MEMORANDUM

August 29, 2017

TO: DC Appleseed

FROM: Hunton & Williams LLP
Arent Fox LLP
Goldblatt Martin Pozen LLP

RE: D.C. Voting Rights – D.C. Council Authority to Amend the “Delegate Act”

EXECUTIVE SUMMARY

Citizens of the District of Columbia lost representation in Congress when the District officially became subject to federal control in 1801. D.C. has pursued many efforts since then to right this wrong. The modern effort stretches back nearly four decades. During that time, D.C. leaders have tried every possible strategy to obtain congressional voting representation for District residents. In 1978, Congress proposed a constitutional amendment for D.C. voting rights, but it expired in 1985, ending well short of three-fourths of the states needed for ratification. D.C. Statehood bills have routinely been introduced in Congress over the decades. In 1993, the U.S. House of Representatives brought a D.C. statehood bill to the floor, but it was defeated 277 to 153.

After that bill failed, D.C. residents and the District government brought a federal lawsuit arguing under Article I, Section 2, and the Seventeenth Amendment to the U.S. Constitution that the failure to apportion Representatives and Senators to the District violated the Equal Protection and Due Process guarantees in the Constitution. However, in 2000, a three-judge panel of the U.S. District Court for the District of Columbia, in a 2-to-1 decision, rejected that argument.

District leaders then sought a political solution again, and the U.S. House of Representatives in 2007 and the Senate in 2009 passed legislation with bipartisan majorities that would have given additional voting Representatives to the District and to Utah. However, opponents effectively killed the legislation in 2009, by attaching an amendment that would have nullified the District’s gun safety laws and limited the Council’s authority to control firearms. Since then, opponents have used that same tactic to defeat the few D.C. democracy measures Congress has seriously considered, including local budget autonomy. In recent years, Mayor Muriel Bowser appointed a Statehood Commission to consider D.C.’s admission to the Union as a state under the “Tennessee Plan,” and D.C. citizens voted overwhelmingly in support of a 2016 Advisory Referendum on Statehood demonstrating overwhelming support among D.C. voters for Statehood. Despite those efforts, D.C. citizens remain without a vote in Congress.

This history makes clear that efforts to give the American citizens who live in the District Congressional voting rights today require new, alternative strategies. As shown in our attached analysis, one of these strategies uses the District’s own authority under the Home Rule Act.
The law is clear that the D.C. Council has the authority, delegated from Congress under the Home Rule Act,¹ to amend federal legislation that applies “exclusively”² to the District. We therefore recommend that the Council pass legislation amending the District of Columbia Delegate Act (“Delegate Act”) to give D.C.’s Delegate to the U.S. House of Representatives the right to vote in the House on issues applying exclusively to the District. Of course, like all Council legislation, any such legislation would be subject to review and possible disapproval by Congress as provided in the Home Rule Act.

We conclude that the Council has such authority under the three-step analysis detailed in the attached memorandum:

- First, the “District Clause” of the Constitution vests Congress with “plenary authority” over the District of Columbia. In fact, pursuant to this delegated plenary power, the House of Representatives in 2007 (with the support of now Speaker Paul Ryan) and the Senate in 2009 passed legislation giving D.C.’s Delegate full voting rights in the House on all issues, not just those applying to the District of Columbia. The proposed legislation is much more limited, allowing D.C.’s Delegate to vote only on matters applying exclusively to the District.

- Second, the Home Rule Act broadly delegated Congress’s District Clause authority to act as the local legislature for the District to the Council. With the exception of ten subjects specifically enumerated in the Home Rule Act in D.C. Code § 1-206.02, the Council has the authority to act on matters that apply “exclusively” to the District and do not affect the property or functions of the United States. Indeed, as the Home Rule Act explicitly states and as numerous court decisions have held, this authority allows the Council to amend or repeal Congressional legislation applying exclusively to the District. This authority includes matters that affect federal officials, so long as the Council legislation at issue affects those officials only in their actions applying to the District.

- Third, the proposed amendment is aimed solely at the Delegate’s involvement in passage of purely local legislation and thus applies exclusively to the District and does not concern the property or functions of the United States. Accordingly, the Delegate Act and a Council amendment allowing the Delegate to vote on matters exclusive to the District are within the Council’s legislative authority. This is so even though the Delegate operates within a federal body because the Delegate would vote only on the floor of the House when Congress performs a local function, enacting laws that are local in scope.

The attached memorandum provides a full legal analysis of case law and other authorities that confirm the Council’s authority to revise federal legislation that applies “exclusively” to the District. We have developed this strategy after careful and in-depth analysis and vetting, and are confident that it is legally defensible and will gain significant support.

We are available to discuss this analysis further with you at your convenience.

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