**ORAL ARGUMENT NOT YET SCHEDULED**

**No. 24-7005**

**UNITED STATES COURT OF APPEALS**
**FOR THE D.C. CIRCUIT**

ERIC J. FLANNERY, and DRANE FLANNERY RESTAURANT, LLC, T/A THE BIG BOARD,

*Plaintiffs-Appellants*,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, and LAQUANDRA S. NESBITT, in her official capacity,

*Defendants-Appellees*.

On Appeal from the U.S. District Court for the District of Columbia, No. 1:22-cv-3108-ABJ

# APPELLANTS' REPLY BRIEF

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## GLOSSARY

| | |
|---|---|
| The Big Board | Plaintiffs-Appellants Eric J. Flannery, and Drane Flannery Restaurant, LLC, T/A The Big Board |
| D.C. Health | Defendants-Appellees District of Columbia Department of Health, and LaQuandra S. Nesbitt, Director, in her official capacity |
| the Council | Council of the District of Columbia |
| the Mayor | Mayor of the District of Columbia |
| APA | Administrative Procedures Act |

## SUMMARY OF THE ARGUMENT

Article I, Section 8 of the Constitution vests in Congress exclusive authority to legislate over the District of Columbia. 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 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 or permit successive emergency periods for the same underlying "emergency." The D.C. Court of Appeals has held that such repeated actions would thwart Congress's reserved constitutional power and are, thus, unlawful. Other courts have struck down substantially similar efforts for this reason. *See 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). The D.C. Court of Appeals laid out a rule that, with narrow exceptions, multiple successive emergency acts are impermissible. *D.C.*

*v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349 (D.C. 1980). Such exceptions do not apply here. Notwithstanding any D.C. local court's decision, this Court has a duty to uphold the constitutional limits on congressional delegation through the Home Rule Act.

D.C. Health's argument that temporary acts save the day errs because the Home Rule Act authorizes 90-day emergencies, not 255-day emergencies, which the Council insists are available under temporary acts. And the temporary acts submitted to Congress did not even authorize shutting down businesses, as the Mayor did here.

Contrary to D.C. Health's assertion, Count I pleads a procedural due process claim. This Court needs to review the Complaint, not the motion practice below. Moreover, D.C. Health did not "demonstrate 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 177–178 (D.D.C. 2002) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

D.C. Heath concedes that "Big Board [sic] has a property interest in its business license that is protected by *procedural* due process." Appellees' Br. at 33. D.C. Health's cancellation of The Big Board's license

without proper authority constitutes a denial of procedural due process. D.C. Health failed to respond to The Big Board's cited cases.

Contrary to D.C. Health's assertion, The Big Board's injuries are fairly traceable to the Council's and the Mayor's unlawful actions. D.C. Health cites an inapposite case, which addressed an oversight by the Council not a repeated flouting of Congress's limited delegation of power through the Home Rule Act.

Finally, D.C. Health argues that the Mayor did not need to rely on the Home Rule Act—she could take these emergency actions for as long as she wanted under the D.C. Administrative Procedure Act (APA). If that were the case, why bother with all the machinations of emergency and temporary acts, emergency orders, and assertions of Home Rule Act authority? But more importantly, an order is not a rule under the APA.

Because the Mayor's orders and the Council's acts exceeded their respective authority, penalties issued pursuant to the unlawful Orders and Acts violated procedural due process.

## ARGUMENT

### I. D.C. subverted the limitations Congress imposed on its authority under the Home Rule Act.

D.C. Health concedes that Congress delegated *limited* authority to

the District of Columbia through the Home Rule Act. *See* Appellees' Br. at 2. Congress explicitly limited that "lawmaking process": "The Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter ...." D.C. Code §1-206.02(a). Both under art. I, § 8, cl. 17 of the U.S. Constitution and the plain text of the Home Rule Act, Congress retains ultimate legislative authority over D.C. Accordingly, D.C.'s "power to govern itself" is not absolute but subject to the reservations that Congress included in the Home Rule Act.

D.C. Health also concedes that the Council and the Mayor used their emergency powers to enact legislative acts and issue mayoral orders for over two years to accomplish their desired outcomes, even though Congress explicitly stated that emergency legislation could only last up to 90 days. *See* D.C. Code §1-204.12(a).[1] The Council passed rolling emergency legislation allowing the Mayor to issue certain emergency orders, which—according to D.C.'s own laws—were effective for up to 15

[1] "If the Council determines, by a vote of two-thirds of the members, that emergency circumstances make it necessary that an act be passed after a single reading, or that it take effect immediately upon enactment, such act shall be effective for a period of not to exceed 90 days."

days, extendable for up to another 15 days—totaling 30 days maximum. D.C. Code §7-2306(a). The Home Rule Act does not authorize rolling emergency legislation. Congress never authorized the extension of these actions via *rolling* legislative acts or mayoral orders on the same subject and for the same emergency, *especially for two years*.[2] This evasion of the requirements of the Home Rule Act subverts congressional intent and the requirements of the plain text.

D.C. Health does not deny that over a two-year period, the Mayor issued more than a dozen "emergency" executive orders in response to the COVID-19 pandemic and that the Council purportedly authorized repeated extensions of the Mayor's orders through successive "emergency" legislation. Congress required via the Home Rule Act that the Council submit legislation it enacts to Congress for a 30-day review period, during which time Congress may act to disapprove and invalidate

[2] The Council cannot infer consent or modification by Congress where, as here, Congress could not have unilaterally modified the requirements of the Home Rule Act. Because the Home Rule Act was enacted by Congress and signed by the President, any expansion of the delegated authority for emergency legislation beyond 90 days would require the same bicameralism and presentment to the President before becoming law. In the absence of such a legislative change, the Council's authority is circumscribed by the Home Rule Act.

the 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 D.C., which authority the Constitution grants directly to Congress. *See Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994). D.C.'s decision to skirt this rule violated the Home Rule Act, and its reliance on such acts to shutter and fine The Big Board violated due process.

## II. Successive emergency acts or orders are unlawful.

### A. Congress did not delegate authority for rolling emergency acts or mayoral orders to evade its emergency clause limitations in the Home Rule Act.

The parties agree that the Home Rule Act provides for emergency legislation, "effective for a period of not to exceed 90 days," that is exempt from the Act's congressional review requirement. D.C. Code §1-204.12(a). In making this limited exemption, Congress did not—explicitly or implicitly—authorize the Council or the Mayor to escape congressional review via rolling emergency actions for years on end. Indeed, "it is clear that government by emergency edict is invalid." *Am. Fed'n of Gov't Emps. v. Barry*, 459 A.2d 1045, 1050 (D.C. 1983). This limitation makes sense "because, very simply, emergency circumstances by definition cannot last

very long," *id.* at 1051, and because otherwise, the exception could literally swallow the rule.

Rolling emergency acts that exceed the 90-day limit are thus unlawful. Congress authorized 90 days—not 90 days, plus 90 days, plus 90 days, *ad infinitum*. "Legislation that is deemed 'emergency legislation' by the Council but nonetheless functions as permanent legislation is invalid because it circumvents the review process mandated by the Home Rule Act, particularly the Congressional layover period." *Atchison v. D.C.*, 585 A.2d 150, 156 n.8 (D.C. 1991).

The D.C. Court of Appeals *en banc* ruling in *Washington Home* laid out a clear rule, which has not been overruled, abandoned, or abrogated. *Washington Home Ownership Council, Inc.*, 415 A.2d 1349. When faced with a challenge to the validity of *multiple* successive emergency acts involving the same "emergency," the *en banc* decision *held* that

> when the Council ... enacts [emergency] legislation, ... that act 'shall be effective for a period of *not to exceed* ninety days,' and the Council *has no authority* to pass another substantially identical emergency act in response to the same emergency.

*Id.* at 1359 (emphasis added) (internal citations omitted). Further,

> 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. ... 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.

*Id.* D.C.'s rolling emergency legislation 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). *Washington Home* did anticipate a *possible* exception for *two* successive 30-day periods in exceptional circumstances necessitated by the congressional calendar. 415 A.2d at 1359, n20.

D.C. Health finds solace in one outlier case, where the court allowed such a narrow exception, allowing a second successive emergency legislative act in a specific circumstance. *U.S. v. Alston*, 580 A.2d 587 (D.C. 1990). In *Alston*, the D.C. Council passed an emergency act to address a crime wave and an identical temporary act which, after congressional approval, would not be effective until after the expiration of the emergency act. *Id.* at 591. "Because the temporary act was still undergoing congressional review when the first emergency act expired ... the Council passed a second emergency act." *Id.* at 592 (cleaned up).

The D.C. Court of Appeals allowed a second successive emergency

act to "preserve the status quo" of an emergency criminal law pending congressional approval. *Id.* at 588. *Alston* was a special case because the facts created "a glaring anomaly ...." *Id.* at 589. At that time, congressional review of D.C. *criminal* laws was extended from 30 to 60 days. The result was that the Home Rule Act

> authorize[d] the Council to adopt emergency legislation for ninety days, using expedited procedures, but [did] not permit normal criminal legislation to take effect until weeks or months after the emergency legislation ha[d] expired.

*Id.* The *Alston* court allowed a narrow exception to facilitate the enforcement of emergency *criminal* laws pending the extended congressional review for *criminal* laws.

*Alston* does not allow the Council to sidestep *Washington Home*. *Washington Home* is still the law in the District of Columbia courts. *Alston* was just an application of *Washington Home*'s narrow footnote 20. But under *Washington Home*, it remains unlawful for "the Council to bypass the normal procedural requirements for the enactment of permanent legislation, or unreasonable delay in the submission of" permanent legislation to Congress. *Barnes v. D.C.*, 102 A.3d 1152, 1156 (D.C. 2014).

Second, *Alston* countenanced two successive emergency acts of 90

days each when failing to allow such successive acts would be contrary to congressional intent. 580 A.2d at 596. But—unlike *Alston*—D.C.'s actions here lasted over two years (over 730 days)—or four times longer than that allowed in *Alston*. It is unlikely that even the *Alston* panel would have approved of such extended rolling actions.[3] The attempt to circumvent congressional review is even more troublesome here because had the Council passed substantially similar permanent legislation, Congress likely would have given it greater scrutiny. Further, the Council did not disclose to Congress the full scope and duration of its and the Mayor's intentions to shut down D.C. businesses. Had the Council provided full disclosure, Congress likely would have had some questions and concerns—and would have had the proper opportunity to reject such a far-reaching and long-lasting abuse of power.

D.C. Health next argues that they are saved by so-called

[3] While *Washington Home* and *Alston* provide local court views of the Home Rule Act, they are not binding on federal courts. The key here is the interpretation of Article I, Section 8 of the Constitution, the Due Process Clause, and the scope of delegated authority in the congressionally enacted Home Rule Act. This Court must enforce the limits of the delegated authority of the Home Rule Act, irrespective of *Alston's* seeming endorsement of some rolling emergency acts in violation of the Home Rule Act.

"temporary legislation." See Appellees' Br. at 3–4, 7–8. D.C. Health explains that "temporary legislation" is designed to close any "gap[s] between the expiration of [emergency legislation] and the enactment of permanent legislation." Appellees' Br. at 4 (citation omitted) (brackets in original). But that is not how the D.C. Council used the process here.

D.C. Health adds that temporary legislation can last "only" 225 days after congressional authorization. But as with the Council's other actions, it evaded even that limitation by stacking multiple temporary legislative enactments, just as the Council and the Mayor did with their emergency legislation and emergency orders. D.C. Health admits that the Council passed "six [temporary rolling] acts," Appellees' Br. at 7–8, lasting well over two years—or about three times longer than the permitted 225 days.

D.C. Health's claim that Congress's failure to disapprove these rolling temporary legislative acts validates them is wrong for two reasons. First, D.C. Health has not pointed to anything in these "temporary acts" that authorized the Council to engage in rolling emergency legislation beyond the 90-day limit set forth in the Home Rule Act at D.C. Code §1-204.12(a). And D.C. Health has not identified any

temporary legislation that authorized the Mayor's mask and vaccine mandates, with draconian penalties of canceling operating licenses for noncompliance. Accordingly, Congress could not have approved, and did not approve, D.C.'s severe penalties, including closing businesses.

D.C. Health relies on one temporary act to support the Mayor's emergency revocation orders "if a licensee violate[s] an emergency order," Appellees' Br. at 7–8. But that act does not include language authorizing the long-lasting mask and vaccine mandates or the Mayor's repeated emergency orders.[4]

[4] D.C. Health argues that The Big Board failed to challenge previous acts or orders shutting down businesses. *See* Appellees' Br. at 45. But the in seriatim series of orders acts as a house of cards, each expressly building upon and relying upon the previous act and order to create a continuation and expansion of the "emergency" regulatory authority. *See* Mayor's Order 2021-147 (in accordance with the "Public Emergency Extension Emergency Amendment Act of 2021, effective October 7, 2021, D.C. Act 24-178, and any subsequently-enacted authorizations to extend the public emergency, it is hereby ORDERED ... Mayor's Order 2021-097, dated July 29, 2021, is reinstated, to the extent that it requires all persons to wear masks indoors."); *see also* Public Emergency Extension Emergency Amendment Act of 2021, D.C. Act 24-178, 68 D.C. Reg. 10692 (Oct. 7, 2021) ("[T]he 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 January 7, 2022."). The validity of the

Second, the Home Rule Act allows for a maximum of 90 days of emergency action—not 225 days. The Home Rule Act has not been amended to allow for emergency actions to last more than twice as long as the 90-day limit. Indeed, the Home Rule Act explicitly states, "The Council shall have *no authority* to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter ...." D.C. Code §1-206.02(a) (emphasis added). And just as the Constitution controls over any congressional act, the Home Rule Act controls over any rule or law passed by the D.C. Council.

The Council's expansive use of the emergency clause emboldened it to use "emergencies" to "govern by emergency edict." *Am. Fed'n of Gov't Emps.*, 459 A.2d at 1050. Yet the Council apparently misapprehended the meaning of the word emergency. Emergencies are not everyday occurrences, nor do they last for years. "Emergency situations have generally been defined as those in which swift action is necessary to protect public health, safety, revenue or the integrity of public institutions." *Mackey v. Montrym*, 443 U.S. 1, 22 (1979). Certainly, the

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scheme of evasion used to create the prior acts and orders is therefore expressly implicated.

pandemic was a serious problem, and it was initially a legitimate emergency. But after the initial emergency, it became a long-term problem. Governmental solutions and actions were heavily debated, both locally and nationally. The pandemic did not justify the Mayor seizing semi-permanent "emergency" dictatorial powers to be used at her discretion. Indeed, D.C. Health has identified no other mayor nationwide who needed or used such emergency powers for two years. It was thus possible to manage the pandemic lawfully, using the legislative process required by the Home Rule Act, without the abuse of power.

Unfortunately, the Council has governed by emergency edict for many years. For example, during 2017 and 2018, it enacted 146 emergency acts and 64 temporary laws. *See Council Period 22 (2017-2018)*, Council of the District of Columbia, https://code.dccouncil.gov/dclaws/22 (last visited Sept. 11, 2024). Then, during the relevant time here—2021 through 2022—the D.C. Council's use of emergency and temporary acts exploded to 289 emergency acts and 161 temporary laws. *Council Period 24 (2021-2022)*, Council of the District of Columbia, https://code.dccouncil.gov/dclaws/24 (last visited Sept. 11, 2024).

While it appears that D.C. has been abusing its emergency legislation and emergency order authority for years, the Covid emergency actions created a new pattern of abuse—rolling emergency legislation and orders for the same emergency, something it rarely attempted prior to 2020. Despite the D.C. Court of Appeals previously holding three consecutive emergency acts to be unlawful, *Washington Home*, 415 A.2d 1349, the D.C. Council issued dozens of rolling emergency acts challenged here.

*Washington Home's* rule rejects the Mayor's rolling emergency orders for two years.

> Nothing 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 orders [in excess of the Home Rule's Acts 90-day limit] in response to the same emergency.

*Id.* at 1359. Yet that is exactly what D.C. did here.

### B. Even assuming D.C.'s temporary legislation was valid, it did not authorize either the Council or the Mayor to issue the orders leading to the Citations issued to The Big Board.

D.C. Health relies on a timeline that demonstrates that no temporary legislation authorized the February 1 and February 7 notices

of infraction. *See* Appellees' Br. at 8–9. At the time the Mayor issued her mask and vaccine orders, and when D.C. Health cited The Big Board under those orders, the Mayor had no authority to issue them. The timeline of events—referenced by D.C. Health—makes this clear.

- October 7, 2021: Council passes "Foreclosure Moratorium Extension, Scheduled Eviction Assistance, and Public Emergency Extension Emergency Amendment Act of 2021" on an "emergency basis" (thus evading Congressional approval), allowing Mayor's authority to continue, *but only* until *January 7, 2022.*
    - This emergency legislation was the 13th emergency legislation on this topic; resulting in 660 total days of emergency legislation instead of the 90-day limit imposed by the Home Rule Act.
- December 20, 2021: Council *introduces* **emergency** legislation allowing Mayor to extend orders until March 17, 2022 (beyond the 15–30-day limit for mayoral orders originally established in D.C. Code § 7-2306(a) and (b)).
- December 20, 2021: Council *introduces* **temporary** legislation allowing Mayor to extend orders until March 17, 2022, but the legislation was not passed until January 6.
- December 20, 2021: Mayor issues the mask mandate, effective December 21, allegedly pursuant to the October 7, 2021, emergency legislation (set to expire on January 7, 2022).
- December 22, 2021: Mayor issues the vaccine mandate, effective January 15, 2022, pursuant to the October 7, 2021, emergency extension (set to expire on January 7, 2022).
- January 6, 2022: Rolling **emergency** legislation introduced on December 20, 2021, *is adopted.*

- January 6, 2022: Mayor issues an order extending her expiring order for an additional 70 days to March 17.
- January 24, 2022: **Temporary** legislation introduced on December 20, 2021, *is adopted and transmitted to Congress on January 31, but does not become effective until March 15, 2022.*
- February 1, 2022: First notice of infraction issued to The Big Board.
- February 7, 2022: Second notice of infraction issued to The Big Board.
- February 15, 2022: Vaccination order expires early per new Mayor order.
- March 1, 2022: Mask order expires early per new mayor order.

While the January 31, 2022, temporary legislation allowing for an extension of the Mayor's orders had been introduced before the Mayor's mask and vaccination orders, it was not adopted and transmitted to Congress until January 31—after such orders were issued. And that legislation was not effective until March 15, 2022. So, that temporary legislation did not go through congressional review until after (1) The Big Board had been injured by the unlawful orders, and (2) the Mayor's mask and vaccination orders had expired.

The Home Rule Act's strict durational limits are sensible—if not constitutionally required—because the effects of these emergency acts and the "emergency" orders promulgated under them can be (and in this

case were) sweeping in scope. *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one."). Closing businesses or severely restricting their operations implicates fundamental property rights and due process rights under the Fifth Amendment. No government official should have such unrestricted authority, and Congress recognized this when it limited the Council's and the Mayor's authority.

## III. The Big Board has not forfeited its due process claim in Count I.

Contrary to D.C. Health's claims, The Big Board has not forfeited its due process claim in Count I. Even when waiver or forfeiture is permissible, courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights." *United States v. Reynoso*, 38 F.4th 1083, 1096 (D.C. Cir. 2022) (citation omitted). The Big Board raised due process in its Complaint, which avoids forfeiture.

D.C. Health's brief attempts to muddy the Complaint by claiming that The Big Board did not assert claims under the Due Process Clause in *either* its Complaint or the opposition to D.C. Health's motion to dismiss. *See* Appellees' Br. at 28. Every case that D.C. Health quotes

found that an argument is forfeited if it is not raised in *either* the complaint *or* the responsive brief. Appellees' Br. at 28 (quoting *e.g.*, *Doe v. Garland*, 17 F.4th 941, 950 (9th Cir. 2021)). And this Circuit has been clear that

> a party may rest on its complaint in the face of a motion to dismiss if the complaint itself adequately states a plausible claim for relief" and that a court should not turn "what should be an attack on the legal sufficiency of the complaint into an attack on the legal sufficiency of the response in opposition to the motion to dismiss.

*Golden v. Mgmt. & Training Corp.*, 319 F. Supp. 3d 358, 378 n.4 (D.D.C. 2018) (quoting *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 345 (D.C. Cir. 2018)). But D.C. Health also admits, *see* Appellees' Br. at 32, that The Big Board *did* raise a due process argument in Count I of the Complaint, *see* Appellants' Br. at 20–28 (outlining Count I's due process arguments). And The Big Board's response to the motion to dismiss regarding Count I's due process claim *did* address "both a legal and factual basis for relief" on Count I. *See* Response in Opposition to Mot. to Dismiss at 21–27. *See also Wash. All. of Tech. Workers* 892 F.3d at 344. Further, The Big Board "cited its complaint—the pleading on which an FRCP 12(b)(6) motion to dismiss focuses—in its response." *Id.* The Big Board satisfied this Court's standard.

When evaluating a motion to dismiss, courts must use "an abundance of caution, and [hold the movant] to its burden of demonstrating that 'no legally cognizable claim for relief exists.'" *See Golden*, 319 F. Supp. 3d at 378 n.4 (quoting 5B Wright & Miller, *Fed. Prac. and Proc.* § 1357 (3d ed. 2015)). Accordingly, this Court should reject D.C. Health's request to deem forfeited The Big Board's due process argument raised in Count I.

## IV. The Big Board's Complaint sufficiently alleges a due process violation in Count I.

D.C. Health misconstrues The Big Board's argument supporting Count I of the Complaint as a substantive due process claim and then spends nearly 20 pages trying to debunk this straw-man argument.[5] The Big Board's opening brief explained, "The crux of The Big Board's Count I is that the District deprived The Big Board's protected property

[5] D.C. Health misquotes The Big Board's opening brief to suggest that Count I is a substantive due process claim stating, "The Big Board acknowledges that the 'touchstone' of substantive due process is 'arbitrary' governmental action." Appellees' Br. at 35. The Big Board's brief actually quoted *Watrous v. Town of Preston*, 902 F. Supp. 2d 243, 267 (D. Conn. 2012) as follows: "the touchstone of due process is protection of the individual against arbitrary action of government." Appellants' Br. at 22. *Watrous'* language applies to both substantive and procedural due process.

interests through *ultra vires* actions—and that deprivation violates due process." Appellants' Br. at 26. Count I asserts that D.C. Heath took away The Big Board's property rights without procedural due process—i.e., by suspending its license without authority to do so. Nevertheless, D.C. Health admits that "[t]o be sure, Big Board [sic] has a property interest in its business license that is protected by *procedural* due process." Appellees' Br. at 33. That is exactly right and preserves this claim.

D.C. Health's motion to dismiss below tests the adequacy of a pleading, not the merits of the case. As a notice pleading, a complaint is "not meant to impose a great burden on a plaintiff." *Baird v. Holway*, 539 F. Supp. 2d 79, 87 (D.D.C. 2008) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). A court should dismiss a complaint only "if the defendant can demonstrate 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Hopkins*, 238 F. Supp. 2d at 177–178 (citing *Conley*, 355 U.S. at 45–46). D.C. Health did not meet its burden.

### A. D.C. Health unlawfully deprived The Big Board of its Fifth Amendment rights through misuse of government powers.

D.C. Health argues that The Big Board should have—but did not—

set forth extensive details of its due process claim in Count I. D.C. Health insists that The Big Board had to allege that D.C. Health deprived The Big Board of its fundamental rights and engaged in "conscious-shocking arbitrary action." *See* Appellees' Br. at 23. D.C. Health misses—or ignores—the point. This is a Section 1983 case against D.C. Health for DC Health's *ultra vires* suspension of The Big Board's license in violation of the Due Process Clause—and more particularly, procedural due process. Compl. Count I (citing U.S. Const. amend. V and 42 U.S.C. § 1983). The Big Board supports Count I with paragraphs 1 through 65 of the Complaint, including specific references to "the Fifth Amendment's Due Process Clause" in paragraph 65. Under the Fifth Amendment, "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This satisfies the requirements of a well-pled notice pleading.

The Big Board fully explained the nature of the claim in its opening brief, supported by many cases. First, D.C. Health does not countermand the "basic proposition" under the Fifth Amendment that "once a going business has been established on the basis of a license or certificate of authority, property rights attach. This means that such license or

certificate may not be revoked, nor may renewal be denied, without *procedural* and substantive due process of law." *Jordan v. United Ins. Co. of Am.*, 289 F.2d 778, 781 (D.C. Cir. 1961) (citations omitted) (emphasis added). D.C. Health does not respond to *Jordan* or to The Big Board's other three cited cases in support of this proposition: *Kartseva v. Dep't of State*, 37 F.3d 1524, 1528 (D.C. Cir. 1994); *PDK Labs Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 9 (D.D.C. 2004); *ABA, Inc. v. D.C.*, 40 F. Supp. 3d 153, 167 (D.D.C. 2014). As these cases make clear, The Big Board had a property and liberty interest in its license. *See, e.g.,* Compl. ¶¶ 4, 7, 41.

Second, and key here, is that D.C. Health's procedure of denying The Big Board's property and liberty interest in its operating and liquor licenses must satisfy the Due Process Clause. And the government can only satisfy procedural due process if it has the authority to act. The Big Board supported this assertion with five cases, none of which D.C. Health addressed: *Watrous*, 902 F. Supp. 2d at 267; *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998); *Brady v. Town of Colchester*, 863 F.2d 205, 215–16 (2d Cir. 1988); *Am. Clinical Lab'y Ass'n v. Azar*, 931 F.3d 1195, 1208 (D.C. Cir. 2019); *Indep. Cosmetic Mfrs. & Distribs., Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 574 F.2d 553, 555 (D.C. Cir. 1978).

In other words, a due process violation occurs when the government acts without "authority under state law." *Brady,* 863 F.2d at 215–16. D.C. Health asserts that "The Big Board does not dispute that the Mayor's orders were authorized by the Council's facially valid emergency COVID-19 legislation, as well as other duly enacted District statutes." Appellees' Br. at 37. In fact, The Big Board *does* dispute the Mayor's authority to issue the masking and vaccination mandate orders: Neither the Mayor nor the Council had the authority to issue the *successive* emergency orders and so D.C. Health did not have the authority to issue the notices of violation based on those unlawful orders.

Very simply, taking The Big Board's licenses, i.e., property rights, without legal authority to do so violates the guarantees of the Due Process Clause. *See* Compl. at ¶¶ 16–33, 43–44. Similar to the Complaint here, in *McCabe v. Barr*, 490 F. Supp. 3d 198, 224 (D.D.C. 2020), the plaintiff's complaint referred only to due process generally, and not to substantive or procedural due process specifically. There, the district court *rejected* the idea that it should construe the complaint, "which fails expressly to invoke either doctrine," to be inadequate because it did not specifically identify substantive or procedural due process. *Id.* at 225.

Further, because the complaint alleged that the actions taken against the plaintiff were *ultra vires* and "recurrently" alleged that the defendant was "without authority" to act, the court found that this was "sufficient to allege that Defendants 'deliberate[ly] flout[ed] ... the law [in a manner] that trammel[ed] significant personal or property rights.'" *Id.* (citation omitted). The Big Board's Complaint likewise sufficiently alleges a due process violation in Count I because that count of the Complaint cites the Fifth Amendment, argues that The Big Board's due process rights were violated, and incorporates facts alleging that the Council's, Mayor's, and D.C. Health's actions were *ultra vires* and without authority

### B. The Big Board's injuries are fairly traceable to the unlawful orders.

Contrary to D.C. Health's claims, The Big Board's injuries are "fairly traceable" to the District's unlawful emergency extensions. "But for" the Mayor's illegal orders, D.C. Health could not have issued the notices of violation. D.C. Health argues that the orders, even if illegal, were only illegal because of a procedural violation of the Home Rule Act. Appellees' Br. at 46. But an illegal order is illegal, no matter why.

D.C. Health rests its excuse for the alleged illegality—and so its attack on The Big Board's traceability allegation—on one inapposite case.

*Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986). But *Dimond* does not apply here for several reasons. First, *Dimond* explained that "while the failure to follow proper procedures does not *by itself* amount to 'injury in fact,' a plaintiff may challenge such a failure where he or she has sustained some additional injury and that additional injury independently satisfies the requirements of standing doctrine." *Id.* at 191 (emphasis in original). In *Dimond*, the plaintiff sought to assert a tort claim that a new D.C. law precluded. The plaintiff asserted that the Council failed to give the law the required second reading and that failure constituted the injury. The court did not find that failure—"by itself"—was "fairly traceable" to the plaintiff's injury. *Id.* But here, there is much more.

This case was not a simple one-time oversight by the Council to have a second reading—the Council and the Mayor repeatedly flouted the time limitations on emergency legislation and emergency orders. And these rolling orders did not just restrict certain tort claims; they facilitated quasi-criminal enforcement actions by D.C. Health. D.C. Health's actions are directly attributable to the Council's and the Mayor's illegal actions. D.C. Health speculates that the Council and the Mayor

*could have* done *legally* what they did *illegally*. But the Home Rule Act's temporal limitations simply do not allow the Council's rolling emergency actions. *See Fabick*, 956 N.W.2d at 869.

Further, the D.C. federal courts appear to have stepped away from *Dimond*'s reasoning on this issue. In one case, the district court invalidated a D.C. law because the Council passed it without a second reading. *Decatur Liquors, Inc. v. D.C.*, 384 F. Supp. 2d 58 (D.D.C. 2005), *rev'd on other grounds and remanded*, 478 F.3d 360 (D.C. Cir. 2007). The only reason *Decatur* gave for distinguishing *Dimond* was an averment that the Council might not have passed the law upon a second reading. On appeal, the *Decatur* court did not address the ongoing vitality of *Dimond*. An illegal law cannot be the font of authority for civil or criminal enforcement.

D.C. Health issued the citations relying on illegal orders, illegal because the Council and Mayor did not have the authority to act as they did. The Council and Mayor's actions directly created the violations of The Big Board's due process rights. If D.C. Health had not enforced the Mayor's unlawful orders against The Big Board, The Big Board would not have had to pay the restoration fee or remained closed during the

summary suspension. At bottom, the violations of the Home Rule Act by the Mayor and the Council—which putatively empowered D.C. Health's actions—caused The Big Board's injuries.

### C. The Mayor's orders are not supported by other sources of law.

D.C. Health incorrectly argues that the Mayor's orders are supported by independent sources of law, i.e., *rules* issued under the D.C. APA. While the Mayor's mask and vaccination *orders* cite D.C. Code §7-131, there is no evidence that the orders ever rely on that code provision, because they cannot. The D.C. Code distinguishes between rules and orders.

D.C. Code §7-131 provides for the issuance of regulations pursuant to D.C.'s APA. D.C. Code §§2-501, *et seq*. Under § 7-131, the Mayor has the authority to "issue *rules* to prevent and control the spread of communicable diseases." D.C. Code §7-131(a) (emphasis added). However, the D.C. Code distinguishes between "rules" and "orders." The mask and vaccination mandates were orders.

The term "rule" under the D.C. Code "means the whole or any part of any Mayor's or agency's statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or

policy or to describe the organization, procedure, or practice requirements of the Mayor or of any agency." D.C. Code §2-502(6)(A). By contrast, the term "order" "means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of the Mayor or of any agency in any matter *other than rulemaking*, but *including licensing*." *Id.* at (11) (emphasis added).

The mask and vaccine mandates fit within the definition of an order, not a rule. Indeed, the mandates—orders—place enforcement authority in "All District government authorities that issue licenses ... including ... the Department of Health." *See* Mayor's Order 2021-147; 2021-148. As it relates to The Big Board, the mask and vaccination *orders* govern how The Big Board—as a licensee—is required to act. D.C. Health has the authority to issue notices of violation to The Big Board as a licensee. An "order" can authorize D.C. Health to issue notices of violation under D.C. Code §2-502(11). D.C. Health issued the notices of infraction against The Big Board pursuant to the Mayor's "orders." Thus, as applied to the current situation, the offending orders are just that—orders—not rules. Accordingly, the mandates are not supported by other independent—*rule*making—authority.

Further, the Mayor's mandates are consistently, internally referred to as *orders*. *See* Mayor's Order 2021-147; 2021-148. If, as D.C. Health claims, the Mayor's "orders" were in actuality "rules," then the Mayor would not have had to rely on the rolling emergency extensions—as she did. The text of the orders belies the claim that they are rules in another way. The Mayor's "rules" must ordinarily go through notice and comment. D.C. Code §2-505(a). In certain emergency situations, "such rule may become effective immediately." D.C. Code §2-505(c). But entities adopting emergency rules typically explicitly quote the code provision: "Per D.C. Official Code §2-505(c) emergency rulemakings are promulgated when the action is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals." *See, e.g.*, Notice of Emergency and Proposed Rulemaking - Limited Local Preferences Regarding Project-Based Units, 66 D.C. Reg. 2517 (Mar. 1, 2019) (quoting code provision). None of the subject Mayor's orders so stated.

If this "independent" authority constituted a viable legal authority as D.C. Health now claims, then D.C. Health should have forcibly argued this point below rather than giving it only a passing reference in its briefing below. Indeed, D.C. Health's reference to this assertion was so

cursory that the trial court did not even consider it—perhaps not even noticing it. At the time the mandates were issued, and during this litigation, the D.C. government did not seriously contend that these self-described *orders* could be considered rules under the D.C. APA. *See* D.C. Code §7-131.

Thus, there is no independent source of law.

## CONCLUSION

This Court should reverse the district court's dismissal decision and remand for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 6,490 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

Date: November 4, 2024 */s/* David L. Rosenthal

## CERTIFICATE OF SERVICE

I filed this brief with the Clerk via ECF, which will email everyone requiring service.

Date: November 4, 2024 */s/* David L. Rosenthal