Good afternoon Chairman Mendelson and members of the Committee. I am Walter Smith, Executive Director of the DC Appleseed Center for Law and Justice. DC Appleseed is a nonprofit public interest organization that addresses important issues facing residents of the National Capital Area. Thank you for giving me the opportunity to present testimony on Bill 19-993, the “Local Budget Autonomy Act of 2012,” a bill DC Appleseed strongly supports.

INTRODUCTION

Earlier this year, Mayor Vincent Gray released his “One City Action Plan” outlining how to make the District a more prosperous, equitable, and sustainable city for all residents. As part of that plan, the Mayor envisioned a city “where every tax dollar is spent wisely on a government that works and where citizens’ voices really count.” The bill that is the subject of this hearing helps implement that vision. It would give the District budget autonomy—the ability of the city to spend the approximately $6 billion in revenue it raises on its own from D.C. residents, businesses, and visitors, without waiting for a congressional appropriation.
The bill would also make the citizens’ voices count. Through this bill, D.C. voters will be able to pass and send to Congress a measure that would establish local budget autonomy and thereby advance democracy in the District.

In this testimony I want to make four points in support of the bill: (1) why a new local strategy such as this bill is needed; (2) the benefits of this bill in advancing the new strategy; (3) the legal authority for the bill; and (4) the unlikelihood that a legal challenge to the bill would succeed.

I. THE NEED FOR A NEW STRATEGY

The Local Budget Autonomy Act is a significant development in the efforts in which DC Appleseed and I have long been involved to advance self-determination for D.C residents. In 1998, as Deputy Attorney General for the city, I represented the Mayor and the Council in the lawsuit we brought in federal court arguing that the continued denial of voting representation in Congress is unconstitutional.

DC Appleseed and I also represented the Mayor and the Council in the suit we brought challenging the constitutionality of the congressional prohibition on the District’s the ability to tax the income of nonresidents. I personally argued that case both before the U.S. District Court and before the a three-judge panel of the U.S. Court of Appeals, which included Judge, now Chief Justice, John Roberts.

While these lawsuits did not succeed in the courts, both of them brought considerable visibility to these issues both locally and nationally, and both helped spur and gain support for congressional legislation designed to address these inequities. DC Appleseed and I worked closely with Congresswoman Eleanor Holmes Norton,
I offer this background not to suggest that DC Appleseed has helped achieve significant advances for the city, but, rather, to make almost the opposite point—that I am concerned by the lack of such advances.

The truth is that the Mayor, the Council, Congresswoman Norton, many individuals, and many organizations such as DC Appleseed, DC Vote, and others have engaged in this effort for a very long time and have done admirable things that have helped to carry on the battle and to bring continuing visibility to the issue. Those efforts have focused on two strategies—winning recognition for our rights in the courts, and urging Congress to afford us our rights through legislation.

I believe both strategies were the right ones and both still need to be pursued. But I also believe we need to acknowledge that those strategies have not produced the results we had hoped for and that District residents are entitled to. That is why I believe now is
the right time to complement those strategies with an additional track. The bill before us this afternoon is exactly that.

We have seen from our experience that even though there is bi-partisan agreement that the District deserves budget autonomy, Congress so far has been unable to pass a bill that would be acceptable to the city. It was only this past September that Senator Joseph Lieberman had to withdraw his proposal for budget autonomy because it was clear that a clean bill would not pass.

In this difficult environment, the District must seek other ways forward on this issue. Fortunately, the Council has the ability to do so using the authority Congress delegated to the city in the Home Rule Act. That Act’s stated purpose was “to relieve Congress of the burden of legislat ing upon local District matters” “to the greatest extent possible.” The budget autonomy Charter amendment referendum is consistent with this purpose. Before addressing the legal authority for the referendum, I would first like to emphasize the benefits of pursuing the referendum as an additional strategy in the District’s continuing efforts to advance democracy.

II. BENEFITS OF PURSUING THE PROPOSED REFERENDUM

As I mentioned, the difficulty of passing a clean budget autonomy bill in Congress has shown us that we need to explore the possibility of advancing a bill locally. The benefit of the Local Budget Autonomy Act is that it originates not from Capitol Hill, but from this Council and the people of the District. The Act has a number of advantages in this regard.
First, proceeding by referendum would allow this Council to take an important new role in advancing budget autonomy because, under the Home Rule Act, it is the Council that must set the referendum in motion.

Second, proceeding with a referendum would allow the people of the District of Columbia to become important actors in this battle because it is the residents themselves who would pass the referendum—which seems only fitting since it is, of course, the residents who are entitled to and will gain from the autonomy that would be the subject of the referendum.

Third, proceeding with the referendum would allow this Council and the people of the District to craft and pass a clean budget autonomy bill and to send to the Hill the bill that the residents of the District believe they are entitled to, rather than relying exclusively on the hope that Congress will pass such a bill itself.

Fourth, it is far from unprecedented for the people of the District to advance democracy by themselves. Their right to amend the Charter by referendum is clearly laid out in the Home Rule Act. Not even two years ago, in fact, the Council authorized a referendum on a Charter amendment to make the Attorney General an elected official. The people resoundingly voted in favor of enhancing self-government, with 76 percent of voters ratifying the amendment. That Charter amendment is now law and will be implemented in the 2014 elections. The proposed referendum would allow the people to take another such step forward.

Finally, if the referendum were passed by the people, it would automatically become law unless both Houses of Congress affirmatively disapprove it within 35
legislative days and the President then signs that disapproval. Obviously, there is a large advantage to the District in being able to use its power under the Home Rule Act to pass the Charter amendment it wants, knowing that the Charter amendment will become law unless both Houses and the President take affirmative steps to disapprove it.

III. LEGAL BASIS FOR THE REFERENDUM

As I just noted, it is not at all unprecedented for the District to amend the Charter by referendum. There is furthermore a strong legal argument that the city can use this process now to establish budget autonomy, and there are good reasons to conclude that no lawsuit could stop the referendum from taking place.

1. The Act is Authorized by the Home Rule Act.

To determine whether the Charter amendment is within the District’s authority, we must first look to the Home Rule Charter, which is akin to a state constitution. The Charter gives the District broad authority to amend it by referendum. The only restriction is that the city may not use the referendum process to amend any “act, resolution, or rule under the limitations” on the Council’s authority set forth in sections 601 to 603 of the Charter. Those sections enumerate a very specific list of limitations, including a prohibition on the imposition of a nonresident income tax, an express requirement that the District pass a balanced budget, and explicit restrictions on the District’s authority to issue bonds. However, nowhere in the Act did Congress similarly prohibit the District from amending the Charter provision that currently sets out the District’s budget process in section 446.
In fact, there is only one provision that is even relevant to the budget process in sections 601 to 603. It is Section 603(a). That section provides that “[n]othing in the [Home Rule Act] shall be construed as” changing existing law or basic procedures relating to the role of the federal government in the District’s budget process. However, this provision is not worded as a “limitation” on the Council’s authority. Instead, it appears intended to clarify that, at the time of the Home Rule Act’s passage, Congress did not mean to change then-existing law regarding the District’s budget process. But this is very different from providing that the Council could not later change that law through a Charter referendum. Because section 603(a) is not a “limitation” on the Council, it should not be read to prohibit the District from establishing budget autonomy by amending section 446.

2. *The Act is Consistent with the Anti-Deficiency Act.*

In addition to the Home Rule Act, there is another law that might be implicated by the local budget autonomy Charter amendment: the federal Anti-Deficiency Act. That Act prohibits federal and D.C. government employees from making or authorizing any “expenditures or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” One might argue that local budget autonomy would violate the Act because there would be no “appropriation or fund” from which the District could spend local funds even if the referendum became law. However, for several reasons this is not correct.

First, the District’s expenditure of local funds pursuant to its local budget would fully meet the meaning and intent of the Anti-Deficiency Act. That Act’s purpose is to
ensure that government employees spend funds only pursuant to appropriate legislative authorization. The Act does not define how that legislative authorization must occur, or specify what legislature must provide that authorization. The Act requires only that there be an “appropriation or fund” behind any obligation or expenditure. This purpose is fully served by the budget autonomy Charter amendment. Any expenditure of local funds would be made pursuant to the local budget passed by the Council after two readings, and that budget would have to complete the 30-day congressional review process. Accordingly, it is not persuasive to suggest there would be no “appropriation or fund” from which local expenditures would be made. The whole point of the referendum is to allow the Council to establish such an “appropriation or fund,” and that establishment cannot occur without congressional review. Moreover, it is worth noting that in section 450 of the Home Rule Act, Congress expressly authorized the Council to “establish such additional special funds as may be necessary for the efficient operation of the government of the District.”

Second, the Anti-Deficiency Act applies to the District through the Home Rule Act. That Act states that “[n]othing in [the Home Rule Act] shall be construed as affecting the applicability to the District government of the [Anti-Deficiency Act.]” That provision is not a limitation on the Council that renders the local budget autonomy Charter amendment impermissible. Instead, it serves only to clarify that, at the time of the Home Rule Act’s passage, nothing in that Act could be construed as affecting the continuing applicability of the Anti-Deficiency Act. But it does not dictate how the Anti-Deficiency Act applies to the District.
Third, Congress has recently confirmed that the District itself can satisfy the “appropriation” requirement of the Anti-Deficiency Act. In 2006 and 2009, Congress enacted legislation giving the District supplemental budget autonomy by allowing the District to spend excess local revenue without a congressional appropriation. In other years, the District has had to submit a supplemental budget request to Congress to appropriate excess revenue. Rather than appropriating the funds itself, Congress through these two acts authorized the Council to expend excess revenue without the need for an additional congressional appropriation. The only way to harmonize the 2006 and 2009 congressional acts with the Anti-Deficiency Act is to read those measures as authorizing D.C. expenditures pursuant to a D.C. appropriation. In fact, unless those two acts are to be rendered void by the Anti-Deficiency Act, Congress must have contemplated that a District appropriation by the D.C. Council—where reviewed by Congress—could in appropriate circumstances satisfy the Anti-Deficiency Act. That would be the case with regard to a local D.C. budget enacted pursuant to the proposed local budget autonomy Charter amendment.

For all these reasons, the local budget autonomy Charter amendment would not cause D.C. employees to violate either the letter or the spirit the Anti-Deficiency Act.

3. A Court Would Not Enjoin the Referendum from Taking Place.

While the District is on solid legal ground in enacting the local budget autonomy Charter amendment, we recognize that a lawsuit challenging the referendum might be brought. However, it is highly unlikely that a court would grant an injunction—the remedy a potential plaintiff would seek—to stop the referendum from going forward.
First, the issue would not be ripe for judicial review because any lawsuit would contest the lawfulness of a contingent future event—enactment of the Charter amendment—that may never occur.

Second, it is doubtful that any party would have standing to challenge the referendum. An individual Member of Congress could not sue because the Act would not subject any one Member for specially unfavorable treatment, or deprive any Member of something to which he or she is personally entitled. Moreover, no private citizen could sue because any harm claimed would amount to nothing more than a generalized grievance. In addition, neither House of Congress would have standing because merely allowing D.C. residents to vote would not cause an injury. Furthermore, a court would likely decline to intervene on Congress’s behalf, given that Congress has full authority to disapprove the referendum legislatively.

Finally, even if a court determined that the case was ripe and that a party had standing, it would most likely refuse to enjoin the referendum. A court would have to find irreparable harm to a plaintiff to grant a preliminary injunction. Merely allowing D.C. residents to vote would not cause such harm.

**CONCLUSION**

I want to say in closing that DC Appleseed applauds the efforts of this Council, the Mayor, and Congresswoman Norton for their work with Congress to give the District budget autonomy. Those efforts should continue. But there are no easy ways forward in this fight for self-determination. That is why the Council is right to pursue this new, complementary strategy that originates locally and involves the people of the District.
Thank you Chairman Mendelson and the rest of the Council for your leadership in advancing this important measure.