IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC J. FLANNERY, and DRANE FLANNERY RESTAURANT, LLC, T/A THE BIG BOARD, 511 ½ 8th Street NE Washington, DC 20002 PLAINTIFFS, v. DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, et al., 899 North Capitol Street NE Washington, DC 20002 DEFENDANTS.	CIVIL ACTION NO. 1:22-cv-3108

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

This case is not, as Defendants claim, about a small restaurant "def[ying] [the] Mayor's orders." Defs.' Mot. to Dismiss (Doc. 8) at 1. Rather, it is about the constitutional balance and limitations of government power. Specifically, Plaintiffs' claims consider the limits that the United States Congress has placed on the District of Columbia Mayor's power and the District government as a whole operating under the D.C. Home Rule Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1–201-207). Plaintiffs also seek vindication of their rights under the U.S. Constitution's guarantee of due process and the D.C. Administrative Procedure Act, D.C. Code §§ 2–501-511.

Article I, Section 8 of the Constitution vests in Congress exclusive authority to legislate over the District. Congress, however, delegated that authority via the Home Rule Act with several important reservations. Among them, legislation enacted by the D.C. Council remains subject to congressional review. The only exception to the congressional review requirement is for emergency legislation, which "shall be effective for a period of not to exceed 90 days." D.C. Code § 1–204.12(a). The Home Rule Act does not contemplate nor permit successive emergency periods for the same underlying "emergency," likely because such repeated actions would thwart Congress's reserved constitutional power.

Since COVID-19 emerged stateside in early 2020, D.C. Mayor Muriel Bowser issued more than a dozen "emergency" executive orders over the ensuing two years in response to the pandemic. And the D.C. Council purported to authorize these repeated extensions of emergency orders for months on end through successive pieces of "emergency" legislation that avoided congressional review. The Mayor's orders imposed and modified a variety of restrictions on people, schools, businesses, and government offices. These emergency orders were issued without

review by the D.C. Council or Congress, despite touching all aspects of civic life for more than two years.

As D.C. courts have put it: Although "the Mayor has a strong interest in combating the spread of COVID-19, … our system does not permit the Mayor to act unlawfully even in the pursuit of desirable ends." *Fraternal Order of Police v. District of Columbia*, Case No. 2022 CA 000584 B at *16 (D.C. Super. Ct. Aug. 25, 2022) (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)) (D.C. Superior Court opinion attached as Exhibit A). To be sure, "even the Government's belief that its action 'was necessary to avert a national catastrophe' could not overcome a lack of congressional authorization." *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 582, 585-86 (1952)). Just as the D.C. Superior Court found that the Mayor lacked the authority to impose a vaccine mandate on District employees in that case, *id.* at *14, the Mayor likewise lacked the authority to impose the rolling "emergency" orders that the District of Columbia Department of Health used to shutter the Big Board in 2022.

Rather than following the process mandated by Congress to impose longstanding legislative rules in the District, the D.C. Mayor—enabled by successive pieces of emergency legislation enacted by the D.C. Council—issued two emergency orders in late 2021 that imposed an indoor mask requirement and proof of vaccination requirement on bars and restaurants. In response, DC Health issued a summary suspension of The Big Board's license and shuttered the business in February 2022 for alleged noncompliance with those orders. Among other penalties, The Big Board paid a $100 restoration fee to obtain permission from DC Health to re-open once the Mayor lifted the underlying orders. DC Health's suspension of The Big Board's license violated federal law by relying on the Mayor's and the Council's actions that contravened the Home Rule Act.

All the while, Plaintiffs were barred from challenging DC Health's actions in the D.C. courts for the entirety of the "emergency" period. D.C. Code § 7–2308. The courthouse doors were thus closed to regulated persons and entities (including Plaintiffs) for more than two years while the Mayor's public emergency declaration remained in effect. The District's actions thus left Plaintiffs with no choice but to pay DC Health's restoration fee for the agency to lift the summary suspension and allow The Big Board to re-open while legislation authorizing evergreen renewals of the Mayor's emergency powers remained in place to stifle judicial review. Plaintiffs' damages claim for this fee alone defeats Defendants' arguments that this dispute is moot.

Moreover, although the specific emergency orders in question have since expired, the precise scenario presented here—where a claimant is barred from bringing a D.C. APA claim during the emergency and faces mootness considerations if he seeks to challenge the bar post-emergency—is plainly "capable of repetition, yet evading review." *See District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1350 n.3 (D.C. 1980) (en banc). The District's decision to close the courthouse doors to Plaintiffs during the pendency of the emergency period violates the due process guarantees of the Fifth Amendment and can occur repeatedly if Plaintiffs are not allowed to seek redress in federal court for this deprivation of federal constitutional rights.

What's more, DC Health shuttered the Big Board without proper authority under the District's own regulations. D.C. Municipal Regulations give DC Health the authority to require a business to cease operations for food safety issues. Yet no provision authorizes such a drastic measure related to the existence of airborne pathogens that have nothing to do with food safety. D.C. Mun. Regs. tit. 25-A, § 4408.1(k). DC Health's attempt to extend its regulatory purview beyond the limited circumstances that the D.C. Municipal Regulations identify to justify closure

provides another viable claim for relief under the D.C. APA through this Court's exercise of supplemental jurisdiction.

The penalties levied on The Big Board by DC Health, including the restoration fee paid by The Big Board, were unlawful. These actions harmed Plaintiffs by infringing upon their federal rights as detailed in the well-pleaded Complaint (Doc. 1). The Court thus has no basis to dismiss Plaintiffs' claims for harm stemming from the Mayor's unlawful orders.

BACKGROUND

Starting from a place of agreement, both sides understand that this case involves the legislative powers of the D.C. Council and the bounds of the District's exercise of its power through the Council, Mayor, and its agencies. *See* Doc. 8 at 2. Yet Defendants choose to overlook the import of the limits placed on the District's exercise of this power and Congress's reserved constitutional power. The District's decision to cross these lines gave rise to DC Health's enforcement action against the Big Board and its associated harm.

I. Legal Framework

The dispute in this case originates squarely in the U.S. Constitution. The Constitution vests in Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. U.S. Const. art. I, § 8, cl. 17. That clause requires some delegation of power from Congress to give the District any legislative authority "whatsoever." The Constitution thus requires that the extent and limits of that delegation to the District be set by Congress.

In 1973, Congress enacted the Home Rule Act to *balance* congressional oversight with local authority over the District of Columbia. D.C. Code § 1–201.01. While establishing the District of Columbia Charter—which in turn created and organized the D.C. Council, D.C. Mayor's office, and various government agencies, D.C. Code § 1–204.01-96—Congress granted

the District government limited legislative powers. *See* D.C. Code § 1–201.02 ("Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution, the intent of Congress is to delegate *certain* legislative powers to the government of the District of Columbia;" and, among other purposes, "consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters." (emphasis added)). By its plain text, Congress retains ultimate legislative authority over the District via the Home Rule Act. So the District's "power to govern itself," is not absolute as Defendants may prefer (at 2), but rather subject to reservations that Congress included in the Home Rule Act.

Congress requires via the Home Rule Act that the District submit legislation enacted by the D.C. Council to it for a 30-day review period, during which time Congress may take action to disapprove and invalidate legislation. *See* D.C. Code § 1–206.02(c)(1). This is no mere formality; Congressional review is key to preserving Congress's exclusive authority to legislate over the District the Constitution's grant of authority directly to Congress. *See Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994) ("[T]he Home Rule Act allows Congress a layover period of thirty statutory days to review legislation submitted by the D.C. Council."). And Defendants acknowledge (at 3) that Congress also retained the authority to amend or repeal any act of the D.C. Council. D.C. Code § 1–206.01.

The parties further agree that the Home Rule Act makes provision for emergency legislation that is exempt from the congressional review requirement. But in such case the legislation "shall be effective for a period of not to exceed 90 days." D.C. Code § 1–204.12(a). In making a limited exemption for legislation that was only to be effective for 90 days, Congress did

not, explicitly or implicitly, authorize action by the D.C. Council and executive to escape Congressional review for years on end.

The D.C. Council's mechanism for enacting temporary legislation that is valid for 225 days after congressional review does not shield the excessive use of emergency legislation from judicial scrutiny. Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 24, Rule 413, 68 D.C. Reg. 228, 292 (Jan. 8, 2021). In fact, the Home Rule Act does not even contemplate temporary legislation—which is why Defendants must resort to arguing (at 4) that "Congress has implicitly approved it." In any event, temporary legislation is at most useful to bridge the "gap" between the expiration of emergency legislation "and the enactment of permanent legislation." *Winters v. Ridley*, 596 A.2d 569, 572 (D.C. 1991) (Schwelb, J., concurring). Temporary legislation cannot simply substitute for permanent legislation. Nothing in the D.C. Code permits temporary legislation to last longer than the allowable period for emergency legislation and somehow extend emergency legislation past its statutorily limited duration.

Further, the District's Public Emergency Act of 1980 gives the Mayor the authority to "issue an emergency executive order" for the "*immediate* preservation of the public peace, health, safety of welfare." D.C. Code § 7-2304(a) (emphasis added). The Mayor may also issue a "public health emergency executive order" under a companion provision. D.C. Code § 7-2304.01. Yet either type of emergency order "shall be effective for a period of no more than 15 calendar days from the day it is signed by the Mayor" and "may be extended for up to an additional 15-day period, only upon request by the Mayor for, and the adoption of, an emergency act by the Council of the District of Columbia." D.C. Code § 7–2306. At its longest, an emergency order from the Mayor is limited to 30 days in duration.

These strict durational limits make sense because the effects of these emergency orders are particularly severe. "No action taken pursuant to an emergency executive order issued by the Mayor pursuant to this chapter shall be subject to § 2-509," the D.C. APA's provision for judicial review, "until after the expiration date of the emergency executive order." D.C. Code § 7–2308. And that is where The Big Board's interaction with the District begins—at the tip of the sword of the Mayor's abuse of her authority to issue emergency orders.

II. Factual Background

On March 11, 2020, the Mayor issued a pair of orders declaring a public emergency and public health emergency due to the COVID-19 pandemic. 67 D.C. Reg. 2956 (Mar. 11, 2020) (Mayor's Order 2020-045); 67 D.C. Reg. 2961 (Mar. 11, 2020) (Mayor's Order 2020-046). Each order was set to expire "fifteen (15) days after its effective date, unless earlier rescinded or suspended." 67 D.C. Reg. 2956, 2960 (Mar. 11, 2020) (Mayor's Order 2020-045 § III); 67 D.C. Reg. 2961, 2962 (Mar. 11, 2020) (Mayor's Order 2020-046 § III). On March 17, 2020, the D.C. Council issued its first emergency, "temporary" (90-day) amendment to authorize the Mayor to extend her emergency orders for an additional period beyond the typical 15 days permitted by the D.C. Code. *See* § 301(b) of COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-247, 67 D.C. Reg. 3093, 3099 (Mar. 17, 2020).

The D.C. Council's first emergency, temporary amendment created subsection (c-1) to D.C. Code § 7–2306:

> Notwithstanding subsections (b) and (c) of this section, the Council authorizes the Mayor to extend the 15-day March 11, 2020, emergency executive order and public health emergency executive order ("emergency orders") issued in response to the coronavirus (COVID-19) for an additional 30-day period.

D.C. Code § 7–2306(c-1) (as amended Mar. 17, 2020).

Over the span of two years, the D.C. Council issued 15 emergency, "temporary" (90-day) amendments[1] to D.C. Code § 7–2306, which read:

> Notwithstanding subsections (b) and (c) of this section, the Council authorizes the Mayor to extend the 15-day March 11, 2020, emergency executive order (Mayor's Order 2020- 045) issued in response to the novel 2019 coronavirus (SARS CoV-2) ***until April 16, 2022***. After the extension authorized by this subsection, the Mayor may extend the emergency order for additional 15-day periods pursuant to subsection (b) or (c) of this section.

D.C. Code § 7–2306(c-1) (as amended Mar. 16, 2022) (emphasis added). And the D.C. Council authorized the "temporary" amendments to last until October 26, 2022. *Id.*

[1] (a) The D.C. Council's 15 acts of emergency, "temporary" legislation to amend D.C. Code § 7–2306 are: § 301(b) of COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-247, 67 D.C. Reg. 3093, 3099 (Mar. 17, 2020); § 507(c) of Coronavirus Support Emergency Amendment Act of 2020, D.C. Act 23-326, 67 D.C. Reg. 7045, 7107 (May 27, 2020); § 507(c) of Coronavirus Support Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-328, 67 D.C. Reg. 7598, 7654 (June 8, 2020); § 2 of Public Health Emergency Authority Additional Extension Emergency Amendment Act of 2020, D.C. Act 23-411, 67 D.C. Reg. 11513 (Oct. 5, 2020); § 301(a) of Protecting Businesses and Workers from COVID-19 Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-483, 67 D.C. Reg. 13860, 13865 (Nov. 16, 2020); § 2 of Coronavirus Public Health Extension Emergency Amendment Act of 2020, D.C. Act 23-524, 67 D.C. Reg 14747 (Dec. 18, 2020); § 4(a) of Coronavirus Public Health Extension Emergency Amendment Act of 2020, D.C. Act 23-524, 67 D.C. Reg 14747, 14749 (Dec. 18, 2020); § 2 of January 2021 Public Emergency Extension Authorization Emergency Amendment Act of 2021, D.C. Act 24-1, 68 D.C. Reg. 1525 (Jan. 15, 2021); § 507(d) of Coronavirus Support Emergency Amendment Act of 2021, D.C. Act 24-30, 68 D.C. Reg. 3101, 3158 (Mar. 17, 2021); § 2 of Coronavirus Public Health Extension Emergency Amendment Act of 2021, D.C. Act 24-79, 68 D.C. Reg. 5600 (May 19, 2021); § 2 of Public Emergency Extension and Eviction and Utility Moratorium Phasing Emergency Amendment Act of 2021, D.C. Act 24-125, 68 D.C. Reg. 7342, 7343 (July 24, 2021); § 3 of Foreclosure Moratorium Extension, Scheduled Eviction Assistance, and Public Emergency Extension Emergency Amendment Act of 2021, D.C. Act 24-178, 68 D.C. Reg. 10692, 10693 (Oct. 7, 2021); § 2 of Public Emergency Extension Emergency Amendment Act of 2021, D.C. Act 24-276, 69 D.C. Reg. 214 (Jan. 6, 2022); § 2 of Public Health Emergency Extension Emergency Amendment Act of 2022, D.C. Act 24-313, 69 D.C. Reg. 850 (Jan. 26, 2022); § 2 of Public Emergency Extension Emergency Amendment Act of 2022, D.C. Act 24-346, 69 D.C. Reg. 2614 (Mar. 16, 2022).

(b) The D.C. Council's second amendment, in § 507(c) of Coronavirus Support Emergency Amendment Act of 2020, D.C. Act 23-326, 67 D.C. Reg. 7045, 7107 (May 27, 2020), actually authorized the Mayor to extend her March 11, 2020 executive orders "for an additional 135-day period" by tacking on a new 90 days to the 45 days remaining under the first amendment's extension. This act, in and of itself, violated the D.C. Home Rule Act's 90-day limit for emergency legislation. *See* D.C. Code § 1–204.12(a). Nevertheless, the successive extensions, all of which evaded congressional review, authorized the Mayor to issue new orders (or extensions) for a period exceeding two years.

Meanwhile, the Mayor took full advantage of the D.C. Council's grant of authority, leaving successive "emergency" orders in place for a period exceeding two years—until at least April 16, 2022. Beginning on March 20, 2020, in reliance of the D.C. Council's amendment to D.C. Code § 7–2306, the Mayor issued the first extension of her declaration of a public emergency and public health emergency. 67 D.C. Reg. 3601 (Mar. 20, 2020) (Mayor's Order 2020-050).

The Mayor extended her initial public emergency declaration seven times during 2020 alone.[2] Although the Mayor once terminated the public health emergency effective July 25, 2021, Mayor's Order 2021-096, she reinstituted a new public health emergency declaration on January 11, 2022, 69 D.C. Reg. 338 (Jan. 11, 2022) (Mayor's Order 2022-008), and extended it later that month, 69 D.C. Reg. 768 (Jan. 26, 2022) (Mayor's Order 2022-019). During this time, the Mayor imposed and extended scores of additional orders for restrictions in the name of the continuous emergency.

These related orders include two orders that underpin The Big Board's license suspension. Namely, Mayor Bowser issued two "emergency orders" in late 2021 imposing an indoor mask requirement including at bars and restaurants, Mayor's Order 2021-147, 68 D.C. Reg. 13954 (Dec.

[2] 67 D.C. Reg. 3601 (Mar. 20, 2020) (Mayor's Order 2020-050); 67 D.C. Reg. 4410 (Apr. 15, 2020) (Mayor's Order 2020-63); 67 D.C. Reg. 5173 (May 13, 2020) (Mayor's Order 2020-066); 67 D.C. Reg. 5612 (May 27, 2020) (Mayor's Order 2020-067); 67 D.C. Reg. 9101 (July 22, 2020) (Mayor's Order 2020-079); 67 D.C. Reg. 11802 (Oct. 7, 2020) (Mayor's Order 2020-103); 67 D.C. Reg. 14986 (Dec. 18, 2020) (Mayor's Order 2020-127). The Mayor has since issued successive orders that extended the public emergency declaration throughout the entirety of 2021 (seven extensions under 68 D.C. Reg. 945 (Jan. 11, 2021) (Mayor's Order 2021-004); 68 D.C. Reg. 2943 (Mar. 17, 2021) (Mayor's Order 2021-038); 68 D.C. Reg. 4664 (Apr. 26, 2021) (Mayor's Order 2021-060); 68 D.C. Reg. 5033 (May 1, 2021) (Mayor's Order 2021-066); 68 D.C. Reg. 5480 (May 17, 2021) (Mayor's Order 2021-069); 68 D.C. Reg. 7595 (July 24, 2021) (Mayor's Order 2021-096); 68 D.C. Reg. 13954 (Dec. 20, 2021) (Mayor's Order 2021-147)) and through April 16, 2022 (two extensions in 2022 under 69 D.C. Reg. 335 (Jan. 6, 2022) (Mayor's Order 2022-007); 69 D.C. Reg. 2503 (Mar. 17, 2022) (Mayor's Order 2022-043)). *See* Mayor's Order 2022-043 § I(2) ("The District has been in a state of public emergency since March 11, 2020"); § I(8) ("This Mayor's Order extends the public emergency through April 16, 2022."). All told, the Mayor has extended her initial public emergency declaration at least 16 times by blanketing successive orders over a two-year period.

20, 2021), and proof of vaccination requirement, Mayor's Order 2021-148, 68 D.C. Reg. 14222 (Dec. 22, 2021).

On February 1, 2022, DC Health issued a "Notice of Infraction" and "Notice of Closure/Summary Suspension" (Doc. 1-1) to The Big Board for alleged violations of D.C. Code § 7–2307. Specifically, the summary suspension alleged that The Big Board violated Mayor's Order 2021-147 (imposing an indoor mask requirement, which "applies in ... restaurants and taverns when persons are not actively eating or drinking"), Mayor's Order 2021-148 ("restaurants and taverns ... shall not permit a guest, visitor, or customer over twelve (12) years old to enter their indoor premises without displaying proof of vaccination against COVID-19"), and Mayor's Order 2022-007 (clarifying that "[t]he vaccination entry requirements of Mayor's Order 2021-148 ... shall apply to persons twelve (12) years of age and older" and "[p]ersons eighteen (18) years and older who are subject to the vaccination requirement of Mayor's Order 2021-148 shall be required to provide proof of their identity with their proof of vaccination"). Plaintiffs received a similar "Notice of Infraction" on February 7 (Doc. 1-2) again for alleged violations of the indoor mask and proof of vaccination requirements. Both notices came with fines of $1,000 for each alleged violation ($2,000 per notice). Docs. 1-1, 1-2.

Although the D.C. Office of Administrative Hearings later dismissed the fines for reasons discussed below, Plaintiffs nonetheless had to pay "a non-compliance restoration fee of $100," which DC Health required "[i]n order for license to be restored." Doc. 1-1 at 4. Defendants do not and cannot dispute (at 10) that Plaintiffs paid the $100 fee as a mandatory condition to reopening in March 2022. *See also* Doc. 1-3 at 2 (acknowledging that "Mr. Flannery paid his restoration fee").

On February 14, 2022, the Mayor announced that she would lift the vaccination requirement effective February 15, and the mask requirement effective March 1. 69 D.C. Reg. 1376 (Feb. 18, 2022) (Mayor's Order 2022-029).[3] Plaintiffs then initiated its challenge to DC Health's sanctions in the D.C. administrative courts. That tribunal explained that "[a]n administrative agency may not act in excess of its statutory authority," but that tribunal "is not delegated authority to grant Petitioner's request to invalidate the Mayor's Orders and declare them invalid and in violation of the Home Rule Act." Doc. 8-4 at 9-10 (citing *Archer v. D.C. Dept of Human Resources*, 375 A.2d 523, 526 (D.C. 1977) ("an administrative agency has no authority to declare invalid legislation enacted by the parent legislature")); *see also id.* at 11 ("[T]his administrative court does not have the legal authority to declare the legislation and Mayoral Orders underlying this [notice of infraction] unconstitutional and must defer to [DC Health's] interpretation.") At bottom, that tribunal thus "is not authorized to grant Petitioner the relief it seeks." *Id.* at 10. Even so, the administrative law judge recognized that the civil fine schedule applicable to DC Health violations did not authorize a fine amount for the alleged violations and dismissed the case. *Id.* at 12-13. In doing so, the administrative law judge acknowledged that Plaintiffs "paid a $100 restoration fee" due to DC Health's enforcement of the Mayor's Orders and Plaintiffs' quest to vindicate their rights now continues in the only forum that may proper relief.

ARGUMENT

Defendants raise, in a different order, three categories of arguments concerning (1) standing, (2) subject matter jurisdiction, and (3) the merits of Plaintiffs' claims. In evaluating a motion to dismiss, the Court must "treat the complaint's factual allegations as true … and must

[3] Even so, other aspects of her emergency orders, including the District employee vaccination mandate later ruled unlawful by the D.C. courts, *Fraternal Order of Police*, Case No. 2022 CA 000584 B at *16, remaining in place. *See* Mayor's Order 2022-029.

grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting *Schuler v. United States,* 617 F.2d 605, 608 (D.C. Cir. 1979)) (internal citation omitted). The notice-pleading rules are "not meant to impose a great burden upon a plaintiff." *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 347 (2005).

I. Plaintiffs have standing to bring each of their claims.

"[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "At the pleading stage, general factual allegations" are sufficient. *Lujan*, 504 U.S. at 561. "[O]n a motion to dismiss," the Court must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* This Court must accept as true the factual allegations in the complaint and "view them in the light most favorable to [Plaintiffs]." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 522 n.12 (2007). When the suit is one challenging the legality of government action or inaction," if "the plaintiff is himself an object of the action (or forgone action) at issue," then "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S at 561-62.

First, the DC Health's actions injured Plaintiffs financially. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (describing "monetary harms" as among "[t]he most obvious" Article III injuries). Specifically, DC Health's actions forced Plaintiffs to pay a $100 restoration fee and to lose business during the suspension. Compl. ¶41. No matter how many times

Defendants seek to minimize the amount of the $100 restoration fee, they cannot get around the fact the D.C. Circuit has repeatedly maintained that a "dollar of economic harm is still an injury-in-fact for standing purposes." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (collecting cases); *see also Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" (citing *McGowan v. Maryland*, 366 U.S. 420, 430–31 (1961) (holding that appellants fined $5 plus costs had standing))). The restoration fee is more than sufficient to establish that Plaintiffs were harmed by DC Health's Home Rule Act, due process, and DC APA violations.

Further, the victim of a "nonphysical tort … may recover not only for any actual pecuniary loss (*e.g.,* loss of business or customers), but for 'impairment of reputation and standing in the community.'" *United States v. Burke*, 504 U.S. 229, 235–37 (1992) (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974)). Of course, Plaintiffs lost business after Defendants shuttered The Big Board for parts of February and March 2022. Compl. ¶¶40-41. So Plaintiffs do not even need to get into reputational harm to establish injury for its claims. Simply put, if the Mayor's orders and corresponding acts of emergency legislation were unlawful—and they were—then DC Health could never have lawfully extracted a fee from or shuttered the Big Board in the first instance.

Next, Plaintiffs were the direct "object of the action," which leaves "little question" that Defendants caused Plaintiffs' injury. *Lujan*, 504 U.S at 561-62. Although Defendants question the sufficiency of Plaintiffs' financial harm, Defendants cannot seriously contest that Plaintiffs' harms were fairly traceable to the challenged conduct. If DC Health had not enforced the Mayor's unlawful orders against Plaintiffs, Plaintiffs would not have had to pay the restoration fee directly to DC Health, nor remained closed while under the terms of the summary suspension. Unlike a

case concerning the downstream effects on states for the cost of purchasing health insurance on which Defendants would prefer to rely (at 8 (citing *California v. Texas*, 141 S. Ct. 2104, 2113 (2021)), Plaintiffs encountered DC Health's regulation and paid for the pleasure directly. Compl. ¶¶40-41. Likewise, a judgment in Plaintiffs' favor can compensate Plaintiffs for their losses on each claim, thus satisfying the command to establish standing "for each claim" on which it seeks redress, *Finnbin, LLC v. Consumer Prod. Safety Comm'n*, 45 F.4th 127, 136 (D.C. Cir. 2022). Compl. ¶63 (Home Rule Act violation), ¶¶68-69 (due process violation), ¶75 (D.C. APA violation).[4]

Defendants attempts to disregard Plaintiffs' alleged facts, ignore the legal standard for a motion to dismiss. *Wisconsin Right To Life, Inc.*, 551 U.S. at 522 n.12. To that end, Defendants argue (at 26-27) that they never had "any intent to enforce the statute" denying a party judicial review during the pendency of an "emergency" against Plaintiffs. That argument ignores the plain text of the D.C. APA's offending provision and Plaintiffs' allegations on the subject. Compl. ¶¶47-50 ("The courthouse doors were thus closed to the regulated persons and entities (including Plaintiffs) for over two years while the Mayor's public emergency declaration remained in effect." (citing Mayor's Order 2021-147 (Dec. 20, 2021))); *see also* D.C. Code § 7–2308. Again, Defendants resort (at 27) to blaming Plaintiffs for the injuries that Defendants caused. *See supra* 14 n.4.

[4] To the extent Defendants seek to dodge standing rules by contending the Plaintiffs' injuries were self-inflicted, the argument falls flat. "An injury is 'self-inflicted' so as to defeat standing only if 'the injury is so completely due to the plaintiff's own fault as to break the causal chain." *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344 (2d Cir. 2015); *see id.* (explaining that an injury is not so "'self-inflicted' so as to defeat standing" when "the defendants have engaged in conduct that may have contributed to causing the injury" and the plaintiff's injury "was not 'solely' attributable to her own actions, but rather was caused in part by [the agency's] determination"). Plaintiffs would not be here but for the agency's determination against it, and its requirement that the fee at issue be paid.

Finally, Defendants contend (at 22) that Plaintiffs should not be permitted to recover for past harm. Of course, courts award relief on that basis every day. Defendants' assertion can only make sense with respect to the Plaintiffs' request that the Court declare the Plaintiffs' rights asserted in the Complaint. *See* Compl. Count IV. While the Declaratory Judgment Act may not create an independent cause of action, it authorized judicial declaration of Plaintiff's rights. Defendants' argument that Plaintiffs are only alleging a "past, completed injury (its suspension) caused by expired laws" is wrong. Doc. 8 at 25. Plaintiffs assert an existing injury—$100 in damages, and compensatory and punitive damages resulting from Plaintiff's actions. If the Court declares that Defendants' actions were unconstitutional, it provides an avenue for such damages. Importantly, D.C. has not repealed the offending ordinances. Even if their mandates have expired, they are on the books and the Court should declare them to be void *ab initio*.

In any event, Plaintiffs' request for a declaratory judgment is necessary because this precise scenario of never-ending emergency orders is "capable of repetition, yet evading review." *See Washington Home Ownership Council*, 415 A.2d at 1350 n.3 (question whether the D.C. Council had power to enact substantially identical successive emergency acts was "capable of repetition, yet evading review"). Unlike cases on which Defendants rely, Plaintiffs' fears of unlawful enforcement are not "wholly conjectural," but rather Plaintiffs were "'personally threatened' [] with prosecution" of the Mayor's orders against The Big Board because DC Health indeed pressed its regulatory enforcement action against Plaintiffs. *Dearth v. Holder*, 641 F.3d 499, 501, 503 (D.C. Cir. 2011) (quoting *Seegars v. Gonzalez,* 396 F.3d 1248, 1251 (D.C. Cir. 2005)).

Plaintiffs' fear of harm through unlawful enforcement is actual, even more than imminent, based on Defendants' enforcement action taken against them and its position (at 10) that DC Health

only allowed Plaintiffs to reopen because the offending orders expired. That means Plaintiffs are again in Defendants' regulatory bullseye with the stroke of a pen reviving similar orders. *See id.* at 503 (a plaintiff's intent to return to an environment that will cause him "to face a set of laws that undoubtedly prohibit him from" engaging in the proscribed conduct that gives rise to his claim makes "his injury sufficiently real and immediate to support his standing to challenge those laws"). Indeed, Defendants' opening line demonstrates their attitude towards the Plaintiffs as simply a little guy "def[ying"] the Mayor (Doc. 8 at 1) who must be made to knuckle under as an example to others who do not submit to the Mayor's decrees, no matter their legality. Constitutional law and public health are only secondary concerns of the Defendants. This posture provides "a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). Defendants do not contend it would ever treat Plaintiffs' response to the continuous emergency orders that regulate how they serve the public any differently.

Defendants' attempt to craft an impossible-to-meet standard (at 21) requiring the exact same pandemic "Omicron levels" and same order language and alleged violations, among other purported requirements, is not the law. *See Beethoven.com LLC v. Libr. Of Cong.*, 394 F.3d 939, 951 (D.C. Cir. 2005), *as amended* (Feb. 4, 2005) (explaining that "recurrent identical agency actions" that give rise to "a 'reasonable expectation' or 'demonstrated probability' that the action will recur" avoids mootness (quoting *Public Utilities Comm'n of Cal. v. FERC,* 236 F.3d 708, 714-15 (D.C. Cir. 2001)). As alleged, Plaintiffs' concerns of a repeat are real and reasonable in light of the District's recent "recurrent identical agency actions" in the name of pandemic safety and new declarations of health emergencies that government officials have declared since. Compl. ¶¶54-55 (identifying the Biden administration's declaration of a new health emergency for monkeypox and

the Mayor's August 2022 order that unvaccinated children will not be allowed in D.C. schools, with no alternate learning opportunities). Those reasonably alleged fears of recurrent harm are thus sufficient to confer standing here and obtain declaratory relief to clarify the extent of Defendants' authority.

Additionally, DC Health's actions pursuant to the Mayor's "emergency" orders also harmed the Plaintiffs because they had no access to judicial review during the two-year "emergency" period and no ability to challenge the regulations. Compl. ¶69. Indeed, Defendants issued repeated fines to Plaintiffs for violations of the same unlawful orders and could do so again with the stroke of a pen. *See id.* The District's judicial review depriving statute would shield itself from judicial review, which makes it capable of repetition, yet evading review. The judicial review depriving statue remains on the books and imminently enforceable against Plaintiffs and similarly-situated entities—readily distinguishable from the cases Defendants turn to for support (at 20) where the government had already *repealed*, rather than even let expire, offending legislation. *See Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) ("This is not a case that is 'capable of repetition, yet evading review'" because the complaint sought a declaratory judgment concerning a statute's unconstitutionality that had since been *repealed*.); *O'Gilvie v. Corp. for Nat. Cmty. Serv.*, 802 F. Supp. 2d 77, 81 (D.D.C. 2011) (declaratory judgment action concerning an expired debarment period was moot because the plaintiff relief exclusively on "claims of reputational injury" there were "too vague and unsubstantiated to preserve a case from mootness" rather than any alleged fear of repetitive or future harm). Each of these reasons establishes Plaintiffs' standing for their request for a declaratory judgment, while also dispensing of any mootness concerns.

II. The Court has subject matter jurisdiction over Plaintiffs' claims.

Defendants' other wish to avoid the merits of Plaintiffs' claims centers on subject matter jurisdiction. This Court, however, has subject matter jurisdiction over each of Plaintiffs' well-pleaded claims and cannot dismiss any claim on that basis.

A. Plaintiffs' claim for a Home Rule Act violation is proper under Section 1983.

Defendants argue (at 18) that Plaintiffs' §1983 claim for Defendants' Home Rule Act violation is improper for two reasons: (1) Defendants effectively seek a rule that Section 1983 is never the proper vehicle to assert a Home Rule Act violation; and (2) Defendants do not appreciate that the claim challenges the *federal aspects* of the Home Rule Act. Precedent weighs against Defendants' arguments on both points.

First, Defendants' conception of §1983 is too narrow. Section 1983 imposes civil liability on one who, under color of law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. "The purposes of the Civil Rights Acts are to obtain compensation for persons whose civil rights have been violated and to prevent the abuse of state power." *Silverman v. Barry*, 845 F.2d 1072, 1079 (D.C. Cir. 1988) (citing *Burnett v. Grattan,* 468 U.S. 42, 53 (1984)). Indeed, "[t]oo restrictive an application risks failing to achieve the Acts' goals of compensation and curbing governmental abuse." *Id.*

As it has done in the past, "[t]he District insists that the [Home Rule Act] establishes a comprehensive remedial scheme that evidences a congressional intent to foreclose judicial remedies." *Bliley*, 23 F.3d at 510 (citing *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 508 (1990)). "As the Supreme Court noted in *Wilder*, the District has the burden 'to show by express provision or other specific evidence from the statute itself that Congress intended to foreclose'

resort to enforcement under section 1983." *Id.* (citing *Wilder*, 496 U.S. at 520-21) (rejecting the argument that §1983 cannot be a vehicle to allege a Home Rule Act violation in the strongest terms: "This argument lacks merit.")).

Here, Defendants do not point to anything *in the statute itself* to argue that Section 1983 is an improper vehicle. *Bliley*, 23 F.3d at 510. Instead, Defendants primarily rely (at 14-15) on a case considering whether a claim for a violation of the Family Education Rights and Privacy Act (FERPA) is cognizable under §1983. FERPA has nothing to do with the Home Rule Act or Congress's reserved constitutional power and is inapposite on its face. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) ("Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes."). And while Defendants are not wrong to point out (at 16) that *Bliley* is not widely cited for the basis of a §1983 claim, the Home Rule Act is not an often-litigated statute. Unless the District violates Congress's reserved constitutional power, there is no need to raise the issue.

In any event, the Home Rule Act is a unique species. "The Home Rule Act is a 'hybrid statute' that contains elements of both federal and local law." *Bliley*, 23 F.3d at 511 (citing *Thomas v. Barry*, 729 F.2d 1469, 1471 (D.C. Cir. 1984)). "It is self-evident, however, that questions regarding Congress's reserved right to review District legislation before it becomes law concerns *an exclusively federal aspect* of the Act." *Id.* (emphasis added). So, even as a direct claim under the Home Rule Act, as Defendants consider (at 16-17), Plaintiffs may bring the claim in federal court. Defendants contend (at 17) that "laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia." 28 U.S.C. § 1366. Yet the Home Rule

Act is at least as much about Congress's reserved legislative power under the U.S. Constitution as it the District's delegated legislative power.

"In order to determine whether a particular claim asserted under the Act falls within federal-question jurisdiction, we must assess whether the specific provision at issue is federal or local in character." *D.C. Ass'n of Chartered Pub. Sch. v. District of Columbia*, 930 F.3d 487, 492 (D.C. Cir. 2019). The analysis thus turns on whether a provision can be "equated" with laws "enacted by state and local governments having plenary power to legislate for the general welfare of their citizens." *Thomas*, 729 F.2d at 1471 (quoting *Key v. Doyle*, 434 U.S. 59, 68 n.13 (1977)).

Defendants put it (at 18) that "*Bliley* was about Congress's powers, and this case is about the Council's powers." Not so. This case is about Congress's reserved legislative powers and when the District oversteps that line to disrupt the balance of power Congress established for it.

In *Thomas*, the D.C. Circuit held that a claim raised under the Home Rule Act concerning the transfer of "certain functions away from the Secretary of Labor" is federal in nature because a "state or local statute" could not "direct the federal government to affect transfers or to abolish positions altering its structure." *Id.* The same is true here because a state could not delegate to itself legislative power specifically granted to Congress. The effect of the relevant provisions does not only limit the District, but traces its origins back to the Constitution itself and Congress's rights and obligations thereunder. After all, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Thomas*, 739 F.29 at 1471 (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976)). Because "[f]ederal rights are implicated," this case is "appropriate for resolution in a federal forum." *Id.* at 1472. This is true under §1983 or even if the Court construed it as a direct claim challenging Defendants' violation of the federal aspects of the Home Rule Act.

B. Plaintiffs' federal due process claim is likewise proper.

Even setting aside the federal nature of Plaintiffs' Home Rule Act claim, Plaintiffs' due process claim is sufficient by itself to confer subject matter jurisdiction over each of Plaintiffs' claims. Defendants do not and cannot provide a jurisdictional reason (at 18-19) to dispose of the due process claim, which plainly arises under the Fifth Amendment. And the Due Process claim likewise arises under §1983. *See, e.g.*, *Silverman*, 845 F.2d at 1079 (considering a Fifth Amendment due process claim against District officials brought under §1983). As Defendants recognize (at 18-19), even if this due process claim were Plaintiffs' only federal claim, the Court can exercise supplemental jurisdiction over Plaintiffs' remaining claims, including its DC APA claim, based on this alone. *See, e.g.*, *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997) ("If the District Court had original jurisdiction, but dismissed for non-jurisdictional reasons, then it could maintain supplemental jurisdiction at its discretion." (citing 28 U.S.C. § 1367(c)(3))). Such an exercise of discretion would be both proper and appropriate in this case with several claims all arises from the same case or controversy.

III. The Court has no basis for dismissing Plaintiffs' claims on the merits.

There is no basis to dismiss any of Plaintiffs' claims at this early stage in litigation.

A. Plaintiffs state a claim for Defendants' violation of the Home Rule Act.

DC Health's summary suspension and fee imposed upon Plaintiffs violated federal law governing the District's authority to issue emergency regulations. Specifically, the legislation and the Mayor's orders that DC Health relied upon were the part of a series of legislative enactments issued by the D.C. Council and emergency executive orders issued by the Mayor covering a two-year period. *See supra* p. 7-10; *see also* Compl. ¶¶2-4. Notwithstanding Defendants' argument to the contrary (at 25), the Mayor's unlawful orders underlying Plaintiffs' harm were part of a series

of actions that the District had to complete—including the never-ending emergency declaration and successive D.C. Council authorizations of emergency authority—in order to harm Plaintiffs. Compl. ¶2 (alleging, correctly, that "the D.C. Council issued a series of 90-day emergency amendments (acts), none of which were subject to congressional review;" *see also id.* at 6 n.1). These actions run afoul of the Home Rule Act and the Constitution.

Oddly, the jumble of emergency orders, directives, and temporary orders makes it nearly impossible to determine what the Mayor was doing and under what authority DC Health was acting when it suspended Plaintiffs' license. *See supra* notes 1-2 and accompanying text. The February 1, 2022 Notice of Infraction and Summary Suspension alleged violation of two orders. Doc. 1-1 at 3, 5. The first was Mayor's Order 2021-147 (the mask requirement), which the Mayor issued on December 20, 2021 and effective until January 31, 2022 at 6:00 a.m. But the notice of infraction that came with the summary suspension arose from an inspection the day *after* that order expired. *Id.* at 4. So, Mayor's Order 2021-147 could not have been the basis for the penalty. The second cited provision was the Mayor's Order 2021-148, which the Mayor issued on December 22, 2021, effective January 15, 2022. Mayor's Order 2021-148 was to remain in effect, not for the permissible 30 days, but rather "until repealed, amended or suspended"—which is not a valid time frame for an emergency order. Mayor's Order 2021-148, § IV.

To make matters more confusing, DC Health's "COVID-19 Food Inspection Form" (Doc. 1-1 at 3) attached to the February 1, 2022 notice references both Mayor's Order 2021-147 and Mayor's Order 2021-148, as well as a yet another order: Mayor's Order 2022-007. Mayor's Order 2022-007 amended "the vaccination entry requirements of Mayor's Order 2021-148," effective January 6, 2022 "through March 17, 2022," barring repeal. Mayor's Order 2022-007, §§ III, V. So, Mayor's Order 2022-007 apparently amounted to a 71-day extension of the requirement, which

is again not a valid time frame for an emergency order. *See* D.C. Code § 7-2306 (limiting a mayoral emergency order to 30 days at its longest duration). In briefing, Defendants' claim (at 26) that "only one set of emergency enactments was in place" when DC Health shuttered The Big Board: "the January 6, 2021 Emergency Act, Mayor's Order 2022-007 (extending the emergency), and the mask and proof-of-vaccination requirements." But Plaintiffs were undoubtedly harmed by the successive nature of the Mayor's orders and emergency acts because DC Health's notice expressly alleged that Plaintiffs violated differed orders, and Mayor's Order 2022-007 expressly extended the requirements imposed by past orders—namely, Mayor's Order 2021-148 (proof of vaccination requirement).

Defendants ignore their burden of proof to show that the Plaintiffs' Home Rule violation claim supposedly fails to state a claim just by listing (at 5-8, 24) a slew of emergency and temporary orders that were in place over the course of two years. Defendants must do more than that; they must show that the specific orders were in effect and were in all respects valid at the time. Otherwise, there is an issue of fact. Defendants created this gordian knot which they must untie.

Further, *Washington Home*—involving a much smaller abuse of emergency orders—is directly on point. There, the D.C. Court of Appeals explained "that Congress intended the Council's emergency power to be *an exception* to the fundamental legislative process requiring a second reading and congressional layover; it is not an alternative legislative track to be used repeatedly whenever the Council perceives an ongoing emergency." *Washington Home Ownership Council*, 415 A.2d at 1359 (emphasis added). Indeed, the D.C. Circuit concluded, with support from the legislative history, "that the Council must follow the 'permanent' legislative route whenever it concludes that emergency circumstances demand legislative protection beyond a 90-

day emergency act." *Id.* Stated clearly, "[n]othing in the structure of the home rule legislative scheme, as applied to the realities faced by the Council, compels a conclusion that Congress must have contemplated the possibility of consecutive, virtually identical 90-day acts by the District Council in response to the same emergency." *Id.* ("The fact that Congress, even when adopting the 1978 amendments to the Home Rule Act, may not fully have appreciated the difficulties it had imposed on the District, does not alter our reading of what Congress has required."). The District's advent of temporary legislation does not change the case law in the D.C. Circuit.

Even though a later panel reasoned that "no one has cited to us, and we have not found, a statement by any member of Congress that the Home Rule Act does not under any circumstances authorize the Council to enact *a second emergency act*," *Washington Home* remains good law. *United States v. Alston*, 580 A.2d 587, 596 (D.C. 1990) (holding "that the Council did not exceed its emergency legislative authority in adopting the Second Emergency Act"). In fact, that the court grappled so much with the concept of whether a second emergency act would run afoul of the Home Rule Act underscores the flagrancy of the D.C. Council's violation here where it passed *fifteen* acts of emergency and "temporary" legislation over two years to repeatedly amend D.C. Code § 7–2306. *See id.* at 598 (distinguishing itself from *Washington Home* on the ground that "the Council had adopted *numerous* successive emergency acts" there, but was only on its second consecutive act in *Alston* (emphasis added)). So, unlike *Alston*, it appears that this Court is "presented with an attempt by the Council to avoid congressional review, and the second reading requirement, by enacting successive emergency acts." *Id*. at 595. Rather, this seems to be "a case of 'chain hanky-panky'" that the Home Rule Act was specifically designed to guard against. *Id*.

Although Defendants point (at 29-30) to courts' acknowledgement that the D.C. Council invented the concept of temporary legislation, that practice cannot provide an escape hatch for

Defendants' end run around the Home Rule Act. *See Alston*, 580 A.2d at 590-91. The *Alston* court did not consider the source of the D.C. Council's authority for what even Defendants refer to (at 30) as "the advent of temporary legislation." Critically, nothing in the Home Rule Act or D.C. Code permits temporary legislation to last longer than the allowable period for emergency legislation in a way that could excuse emergency legislation from exceeding its statuary bounds. Put another way, because the Home Rule Act does not permit emergency legislation to last longer than 90 days, a lengthier piece of temporary legislation—*completely foreign to and unauthorized by the D.C. Code*—cannot save emergency legislation or executive orders promulgated thereunder that exceed statutory duration limitations. Defendants' proffered temporary legislation escape hatch would nullify the Home Rule Act's provision that emergency legislation "shall be effective for a period of not to exceed 90 days." D.C. Code § 1–204.12(a). That cannot be so. *See, e.g.*, *Dodd v. United States*, 545 U.S. 353, 371 (2005) ("It is, of course, a basic canon of statutory construction that we will not interpret a congressional statute in such a manner as to effectively nullify an entire section."); *U.S. ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1234 (D.C. Cir. 2012) (accepting a rule that "would render [a statutory provision] a nullity" would "contravene 'the longstanding cannon of statutory construction'" against such a practice (citation omitted)).

As alleged, the Mayor's inconsistent orders on these issues demonstrate the lack of any realistic public health threat from Plaintiffs' alleged violations. Compl. ¶45 ("Even though the Mayor deemed the vaccine mandate to be an '*emergency,*' the Mayor provided several weeks of advance notice before it was implemented, and then it lasted barely that long before it was effectively repealed." (citing Mayor's Order 2021-148 (dated December 22, 2021), Mayor's Order 2022-029 (dated February 14, 2022)). Despite Defendants' hyperbole, there is no evidence of actual viral transmission at The Big Board during the period of the violation. Compl. ¶46.

And the Supreme Court has strongly cautioned against imposing any regulations related to a vaccine mandate. *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin*, 142 S. Ct. 661, 665 (2022). Rather, such a drastic measure "is instead a significant encroachment into the lives—and health—of a vast number of [people]." *Id.* It is strikingly unlike any health and safety requirements or other barriers to participate in public life by eating in a restaurant. *See id.* (such a mandate "cannot be undone at the end of the workday" (quoting *In re MCP No. 165*, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C. J., dissenting))); *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."). Again, D.C. courts have recognized that the Mayor exceeded the bounds of her authority when imposing over a dozen pandemic-related orders and "our system does not permit the Mayor to act unlawfully even in the pursuit of desirable ends." *Fraternal Order of Police*, Case No. 2022 CA 000584 B at *16 (declaring that the Mayor's order imposing a vaccine mandate on District employees exceeded her authority).

No matter the reason, an official may not make an end run around limitations on government power in a way that contravenes established law. In a similar case, the Wisconsin Supreme Court struck down a governor's attempt to issue successive emergency orders that evaded the statutory time limit for emergency orders just as the Mayor did here. *Fabick v. Evers*, 956 N.W.2d 856, 869 (Wis. 2021) (a governor cannot "make an end run around" duration-limiting language in an emergency management statute by issuing new emergency orders after the fulfillment of the time allowed for a prior emergency order based on the same predicate emergency). Each of these reasons render the legislation and the Mayor's Orders upon which the

DC Health suspension relied *ultra vires*, and therefore the suspension itself *ultra vires*, null, and void.

B. Plaintiffs state a claim for Defendants' due process violation.

To compound Plaintiffs' harm from Defendants' end run around the Home Rule Act, as a matter of fact, Plaintiffs were unable to challenge DC Health's actions in the D.C. courts for the entirety of the "emergency" period. Compl. ¶¶39-40 (citing D.C. Code § 7–2308). With the courthouse doors shut, Plaintiffs had no choice but to incur the harm of paying DC Health's restoration fee and wait for the agency to lift the summary suspension before it could re-open. Compl. ¶¶41-43. And the stringent language of the statute depriving parties of due process "until after the expiration date of the emergency executive order," D.C. Code § 7–2308, is exactly the type of inflexible language that makes this experience "capable of repetition, yet evading review." Compl. ¶¶44 (citing *Washington Home Ownership Council*, 415 A.2d at 1350 n.3).

Even so, Defendants quibble (at 32) with Plaintiffs' factual contentions and speculate about whether a party could have brought "a pre-enforcement challenge" or simply ignored the law and brought "an equitable action under local law in local court." And Defendants go even further by suggesting (at 32) that Plaintiffs could have challenged the Mayor's orders first in this Court, while also signaling it would have again fought Plaintiffs' standing.[5] To be sure, had Plaintiffs not first availed itself to the administrative review process and proven that forum was unable to provide the requisite relief, Defendants undoubtedly would be arguing a lack of exhaustion here and

[5] Defendants' contradictory suggestion (at 5, 11) that it could have appealed the administrative law judge's decision making clear that tribunal lacked authority to provide sufficient relief also fails to align with other cases in this district. *See, e.g.*, *BEG Invs., LLC v. Alberti*, 34 F. Supp. 3d 68 (D.D.C. 2014) (the DC Court of Appeals lacks the power to award damages in an administrative appeal, such that it cannot "compensat[e] the Plaintiff for any loss that occurred while it was required to comply with the Board's Order."); *Sullivan v. Murphy*, 478 F.2d 938, 963 (D.C. Cir. 1973) ("[E]xhaustion of local remedies doctrine is appropriate, as a reason for denial of Federal relief, only when there has been a failure to utilize state remedial channels that are both accessible and capable of affording a full measure of relief.").

attempt to send Defendants back to that forum with the caveat that their time to seek relied in the D.C. administrative courts has expired.

Of course, "due process requires … some form of judicial review" when a government body "decides to revoke a permit" or license to operate. *See Makdessian v. City of Mountain View*, 152 F. App'x 642, 644 (9th Cir. 2005). And Plaintiffs suffered prejudice by having to pay a fee that should not have been required in the first place, but one that they at least could have challenged up front but for the District's deprivation of judicial review during the pendency of the emergency. Compl. ¶¶54-55. Defendants answer (at 33 n.10) that process would have been slow in the D.C. courts anyway is unavailing and highlights the flaw in their conception of due process rights. Finally, Defendants argue (at 34) that the "mere postponement" of judicial review is no harm at all. That contention is laughable in the face of the "old principle that justice delayed is justice denied." *See, e.g.*, *Ungar v. Smith*, 667 F.2d 188, 195 (D.C. Cir. 1981). Contrary to Defendants' position (at 34), public health is *not* "paramount" when "even the Government's belief that its action 'was necessary to avert a national catastrophe' could not overcome a lack of congressional authorization." *Fraternal Order of Police*, Case No. 2022 CA 000584 B at *16 (quoting *Youngstown Sheet & Tube Co.*, 343 U. S. at 582, 585-86).

C. Plaintiffs state a claim for Defendants' violation of the D.C. APA.

Finally, Plaintiffs also stated a claim for Defendants' violation of the D.C. APA. Compl. ¶¶45-47. DC Health may not take the drastic step of forcing a business to close its door without a permissible reason for doing so. *See* D.C. Mun. Regs. tit. 25-A, § 4408.1(k) (DC Health may require a licensee to cease operations if it determines "the existence of any … condition[s] which endanger[] the public health, safety, or welfare.").

As Defendants identify (at 35), DC Health "may summarily suspend a license to operate a food establishment if it determines through an inspection, or examination of employees, food, food

source, records, or other means as specified in this Code, that an imminent health hazard exists." D.C. Code § 48-108.01(c). But that statute requires context from the lawfully promulgated regulations interpreting that specific code section. And those regulations provide a list of *food safety* related reasons for compelling closure, *see* Compl. ¶¶46-47 (citing D.C. Mun. Regs. tit. 25-A, § 4408), that do not relate to the existence of airborne pathogens. *See Yates v. United States*, 574 U.S. 528, 543 (2015) ("[T]he principle of *noscitur a sociis*—a word is known by the company it keeps—[] 'avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the [regulation].'" (citation omitted)). As alleged, a "failure to check vaccination status or ensure that staff wear masks does not endanger the public health" in the manner anticipated by the District's promulgated regulations. Compl. ¶47. The enumerated bases for closure prove this up, (*e.g.*, tampering with people's foods, D.C. Mun. Regs. § 4408.1(k)(9); lacking hot water, *id.* § 4408.1(k)(8); and not having a food protection manager present, *id.* § 4408.1(k)(5)). Accordingly, DC Health exceeded its regulatory authority by forcing Plaintiffs to close their doors for alleged violations that fall outside of the category of potential harms for which the District's own regulations authorize such a drastic sanction. *See, e.g.*, *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Services*, 2021 WL 1779282 (D.D.C. May 5, 2021) (invalidating the Centers for Disease Control and Prevention's eviction moratorium on the grounds that the moratorium exceeded the CDC's authority under the Public Health Service Act, 42 U.S.C. § 264).

Defendants excuse their unlawful conduct with the idea that they had to protect the public by imposing autocratic mandates intended to shield the entire population from an un-anticipatable problem. But this mandate was not the only way to deal with the issue. Indeed, if the public did not want to be exposed to those not displaying government-issued vaccination papers or maskless persons, they were not obligated to enter an establishment not requiring those things. D.C.

residents and visitors still have the liberty to choose where to eat and socialize. The Mayor need not dictate every aspect of people's lives to protect them. Food tampering, improper food preparation and the like are not visible to the public; hence the need for and the regulations addressing those problems. But if someone is only comfortable entering a restaurant or bar with an easily observable masks required policy and check-at-the-door vaccine monitor, then they have that choice. The Mayor's unlawful and overreaching directive cannot be excused as the only possible way to protect patrons.

IV. Any minor items Defendants raise may be cured via a simple amendment or Rule 25(d) motion.

There is no basis to dismiss any of Plaintiffs' claims at the motion to dismiss stage. Of the potential items that Defendants identified (*E.g.*, Doc. 8 at 28 n.9), multiple are ministerial in nature and could be adjusted via a simple amendment or Rule 25(d) motion if the Court prefers that path to avoid any delay in proceedings. *See* Fed. R. Civ. P. 25(d). Under Rule 25(d), "[a]n action does not abate when a public officer who is a party in an official capacity … ceases to hold office while the action is pending." *Id.* Instead, "[t]he officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but *any misnomer not affecting the parties' substantial rights must be disregarded*. The court may order substitution at any time, but the absence of such an order does not affect the substitution." *Id.* (emphasis added).

For instance, Plaintiffs agree with Defendants that Sharon Lewis is now the Interim Director of DC Health, in place of former Director LaQuandra S. Nesbitt. And, although plaintiffs regularly name DC Health as a defendant, *see, e.g.*, *Fields v. DC Health*, 155 F. Supp. 3d 9 (D.D.C. 2016); *Charmed, LLC v. D.C. Dep't of Heal*th, 263 A.3d 1028 (D.C. 2021), if the Court believes that the District of Columbia is the proper party in its place, the parties can also seamlessly make that substitution under the same principles as in Rule 25(d).

CONCLUSION

For all these reasons, this Court should deny Defendants' motion to dismiss in its entirety.[6]

Respectfully submitted,

Dated: February 13, 2023

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**pro hac vice* admission pending
***pro hac vice* motion forthcoming

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[6] To the extent the Court is inclined to grant the motion, Defendants do *not* argue that dismissal should be *with* prejudice and Plaintiffs would nevertheless request that the Court do so *without* prejudice. *See, e.g.*, *Richardson v. United States*, 193 F.3d 545, 548-49 (D.C. Cir. 1999) ("Leave to amend a complaint shall be freely given in the absence of undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies, or futility"); *Hill v. Fed. Jud. Ctr.*, 238 F. App'x 622, 623 (D.C. Cir. 2007) (requiring that futility must be "obvious" to deny amendment).

CERTIFICATE OF SERVICE

I e-filed this document on February 13, 2023, which emailed everyone requiring service.

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