp. Gen. 215, 216 (1980) (quoting 42 U.S.C. § 5419 (1980)) (mobile home inspection fees held in the Treasury); 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority set up outside the Treasury) (discussing 16 U.S.C. § 831n-4(a)).

In sum, the Council's ADA argument—and hence its derivative arguments for why the BAA does not also violate both HRA section 603(e) and the Budget and Accounting Act—fails because section 450 does not authorize expenditures from the General Fund and thus does not constitute a permanent appropriation.

B. The HRA's Legislative History Confirms That Congress Precluded The Council From Altering Congress's Role In The District's Budget Process.

The HRA's legislative history confirms that Congress barred the Council from altering Congress's role in the District's budget process through Charter amendments. As explained in our opening brief (at 29–30), both the Senate and the House specifically considered home-rule legislation that would have granted the District autonomy over its budget. *See* S. 1435, § 504; H.R. 9682, § 446 (as reported Sept. 11, 1973). Although the budget-autonomy provision passed the Senate, it was a non-starter in the House. *See* Newman & DePuy, *Bringing Democracy To The Nation's Last Colony*, 24 AM. U. L. REV. 537, 592 & n.112 (1975). Influential House members viewed retaining congressional control over the District's budget as not only desirable, but even constitutionally required. 3 HOME RULE HISTORY 2111 (remarks of Rep. Natcher, chairman of the House Appropriations District of Columbia Subcommittee); *id.* at 3577 (statements of Vice-President designate Ford). Accordingly, in the same memorandum that the Council cites as evidence of Congress's intent to grant the Council authority to amend the District Charter, House staff emphasized that Congress's retention of control over the District's

"budget/appropriation process" was "[e]ssential for House approval" of the Home Rule Act. *Id.* at 2931 (staff memo for Chairman Adams).[13]

To secure passage of the Act, the bill's supporters in the House therefore abandoned the local-autonomy provisions and replaced them with section 446. 3 HOME RULE HISTORY 2084 (statement of Rep. Diggs); 119 Cong. Record 33405 (1973). But that was not the only change the bill's advocates made to accommodate the opponents. They also added section 603(a), under the heading "Limitations on Borrowing and Spending." *Compare* 119 Cong. Rec. 33409 (1973), *with* H.R. 9682, § 603 (as reported Sept. 11, 1973); H.R. Rep. No. 93-703, at 78 (1973). That additional change—which the Council ignores—is critical: Had Congress wanted to retain its existing role in the District's budget process while simultaneously granting the District the authority to change that role in the future through a Charter amendment, as the Council argues, it would have stopped after adopting section 446. By going further, and placing an additional limitation on the Council's legislative authority, Congress made its goal clear: To ensure that Congress permanently "retain[ed] . . . the authority to review and appropriate the entire District budget" unless and until *it*, not the Council, decided otherwise. 119 Cong. Rec. 40314 (1973) (Rep. Diggs on the D.C. Home Rule Conf. Rep.); *see also id.* at 40316 (HRA's financial provisions "preserve Congress['s] complete role in the review and appropriation of the entire District budget"); HRA section 603(c) (D.C. Code § 1-206.03(c)) (requiring the Council to take certain action "to the extent its budget is approved" by Congress).

To avoid the obvious implications of the addition of section 603(a), the Council focuses its legislative-history discussion on Congress's decision to include several budget-related provisions in the Charter, thereby subjecting them to possible amendment. *See* P.R.R. 11–18. But

[13] Plaintiff's discussion of legislative history at P.R.R. 15 involves discussion of a bill that would have granted budget autonomy, *see* 1 HOME RULE HISTORY 309–10, 342–43, 507, and thus is inapposite.

the fact that Congress intended to grant the Council authority to make *some* changes to the budget process through Charter amendments is undisputed, and thus the Council's legislative-history analysis is largely irrelevant. The key point is that Congress placed carefully considered limits on the Counsel's authority to amend its Charter. As explained above, prohibiting any changes to Congress's role in the District's budget was chief among those limitations.

In support of its argument that Congress intended to allow laws like the BAA, the Council also notes (P.R.R. 16) that "when the Home Rule Act was passed in 1973, it was considerably more difficult to amend the Charter." Because Congress could more easily block an amendment, this argument goes, it did not need to affirmatively preclude the Council from using the amendment process to grant the District budget autonomy. But whether or not Congress "needed to exclude the issue from the amendment process," P.R.R. 16, is beside the point. The point is that Congress *did* exclude it, through the adoption of section 603(a), which continues to apply despite changes in the Charter-amendment process.

Finally, the Council notes (P.R.R. 17–18) that in 1977 it used its amendment authority to add a Charter provision instituting a public-initiative process. Because Congress had expressly declined to implement a similar provision when adopting the HRA, the Council argues that "Congress understood that the Charter could be amended to override decisions previously made." *Id.* at 18. Unlike in the case of the budget-autonomy provisions, however, Congress did not both decline to adopt the public-initiative provision *and* add a term to the HRA affirmatively prohibiting the Council from instituting one. To the contrary, Congress granted the Council extraordinarily broad authority to legislate in matters related to elections, including ballot initiatives. *See* D.C. Code § 1-207.52 ("Notwithstanding any other provision of this chapter or of any other law, the Council shall have authority to enact any act or resolution with respect to

matters involving or relating to elections in the District."); *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 113 (D.C. 2010) (*en banc*). The Council's use of the amendment process to promulgate a public-initiative provision thus provides no help to the Council.

C. The Other Side's Remaining Arguments Are Meritless.

1. Defendants' Decision Not To Enforce The BAA Was Proper.

Amici Appleseed *et al*. spend a substantial portion of their brief (at 10–17) discussing whether defendants could properly decline to enforce the BAA. The need for (or usefulness of) this extended exposition is unclear; the question of the BAA's validity is now before the courts, and defendants have made clear that they will abide by the courts' resolution of that question.

In any event, Appleseed's arguments lack merit. The Supreme Court in *Myers v. United States*, 272 U.S. 52 (1926), upheld the President's view that the law at issue was invalid without making any suggestion that he had acted improperly in refusing to honor the law. In *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456 (D.C. Cir. 2001), the court explained that "[t]he power to take care that the laws be faithfully executed is entrusted to the executive branch—and only to the executive branch. One aspect of that power is the prerogative to decline to enforce a law," *id.* at 466 (citation omitted). Moreover, four Justices have expressed the same view that the D.C. Circuit did in *Baltimore Gas*. *See Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional."). And the U.S. Justice Department's Office of Legal Counsel (OLC) has issued a memorandum explaining at length the President's authority not to enforce statutes "that he views as unconstitutional." *Presidential Authority To Decline To Enforce Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994), *available at*

http://www.justice.gov/olc/nonexcut.htm.[14] The OLC opinion makes it clear that it is particularly appropriate for a chief executive to decline to implement a law perceived as unlawful when, as here, it will result in a court resolution of the matter. Indeed, so well-established is the principle of executive authority not to enforce statutes deemed to be invalid that Congress has enacted a law requiring the executive to inform it whenever that occurs. *See* 28 U.S.C. § 530D(a)(1)(A)–(B).

In *Mayers v. Ridley*, 456 F.2d 630 (D.C. Cir 1972), the Circuit Court held that even a ministerial officer of the District government, the Recorder of Deeds, must decline to act in a manner that would violate federal law. The court stated: "[W]hether the Recorder's duties are viewed as discretionary or ministerial, it should at least be clear that he has not been invested with the authority to break the law." Nor are the Mayor and the CFO free to violate federal law, such as the ADA, to enforce the BAA, which both the District's Attorney General and the independent federal agency, GAO, have opined is invalid and null and void.[15]

The exercise of such authority does not derogate the separation of powers, and in particular does not intrude on the province of the courts. As this lawsuit shows, an executive's decision not to enforce a statute typically allows those aggrieved by that decision to challenge it in court. So long as the executive respects the judiciary's final ruling on the validity of the law in question—as, again, defendants here have made clear they will—the courts' role is preserved.

2. Congress's Failure To Disapprove The BAA Does Not Suggest Approval.

Appleseed also asserts (Br. 18–20) that Congress's failure to disapprove the BAA shows

[14] As OLC stated in this memo, "[t]he fact that a sitting President signed the statute in question does not change this analysis." *Id.* ¶ 7. Hence, "the President's signing of a bill does not affect his authority to decline to enforce constitutionally objectionable provisions thereof." *Id.* The same logic applies to the District's Mayor.

[15] *See also Matter of Council of City of New York v. Bloomberg*, 6 N.Y. 3d 380 (N.Y. 2006), where New York's highest court upheld the Mayor's refusal to implement local legislation that conflicted with state law and was preempted by federal statute.

its approval of the law. That argument lacks merit. The question is not whether Congress in some vague sense approved of the BAA, but whether Congress affirmatively ratified it to the extent that its inconsistency with HRA limitations can be excused. And the Supreme Court and D.C. Circuit cases that reject congressional inaction as a basis for discerning legislative intent are legion. *See, e.g.*, *DePierre v. United States*, 131 S. Ct. 2225, 2236 n.13 (2011); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from [it]." (internal quotation marks omitted)); *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (maj. op. of Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.").[16]

Appleseed points to *Kimbrough v. United States*, 552 U.S. 85 (2007), for the proposition that congressional inaction is relevant in regard to "a 'high-profile' action that clearly drew Congress's attention." Appleseed Br. 20. But Supreme Court precedent since *Kimbrough* undercuts the notion of any "high-profile" exception. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 508 n.21 (2008) (invoking "the Court's oft-expressed skepticism towards reading the tea leaves of congressional inaction" in a case involving the Exxon Valdez oil spill (internal quotation marks omitted)). Moreover, even if *Kimbrough* created such an exception, it would not apply here. *Kimbrough* explained that the inaction in that case occurred not simply in a "high-profile area" but one "in which [Congress] had previously exercised its disapproval authority." 552 U.S. at 106. Congress, of course, has not previously disapproved any effort by the Council to seize budget autonomy. There is thus no basis to infer any approval from its failure to disapprove

[16] Congress has not been silent. It obtained a persuasive GAO opinion that the Act is null and void; the relevant subcommittee of the House issued a report declaring its view that the Act and referendum were advisory only and did not constitute a valid, lawful action; and the House's Bipartisan Legal Advisory Group has sought leave to file an *amicus* brief here.

the BAA.[17]

CONCLUSION

Defendants' summary judgment motion should be granted, plaintiff's motion denied.

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[17] Amici Concerned Legal Professionals (CLP), meanwhile, simply ignore the limitations in HRA sections 601–603, arguing as though Congress granted the District unlimited autonomy save for a reservation of the power to disapprove Council legislation (and to pass legislation itself). *See* CLP Br. 12 ("The Home Rule Act and the Charter should be read broadly . . . . No other purpose or limitations ought to be presumed."). That is not what the HRA provides. CLP provide no basis to disregard the express limitations that Congress included (nor any reason to read them as the Council urges).

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