ORAL ARGUMENT NOT YET SCHEDULED

No. 17-7155

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. ASSOCIATION OF CHARTERED PUBLIC SCHOOLS, *et al.*,
Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:14-cv-01293-TSC
Before the Honorable Tanya S. Chutkan

OPENING BRIEF FOR APPELLANTS

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June 14, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appellants D.C. Association of Chartered Public Schools, Eagle Academy Public Charter School, and Washington Latin Public Charter School appeared in the district court and are parties in this Court.

Appellees District of Columbia, Muriel Bowser, in her official capacity as Mayor of the District of Columbia, and Jeffrey DeWitt, in his official capacity as Chief Financial Officer of the District of Columbia, appeared in the district court and are parties in this Court. Former D.C. Mayor Vincent Gray appeared in his official capacity in the district court, but has been replaced by current D.C. Mayor Muriel Bowser in her official capacity as a party in this Court.

The Council of the District of Columbia participated as amicus curiae on behalf of Defendants-Appellees in the district court and has filed a notice of intent to participate as amicus curiae in this Court. Additional amici curiae who appeared in the district court on behalf of Defendants-Appellees were 21st Century School Fund; Mary Filardo; Terry Goings; Ron Hampton; Cathy Reilly; Victor Reinoso; Senior High Alliance of Parents, Principals, and Educators; Nancy Sarah Smith; Eboni-Rose Thompson; Martin Welles; Suzanne Wells; Washington Teachers Union Local #6; American Federation of Teachers; Mark Simon; Iris Jacob; Brian Doyle; Rebecca Reina; Tina Fletcher; and Faith Swords. Amici curiae that appeared in the district court on behalf of Plaintiffs-Appellants were the Black

Alliance for Educational Options; Center for Education Reform; Friends of Choice in Urban Schools; and National Alliance for Public Charter Schools.

B. Rulings Under Review

Appellants appeal the memorandum opinion and order (Dkt. 57 and 58) issued by the district court (Chutkan, J.) in Civil Action No. 1:14-cv-01293-TSC on September 30, 2017, granting Defendants-Appellees' cross-motion for summary judgment and denying Plaintiffs-Appellants' motion for summary judgment. The district court's opinion has been reported at 277 F. Supp. 3d 67 and is reprinted in the Joint Appendix at JA1005. The district court's order is reprinted at JA1028.

C. Related Cases

This matter has not previously been before this Court. Undersigned counsel is unaware of any related cases currently pending in this Court or in any other court.

/s/ Kelly P. Dunbar
Kelly P. Dunbar

June 14, 2018

CORPORATE DISCLOSURE STATEMENT

Appellant D.C. Association of Chartered Public Schools is a 501(c)(3) non-profit organization that serves all chartered public schools in the District of Columbia. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Appellant Eagle Academy Public Charter School is a 501(c)(3) non-profit organization. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Appellant Washington Latin Public Charter School is a 501(c)(3) non-profit organization. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

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GLOSSARY

HRA	District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act"), Pub. L. No. 93-198, 87 Stat. 774 (1973)
JA	Joint Appendix
RSUF	Defendants' Response to Plaintiffs' Statement of Material Undisputed Facts
SRA	District of Columbia School Reform Act of 1995 ("School Reform Act"), Pub. L. No. 104-134, 110 Stat. 1321 (1996)
SUF	Plaintiffs' Statement of Material Undisputed Facts
TRS	Teachers' Retirement System

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. On September 30, 2017, the district court entered an order granting summary judgment for Defendant-Appellees, the District of Columbia and two officials sued in their official capacities. Plaintiff-Appellants filed a timely notice of appeal on October 27, 2017. *See* Fed. R. App. P. 4(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District of Columbia violates the uniform funding mechanism Congress enacted, pursuant to its Article I constitutional authority to legislate for the District, in the District of Columbia School Reform Act of 1995 by providing significantly more funding for the operating expenses of traditional public schools on a per-student basis than it provides for the operating expenses of D.C. public charter schools on a per-student basis.

2. Whether the District of Columbia violates the District of Columbia School Reform Act of 1995 by using projected enrollment in funding traditional public schools while using audited enrollment in funding D.C. public charter schools.

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Relevant constitutional provisions and statutes are provided in an Addendum to this brief.

INTRODUCTION

In the early 1990s, the public school system in the District of Columbia was in crisis. To remedy that crisis, and after more than a year of careful study, Congress exercised its constitutional authority to legislate for the District by enacting the District of Columbia School Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 107-156 (1996) (codified as amended at D.C. Code §§ 38-1800.01 to 1809.01).[1] As part of this comprehensive reform, Congress authorized the establishment of a new, path-breaking model of public education—namely, public charter schools. Congress determined that such public charter schools, which would be open to all District residents, would markedly improve the education of students, encourage innovation, and promote community involvement in public education.

To ensure that public charter schools and traditional public schools operate on a level playfield, Congress mandated that the District fund "the operating

[1] Citations to the "School Reform Act" are to section references in the Public Law as enacted by Congress, rather than as codified in the D.C. Code.

expenses" of all public schools, whether charter or traditional, on a "uniform" per-student basis. SRA § 2401(b). Despite this straightforward uniform funding mandate, the District has for years made no secret of the fact that it unequally funds the operating expenses of traditional public schools and public charter schools through various means, including paying for facilities management services at traditional public schools, but not charter schools; funding teacher pensions for traditional public schools, but not charter schools; and providing supplemental operating expense funding to traditional publics schools, but not charter schools. This differential funding of public education is the very concern that Congress enacted the uniform funding mechanism to remedy and it countermands the text, structure, history, and purposes of the School Reform Act.

The district court reached a contrary legal conclusion based on a deeply flawed interpretation of the School Reform Act and by affording novel and unfounded deference to the District's interpretation of that congressional enactment. This Court should vacate the district court's judgment, and hold that the District's unequal funding practices violate the School Reform Act.

STATEMENT OF THE CASE

I. CONGRESS'S PLENARY POWER OVER THE DISTRICT

Article I of the U.S. Constitution grants Congress "the power … to exercise exclusive Legislation in all Cases whatsoever" over the District. U.S. Const. art. I,

§ 8, cl. 17. This authority is "plenary," *Palmore v. United States*, 411 U.S. 389, 397 (1973), and "Congress' power over the District of Columbia encompasses the *full* authority of government," *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (emphasis in original); *see also Kendall v. United States*, 37 U.S. 524, 619 (1838).

For most of the District's history, Congress exercised this authority by acting directly as a local legislature. In 1973, Congress enacted the D.C. Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201.01 *et seq.*). The Home Rule Act's purpose was "to delegate certain legislative powers to the government of the District" to "relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02. Though this delegation "extend[s] to all rightful subjects of legislation," *id.* § 1-203.02, it remains "[s]ubject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution," *id.* § 1-201.02(a).

To make that point emphatically clear, Congress expressly "reserve[d] the right, at any time, to exercise its constitutional authority as legislature for the District," and also retained the power to "enact[] legislation for the District on any subject, … including legislation to amend or repeal any law in force in the District

prior to or after enactment of this chapter and any act passed by the Council." D.C. Code § 1-206.01. Moreover, in keeping with this design—a general delegation of legislative power subject to Congress's retention of the power to act as a legislature for the District—Congress imposed several specific "[l]imitations" on the District's delegated authority. *Id.* § 1-206.02.

At the same time, Congress took steps to facilitate the transition to home rule. Congress enacted the Home Rule Act against a backdrop in which Congress had long acted as a local lawmaker. Rather than wiping all preexisting local laws off the books, thus requiring the District to legislate anew in each of those areas, Congress provided that no preexisting law—namely, those laws "in force on January 2, 1975"—shall be "amended or repealed" by the Home Rule Act. D.C. Code § 1-207.17(b). However, Congress made clear that the District could "amend[]" or "repeal[]" "any such law"—that is, pre-1975 laws—going forward. *Id.* This cabined grant of authority to repeal or amend preexisting law ensured that the new home-rule government "could start and could operate," while sparing Congress the trouble of "having to go through and redo the whole District of Columbia Code" to address minor local issues like whether citizens could "fly kites" or "open alleys." *Full Comm. Markup of H.R. 9056, Titles III and IV: Hearing Before the H. Comm. on the Dist. of Columbia*, 93rd Cong. 1034-1035

(July 18, 1973) (statement of Rep. Adams). Even as to this pre-1975 amendment power, Congress qualified the District's authority. *See* D.C. Code § 1-206.02(a)(3).

Congress's reservation of its right, in Section 1-206.01, to exercise its constitutional authority to act as the legislature for the District was not limited to future amendments of the Home Rule Act. Rather, members of Congress "foresaw a strong, vigilant, and ongoing role for the Congress" in District affairs, which could require Congress to resume its role as a direct legislator. 119 Cong. Rec. 30,532 (1973) (remarks of Rep. Adams). This delegation was "given with the express reservation that the Congress may, at any time, revoke or modify the delegation in whole or in part," and that Congress "could continue to initiate local legislation should it so desire." H.R. Rep. No. 93-482, at 15 (1973).

Finally, Congress included in the Home Rule Act a 30-day period of passive congressional review before a District legislative act could become effective. D.C. Code §§ 1-204.04, 1-206.02(c)(1). The review period was intended as a companion, not a substitute, for Congress's reserved power to enact local legislation directly for the District. *See Full Comm. Markup of H.R. 9056, Titles III and IV: Hearing Before the H. Comm. on the Dist. of Columbia*, 93rd Cong. 982-983 (July 11, 1973) (statement of Rep. Adams).

II. CONGRESS ENACTS THE SCHOOL REFORM ACT IN THE FACE OF A CRISIS IN PUBLIC EDUCATION IN THE DISTRICT

For the first two decades of home rule, the District exercised its Home Rule Act authority to manage local public education. This period was characterized by constant intra-governmental conflict, leading to frequent changes in leadership and educational programs and causing D.C. public schools to suffer as a result. *See* David Osborne, *A Tale of Two Systems: Education Reform in Washington, D.C.*, Progressive Policy Institute 1-2 (2015).

By the early 1990s, the public education system in the Nation's capital was failing by every important measure of educational, managerial, and financial performance. Thus, in 1995, Congress took "a renewed interest … in ensuring greater educational opportunity for D.C. children." H.R. Rep. No. 104-455, at 141 (1996) (Conf. Rep.). Congress launched "a year of debate, discussion, and negotiation" in order to determine "the amount, shape and pace of education reform necessary" to fix D.C.'s troubled school system. *Id.* at 141.

In seeking to build a world-class education system for the District's children, Congress took substantial steps to understand local concerns and many potential reforms. A specially appointed congressional task force "convened numerous meetings with individuals and interested groups in the District of Columbia," including the Mayor, members of the D.C. Board of Education, and the

Superintendent of the D.C. public school system. 141 Cong. Rec. 31,366 (1995). The Speaker of the House, working closely with the D.C. delegate, organized a town hall-style meeting at a local high school "to hear from District of Columbia citizens about their concerns with the … education system." *Id.* And Congress invited numerous national experts on education reform as well as local officials to testify. *See, e.g.*, *Urban Education Reform and the District of Columbia Schools: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Economic and Educ. Opportunities*, 104th Cong. (1995).

What Congress learned was that the D.C. public school system was "broken" and in dire need of outside intervention. S. Rep. No. 104-144, at 6 (1995) (Conf. Rep.). Congress showed particular interest in a report from the D.C. Committee on Public Education that presented "a grim picture" of a school system that had made "no progress" in implementing reforms. H.R. Rep. No. 104-455, at 142 (internal quotation marks omitted). The report concluded that the academic performance of D.C. public school students, already below the national average, had continued to worsen. *See id.* The report also concluded that schools were "shackled by an oppressive bureaucracy that … exploit[ed] divisions within the Board and between the Board and the Superintendent," undermining all efforts to implement necessary systemic improvements, *id.*, and identified persistent problems "in providing

timely and adequate material support to local schools[.]" *Id.* Indeed, the Board of Education's own president testified that city officials had for years treated funding for public schools as "a political football" to the detriment of local students. *Hearing Before the Subcomm. on the District of Columbia of the S. Comm. on Appropriations*, 104th Cong. (1996) (statement of Karen Shook, President, D.C. Board of Education).

Faced with this alarming and unequivocal evidence of a crisis in public education and exercising its authority under the Constitution to legislate for the District, Congress passed the District of Columbia School Reform Act of 1995, as a comprehensive response to a public education system in crisis. Congress sought through the School Reform Act to "creat[e] … local structures" that would "ensur[e] greater educational opportunities for D.C. children." H.R. Rep. No. 104-455, at 141-142; *see also* 141 Cong. Rec. 31,366.

Critical to this reform of public education was Congress's authorization of the establishment of public charter schools in the District. *See* SRA § 2201. The accompanying Senate Report made clear this innovative "charter schools initiative" was designed "to improve the education of students, and encourage community involvement in education." S. Rep. No. 104-144, at 7. Congress explained that "[c]harter schools offer great promise in reforming public education

because they link the important factors of school-site autonomy, parental choice, regulatory flexibility, private sector initiative, accountability for student outcomes, and community participation." *Id.*

Under the School Reform Act, charter schools are public schools and Congress structured them to "retain[] [the] essential elements" of public education. H.R. Rep. No. 104-455, at 143. Congress thus required that enrollment at D.C. charter schools, like traditional public schools, be open to all D.C. children regardless of color, creed, or ability to pay. SRA § 2206(a)-(b). Congress further required that public charter schools be funded by the public, *id.* § 2401(b)(1)(B), and be accountable to the public for providing students with a quality education, *id.* § 2204(c)(11). Congress ensured, however, that charter schools would be free from District supervision and oversight. *Id.* § 2204(c)(3).

In creating a new model of public education for the District, Congress faced the unfortunate reality that, as described above, funding for public schools had at times been a "political football" in the District. Moreover, Congress was concerned about the possibility of "a two-tiered system of public schools," 141 Cong. Rec. 31,366, as between traditional public schools and new public charter schools. To "ensure that [such a system] would not result," *id.*, Congress deliberately restricted the District's exercise of funding authority to ensure that

traditional public schools, on the one hand, and new public charter schools, on the other, would receive operating funding on equal terms.

Specifically, central to the School Reform Act was Congress's establishment of a "uniform funding mandate" to ensure that the District would fund traditional public schools and newly created charter schools on a uniform per-student basis. To achieve that goal, Congress mandated that the Mayor and the D.C. Council "shall establish … a formula to determine the amount of … the annual payment to the Board of Education for the operating expenses of the District of Columbia public schools" and "[t]he annual payment to each public charter school for the operating expenses of each charter school." SRA § 2401(b)(1)(A)-(B).

Congress did not leave the creation of this funding formula entirely to the discretion of the District, however. Instead, Congress required that the amount of annual operating expenses paid to traditional public schools and charter schools must be calculated on an equivalent basis. Congress thus specified that annual operating expenses "shall be calculated by multiplying a *uniform dollar amount* used in the formula" by the number of students enrolled at traditional public schools and the number of students enrolled at each charter school. SRA § 2401(b)(1)(B)(2) (emphasis added). This approach would ensure parity in funding for all D.C. public schools—whether traditional or charter.

Finally, Congress made clear that the District must exercise its authority to fund operating expenses for public education in keeping with this equal-funding requirement. Congress thus directed that the District "shall make annual payments from the general fund of the District of Columbia *in accordance with the formula*." SRA § 2401(a) (emphasis added). The "general fund" is the District's general source of funding. *See* D.C. Code § 47-131(a).

A related House Report made clear Congress's intent that this uniform funding mechanism be comprehensive, providing that "the funding formula," and resulting "annual payments," "must include":

- "all facilities operating costs, including utilities";
- "all local education agency evaluation, assessment, and monitoring costs"; and
- "any other direct or indirect costs normally incurred by, or allocated to, schools under the control of the Board of Education and the overall public school system."

H.R. Rep. No. 104-689, at 50 (1996).

Congress included only two "exceptions" to the uniform funding requirement. First, in consultation with the Board of Education and Superintendent, the Mayor and D.C. Council may adjust the annual payments based on a calculation of "the number of students served by such schools in certain grade levels" and "the cost of educating students at such certain grade levels."

SRA § 2401(b)(3)(A). Second, the Mayor and D.C. Council may adjust annual payments if any school "serves a high number of students with special needs" or "who do not meet minimum literacy standards." *Id.* § 2401(b)(3)(B)(i)-(ii).

Two years after Congress passed the School Reform Act, the D.C. Council passed the Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998, which established a Uniform Per Student Funding Formula. *See* D.C. Code §§ 38-2901–38-2912.

III. THE DISTRICT'S UNEQUAL AND UNLAWFUL FUNDING PRACTICES

Notwithstanding the express uniformity mandate Congress enacted in the School Reform Act, the District has consistently provided D.C. public charter schools with less annual funding for operating expenses on a per-student basis than traditional public schools. The existence of these disparities is not in dispute. Indeed, D.C. officials have long acknowledged them.

For example, in 2011, an independent commission established by the District concluded that the District had inappropriately "provid[ed] additional funding to" traditional public schools for functions that should have been funded through the uniform funding mechanism. District of Columbia Pub. Educ. Fin. Reform Comm'n, *Equity and Recommendations Report for the Deputy Mayor for Education* 19 (Feb. 17, 2012). Moreover, a study commissioned by former Mayor Gray's Deputy Mayor for Education confirmed that education funding in the

District "is inequitable." JA701-JA702. The study analyzed many of the District's funding practices and concluded that the "funding disparities are contrary to DC law." JA702. The study recommended, among other things, that all operating expenses for all public schools—whether traditional or charter—be funded through a uniform funding formula subject only to specific and limited exceptions and that the District create "greater transparency and accountability in education budgeting, resource allocation, and reporting." JA702.

Despite those forceful calls for reform, funding disparities persist with respect to at least three types of educational operating expenses.

A. Facilities Maintenance And Related Management Services

For years, the District has allocated money to other District agencies to pay for facilities maintenance and related services provided to traditional public schools, without accounting for those payments in calculating the per-student payments made to D.C. charter schools. This subsidization is significant. For example, from FY 2012 through FY 2015, the District provided more than $184.7 million in funds to traditional public schools through funding allocated to the D.C. Department of General Services but earmarked to pay for facilities maintenance,

repairs, and related management expenses of traditional public schools. JA210 (SUF ¶ 6). Importantly, the District has admitted these facts. JA547 (RSUF ¶ 46).

In FY 2015 alone, the District provided more than $34 million to traditional public schools through funding to the Department of General Services. JA216 (SUF ¶ 57). That agency, in turn, provides facilities services to public schools, which included "coordinat[ing] the day-to-day operations of District-owned properties by: (A) [m]aintaining building assets and equipment; (b) [p]erforming various repairs and non-structural improvements; and (C) [p]roviding janitorial, trash and recycling pickup, postal, and engineering services; provided, that [public schools] shall remain responsible for providing janitorial services at [public schools] facilities." D.C. Code § 10-551.02. In other words, the District provided more than $34 million to public schools for the maintenance and repair of buildings; trash and recycling; and engineering and postal services—but did not provide such funding to charter schools.

Since FY 2012, the District has also paid for an array of other operating expenses for traditional public schools while providing no comparable funding for D.C. public charter schools—including millions of dollars per year for financial services, and hundreds of thousands of dollars per year for, among other things,

environmental services and realty—as shown in the following chart. *See, e.g.*, JA217-JA218 (SUF ¶¶ 59, 62, 65).

FY	Facilities	Agency Mgmt.	Asset Mgmt.	Construction	Contracting/ Procurement	Total
2012	$42.7M	$3.2M	$421K	$213K	$1.4M	$47.8M
2013	$42.8M	$3.5M	$368K	$211K	$1.5M	$48.4M
2014	$45.2M	$4.2M	$364K	$242K	$730K	$50.7M
2015	$34.8M	$2.4M	$403K	$201K	-	$37.8M
2016*	$31.6M	$3.1M	$454K	$235K	-	$35.3M
2017**	$27.2M	$2.9M	$486K	$281K	-	$30.9M

*Approved **Proposed

JA215-JA218 (SUF ¶¶ 48-65). Again, the District has admitted these facts. *See* JA550-JA551 (RSUF ¶¶ 59, 62, 65).

In contrast, D.C. public charter schools must pay for all facilities maintenance, financial, and realty services out of their own budgets. In FY 2015, the funding disparity generated by this category of operating expenses alone resulted in the District spending $795 more per traditional public school student than it spent on his or her public charter schools counterpart. *See* JA182 ($37.8M allocation to Department of General Services divided by 47,548 students enrolled in traditional public schools in FY 2015).

B. Teacher Pensions

In addition, the District has long engaged in the disparate funding of teacher pension costs. From FY 2012 to FY 2016, for example, the District provided more than $124.9 million to traditional public schools through the Teachers' Retirement

System. JA218 (SUF ¶ 66). The District makes no such appropriations to fund teacher pensions for public charter schools—despite Congress's recognition in the School Reform Act that charter schools could establish retirement systems for teachers and that the only funding mechanism for those systems would be the Act's uniform funding mechanism. *See* SRA § 2207(b). Again, the District admits these facts. JA218-JA219 (RSUF ¶¶ 66-72).

This disparity is substantial. In FY 2015, traditional public schools received an additional $828 per pupil that was not provided to public charter schools. *See* JA182 ($39.4M payment divided by 47,548 students enrolled in traditional public schools in FY 2015). This imbalanced funding of teacher pensions—a core employee benefit—has not merely persisted but, as the following chart demonstrates, the amounts of contributions and the resulting disparity are only increasing:

FY	TRS Payment
2012	$3M
2013	$6.4M
2014	$31.6M
2015	$39.4M
2016*	$44.5M
2017**	$56.8M

*Approved **Proposed

JA218-JA219 (SUF ¶¶ 67-72).

C. Supplemental Funding

Finally, the District has made substantial "supplemental" operating expense payments to traditional public schools outside of, and without complying with, the School Reform Act's uniform funding mandate. The District has provided such funding to cover traditional public schools' operating expenses when they exceed annual payments from the general fund, but the District has not accounted for these additional funds in calculating the per-student payments made to D.C. public charter schools. JA219-20 (SUF ¶¶ 73-86). These material facts are also undisputed. *See, e.g.*, JA553 (RSUF ¶ 73).

In FY 2012, for example, the approved annual payment by the District for traditional public schools was $611,817,000. JA219 (SUF ¶ 77). But such traditional public schools' actual operating expenses payment for FY 2012 was $638,879,000, JA219 (SUF ¶ 78), a difference of more than $27 million.

The District has addressed these shortfalls in numerous ways, none in compliance with the School Reform Act's uniform funding mechanism. The District has enacted supplemental appropriations to traditional public schools, JA220 (SUF ¶ 80), and it has also made direct payments to cover operating expenses in excess of annual payments, JA220 (SUF ¶¶ 81-86). In all cases, the District has failed to account for this additional funding when calculating the per-student payments made to D.C. charter schools for their operating expenses.

IV. PROCEEDINGS BELOW

After many unsuccessful attempts to persuade the District to fund D.C. charter schools fairly and equally consistent with the School Reform Act, Appellants—the D.C. Association of Chartered Public Schools, Eagle Academy Public Charter School, and Washington Latin Public Charter School (collectively, "Charter School Appellants")—sued the District of Columbia, as well as the Mayor and Chief Financial Officer in their official capacities (collectively, "the District"). *See* JA12-42 (complaint).

The Complaint alleged that the well-established disparate funding practices described above violate the School Reform Act's uniform funding mandate, and conflict with Congress's exclusive authority to legislate for the District under Article I of the Constitution. Charter School Appellants thus sought (i) a declaration holding unlawful those D.C. laws and practices that conflict with and violate the School Reform Act's uniform funding mechanism; and (ii) an injunction requiring the District to comply with the School Reform Act.

The District first moved to dismiss the Complaint. The District argued, among other things, that the complaint failed to state a claim because the Home Rule Act arrogates to the District the legal authority to amend or repeal the School Reform Act's uniform funding mechanism. The District advanced the extreme position that, because the School Reform Act was passed exclusively for the

District and because Congress did not expressly prohibit the District from doing so, the District was free to ignore, amend, or even repeal the School Reform Act in whole or in part, as it sees fit.

The district court denied the motion to dismiss in relevant part. Relying on "[t]he text, context, and history of the School Reform Act," the district court held that "Congress did not intend on the Council treating the [uniform funding mechanism] as optional." JA132. Instead, the court reasoned, the School Reform Act effects an "implied withdrawal of the Council's delegated authority" to legislate in a manner that conflicts with School Reform Act requirements, including the uniform funding mechanism. JA138.

Because there were no material facts in dispute, the case proceeded to cross-motions for summary judgment. Charter School Appellants first moved for summary judgment, arguing that the District's persistent disparate funding practices violate the School Reform Act and conflict with Congress's Article I authority over the District. *See* JA166-JA208 (motion for summary judgment). Charter School Appellants explained that the School Reform Act requires the District to fund all "operating expenses" of public schools, whether traditional or charter, through a "uniform" per-student funding mechanism and that the District

was regularly violating that requirement through, among other things, facilities funding, teacher pension payments, and supplemental funding.

In cross-moving for summary judgment, the District did not dispute key material facts underlying the existence of those funding disparities or its intent to continue this unequal funding. *See* JA500-JA504. Instead, the District renewed its aggressive legal position that it has the authority to repeal any and all congressional enactments that govern only the District, such as the School Reform Act. In the alternative, the District argued that the uniform funding mechanism was not the exclusive means for funding operating expenses, so that the District was free to make disparate payments outside of that mechanism. Moreover, the District argued that its payments for facilities maintenance and teacher pensions were not "operating expenses" under the School Reform Act.

The district court granted summary judgment for the District. JA1005-JA1028. The court believed there was insufficient interpretive evidence that Congress intended "the [uniform funding] formula to be the exclusive, as opposed to primary, means of funding education," and, therefore, the court reasoned, the District's funding practices did not "clearly violate[] the School Reform Act's formula requirement." JA1023. Further, the court relied on the fact that Congress left the term "operating expenses" "undefined," which, according to the court, was

evidence that the District had discretion in its funding practices. JA1020. The court also held that, in interpreting the School Reform Act, it was obliged to apply "some degree of deference" to the District's statutory interpretations. JA1020.

Charter School Appellants timely appealed the district court's decision.

SUMMARY OF ARGUMENT

I. The legal question presented is whether the District violates the School Reform Act—enacted pursuant to Congress's Article I authority to legislate for the District—by funding "the operating expenses" of traditional public schools and D.C. public charter schools unequally. Congress left no doubt as to the correct answer: as an exercise of Congress's plenary authority to legislate for the District, the School Reform Act requires the District to establish and follow a "uniform" funding formula designed to ensure that traditional public schools and public charter schools receive the same level of annual funding on a per-student basis. Congress viewed this mandate as critical to fulfilling the promise of public charter schools as an innovative solution to the historical failings of the District's public school system. Moreover, the text, structure, history, and purposes of the School Reform Act compel the conclusion that Congress intended this uniform funding mechanism to mandatory, exclusive, and comprehensive.

Despite the straightforward statutory command of funding parity, the District for years has strayed far from that mandate. Specifically, the District has

funded three categories of "operating expenses"—facilities maintenance, teacher pensions, and supplemental appropriations—without complying with the uniform funding mechanism. The resulting unequal funding practices have caused significant disparities on a per-student basis, defeating Congress's manifest objectives in enacting the School Reform Act.

The district court erred in reaching a contrary result. First, the court wrongly held that the uniform funding mechanism is not exclusive—in the court's view, the District is free to fund operating expenses either complying with the requirement of uniformity or not, apparently at the District's discretion. That conclusion defies settled principles of statutory interpretation and cannot be squared with any reasonable understanding of congressional intent. Second, the court held that Congress delegated to the District discretion to interpret "operating expenses" by not defining that phrase. That holding conflicts with established precedent recognizing that courts must give undefined statutory phrases like "operating expenses" their well-established meaning. And here, there is every indication Congress intended the ordinary definition of operating expenses to control, which easily includes the three categories of disparate funding at issue. Finally, the district court improperly deferred to the District's construction of this congressional enactment based on a novel, unrecognized doctrine of deference.

Recognizing that its funding practices cannot be squared with the School Reform Act's uniformity mandate, the District has at times advanced other legal positions, including the remarkable view that the District is free to repeal, amend, or annul the congressionally enacted School Reform Act, in whole or in part, and that Congress has acquiesced in and ratified the District's unequal and unlawful practices. Those alternative defenses fail on the merits as well.

II. In addition to its systemic defiance of the uniform funding mechanism, the District admits that it tilts the playing field in favor of traditional public schools in another way. Specifically, the District funds operating expenses to traditional public schools based on *projected* student enrollment, while funding operating expenses to public charter schools based on *actual* student enrollment. This discrepancy consistently results in overpayments traditional public schools in contravention of the School Reform Act's polestar of uniformity.

The district court held that Charter School Appellants lacked standing to challenge this conduct, on the theory that overfunding traditional public schools does not injure public charter schools. That is not so. Traditional public schools and public charter schools compete for funding in a competitive environment, and must also compete to attract and retain teachers, staffs, parents, and students. The District's use of a different methodology for calculating enrollment creates a

concrete funding imbalance and unfairly tilts the playfield in favor of traditional public schools, at the expense of public charter schools. That competitive imbalance is an Article III injury that would be redressed by relief requiring the District to adhere to the School Reform Act.

STANDARD OF REVIEW

This Court reviews a "grant of summary judgment *de novo*, applying the same standard as the district court," *McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2006), and "with no deference to the District Court's analysis," *Durant v. D.C.*, 875 F.3d 685, 693 (D.C. Cir. 2017). Summary judgment is appropriate in the District's favor only if "there is no genuine dispute as to any material fact" and the District "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. THE DISTRICT'S ADMITTEDLY DISPARATE FUNDING OF OPERATING EXPENSES VIOLATES THE SCHOOL REFORM ACT

Exercising its plenary authority to legislate for the District, Congress enacted the School Reform Act to address a crisis in public education in the Nation's capital. As part of its overhaul of the education system, the District created public charter schools as a new, innovative model of educational reform. In part to ensure that the District would treat congressionally authorized public charter schools the same as traditional public schools, Congress enacted a "uniform" funding

mechanism, SRA § 2401(b)(2), and directed that the District "shall make annual payments … in accordance with" that uniform mandate, *id.* § 2401(a).

Despite that command of parity, the District for years has engaged in unequal funding practices by providing materially greater funding to traditional public schools than public charter schools. Those disparate funding practices countermand the School Reform Act's text, structure, history, and purposes. The district court reached a contrary result based on a deeply flawed interpretation of the statute and by inventing a new and wholly unjustified form of deference for the District's interpretations of a congressional enactment. This Court should reverse and direct summary judgment in favor of Charter School Appellants.

A. The School Reform Act Requires The District To Fund All Operating Expenses Through The Uniform Funding Mechanism

All of the traditional tools of statutory interpretation—namely, the text, structure, history, and purposes of the School Reform Act—compel the same conclusion: Congress designed the School Reform Act's carefully calibrated "uniform" funding mechanism to be the exclusive means for funding "the operating expenses" of traditional public schools and public charter schools.

1. Statutory Text

Interpretation of the School Reform Act "begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997); *Engine Mfrs.*

Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004). Here, the plain meaning of the text evidences Congress's intent that the District fund traditional public schools and charter schools exclusively through a mechanism designed to ensure those schools would operate on equal footing.

To start, Congress directed that, in devising an operating-expense funding formula, the District must apply a "*uniform* dollar amount" as between traditional public schools and public charter schools. SRA § 38-1804.01(b)(2) (emphasis added). Uniform means "[c]haracterized by a lack of variation; identical or consistent." *Black's Law Dictionary* 1530 (7th ed. 1999); *see also Merriam Webster Collegiate Dictionary* 1292 (10th ed. 1995) (uniform: "having always the same form, manner, or degree: not varying or variable"); *Concise Oxford English Dictionary* 1577 (11th ed. 2004) (uniform: "the same in all cases and at all times; not varying"). Thus, although Congress delegated to the District some discretion to determine the per-student dollar *amount* to be used in applying the formula, Congress left the District no discretion once those amounts are set to *vary* the per-student funding distributions as between traditional public schools and public charter schools. Even without more, it would be surpassing strange to think that Congress would have mandated uniformity, only to leave the District free to allocate funding in a non-uniform manner.

It is unsurprising, then, that other statutory provisions compel the conclusion that the uniform funding mechanism is mandatory and exclusive. Congress thus specified that the District "*shall* make annual payments from the general fund … *in accordance with the [uniform funding] formula*." D.C. Code § 38-1804.1(a) (emphases added). It is a "well-recognized principle that '[t]he word 'shall' is ordinarily [t]he language of command.'" *Allied Pilots Ass'n v. Pension Ben. Guar. Corp.*, 334 F.3d 93, 98 (D.C. Cir. 2003). Moreover, "[t]o be *in accordance* is to be in conformity or compliance." Garner, A Dictionary of Modern Legal Usage 14 (2d ed. 1995). Thus, by specifying that the District's funding of public schools (traditional or charter) "shall" be exercised "in accordance with the [uniform funding] formula," Congress made clear its intent that operating expenses be funded equally on a per-student basis. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("the word 'shall' usually creates a mandate, not a liberty"). Where, as here, "a statute limits a thing [*i.e.*, funding of operating expenses] to be done in a particular mode [*i.e.*, through a uniform funding mechanism], it includes the negative of any other mode [*i.e.*, funding outside that mechanism]." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quotation omitted).

Other statutory indicia reinforce the conclusion that Congress intended the uniform funding mechanism to be exclusive. In § 2401(b)(1)(A), for example, Congress provided that the uniform funding mechanism is to provide for "*the* operating expenses of the District of Columbia public schools." SRA § 2401(b)(1)(A) (emphasis added). Similarly, Congress specified the formula should govern payments to "each public charter school for *the* operating expenses of each public charter school." *Id.* § 2401(b)(1)(B) (emphasis added).

Congress's consistent choice of a definite article ("the") to modify a plural noun ("operating expenses") is more evidence that Congress designed the uniform funding mechanism to cover *all*, not *some*, "operating expenses"—otherwise Congress would have used different phrasing or omitted "the" as a definite article. Congress's use of the "definite article ['the'] before the plural noun[] ['operating expenses'] requires" the conclusion that "all" operating expenses are covered by the uniform funding mechanism. *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *see American Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) ("By preceding the words 'remedies and procedures' with the definite article 'the' … Congress made clear that it understood [those] remedies to be exclusive.").

2. Statutory Structure And Context

The School Reform Act's structure and context strengthen this interpretation. The heading of a statutory provision is a "familiar interpretive

guide[].” *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015). In the School Reform Act, the section governing school funding is entitled “Per Capita District of Columbia Public School and Public Charter School Funding.” That underscores Congress’s decision to mandate per-capita student funding as a mechanism for achieving parity in funding traditional public schools and D.C. charter schools.

Even more significantly, when Congress intended to permit the District to depart from the uniform funding mandate, it said so expressly. Congress thus provided two express exceptions to the equal-funding requirement: the District “may adjust the formula” based on the number of students in certain grade levels, SRA § 2401(b)(3)(A), and “may adjust the amount of the annual payment” for schools that serve a high number of students with special needs, *id.* § 2401(b)(3)(B). Congress’s specification of these exceptions—neither of which countenances the District’s practices here—is powerful evidence that Congress did not intend to permit other instances of unequal funding. “[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Hillman v. Maretta*, 569 U.S. 485, 496 (2013) (internal quotation marks and citation omitted)); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Here, there is no evidence of a contrary intent.

3. Legislative History

Relevant legislative history confirms that the School Reform Act means what it says and that the uniform funding mechanism is the mandatory and exclusive means for funding public educational "operating expenses."

For one thing, Congress made clear that a key purpose of the School Reform Act was to "direct[]" the District "to establish a uniform and efficient formula for *funding public education*. The same formula will be used for students enrolled in individual public charter schools authorized [by the School Reform Act] and the District of Columbia Public School System." H.R. Rep. No. 104-455, at 146 (emphasis added). This formula, Congress explained, "will clarify and focus decisions regarding *funding for public education* around students' needs." *Id.* (emphasis added). That description is strongly indicative of a congressional intent that the uniform funding mechanism be used for all, not some, "public education" funding and that this choice was deliberate—that is, by tying funding to the number of students, the mechanism would necessarily focus on *students'* needs, rather than perceived differences in *schools'* budgetary needs.

Consistent with that objective, the legislative history is equally clear that all operating expenses must be included in and distributed through the uniform funding mechanism. A House Report thus explained that formula "must include the total costs of the operations of the Board of Education itself, all central

administration and central office costs, including those applicable to the Superintendent of Schools." H.R. Rep. No. 104-689, at 50. The Report went on to provide that the uniform funding mechanism must reflect "*all facilities operating costs*, including utilities, all local education agency evaluation, assessment, and monitoring costs, and *any other direct or indirect costs* normally incurred by, or allocated to, schools under the control of the Board of Education and the overall public school system." *Id.* (emphases added).

By specifying that "all" operating costs, whether "direct or indirect," must be included in the uniform funding mechanism, Congress obviously had in mind a capacious definition of "operating expenses." The legislative history neither suggests that Congress intended a cramped definition of that phrase nor supports the bizarre notion that Congress intended to delegate to the District the authority to cherry-pick operating expenses that could be included or excluded from the uniform funding mechanism. That makes good sense, as either approach would have seriously undermined Congress's goal of putting public charter schools on equal footing with traditional public schools.

4. Statutory Purpose

Finally, considerations of statutory purpose put an exclamation point on this interpretation of the School Reform Act. *See McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) ("[e]xamination of purpose is a

staple of statutory interpretation"); *Wagner v. Federal Election Comm'n*, 717 F.3d 1007, 1014 (D.C. Cir. 2013) ("[l]egislative purpose … confirms the mandate of the statutory text").

In enacting the statute, Congress created a path-breaking model of public education through D.C. public charter schools. Congress established this model "to improve the education of students, and encourage community involvement in education." S. Rep. No. 104-144, at 7. Such schools, in Congress's judgment, "offer great promise in reforming public education." *Id*. At the same time, Congress sought to "ensure that a two-tiered system of public schools would not result." 141 Cong. Rec. 31,366.

Congress's uniform funding mandate fits hand in glove with those objectives by ensuring that the District could not (whether intentionally or inadvertently) undermine the public charter school model through unequal funding practices. That parity mandate, of course, also ensures that the District could not favor public charter schools by providing more funding on a per-student basis.

Treating the uniform funding mechanism as optional or interpreting the provision narrowly (and atextually) such that it does not include all "operating expenses"—arguments the District has at times advanced—would risk rendering the uniform funding mechanism a dead-letter. Under either view, the District

could establish an inadequate baseline amount under the formula and then separately distribute additional funds to traditional public schools, but not to public charter schools, resulting in blatantly unequal funding. It is inconceivable that Congress would have exhaustively studied how to fix public education in the District for more than a year, but then enacted a comprehensive reform statute that the District could so easily frustrate or defeat. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C. Cir. 1983) ("A statute should ordinarily be read to effectuate its purposes rather than to frustrate them."); *see also Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) ("It is an elementary rule of construction that 'the act cannot be held to destroy itself.'").

Finally, all agree that Congress created D.C. public charter schools to be independent from District oversight and the stifling bureaucracy Congress deemed that to entail. *See, e.g.*, SRA § 2204(c)(3). An exclusive uniform funding mechanism directly advances that objective by freeing charter schools from the influence the District might otherwise exercise through funding distributions. Absent a strict uniform funding mandate, public charter schools would be beholden to the District's policy preferences, as the District could hold out increased or decreased funding as a means of *de facto* supervision. *Cf.* Datla & Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L.

Rev. 769, 816 (2013) ("Congress primarily exerts influence over agency heads … through the power of the purse. Thus an agency has an incentive to shade its policy choice toward the legislature's ideal point to take advantage of that inducement.") (internal quotation marks and alterations omitted). This helps to explain not only why Congress established a uniform funding mechanism, but why Congress ranked it as exclusive and mandatory.

B. The District's Funding Practices Violate The School Reform Act

Despite Congress's intent that the District fund "the operating expenses" of traditional public schools and public charter schools exclusively through a uniform funding mechanism, the District has regularly violated that statutory requirement. Indeed, the District has funded three categories of "operating expenses"—facilities maintenance, teacher pensions, and supplemental appropriations—without complying with the uniform funding mechanism.

At the threshold, the types of funding at issue are plainly "operating expenses." Although Congress did not expressly define that phrase in the School Reform Act, it is a concept regularly used by "accountants, regulators, courts, and commentators" and it thus should be defined "in accordance with the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986).

As a specialized term, "operating expenses" is widely understood to denote "the costs … incurred … by an organization in the ordinary course of business." *A Dictionary of Accounting* 253 (1999); *see also The IEBM Dictionary of Business and Management* 219 (1999) (defining "operating expenses" as expenses "incurred in the course of running a business"); *Black's Law Dictionary* 599 (7th ed. 1999) (defining "operating expense" as an "expense incurred in running a business and producing output"); *The Complete Dictionary of Accounting & Bookkeeping Terms* 190 (2011) (defining "operating expenses" as "[c]ost incurred in carrying out daily operations within the company. These costs include payroll, sales commissions, and employee benefits."); *Dictionary of Accounting* 192 (2d ed. 2001) (defining "operating expenses" as "costs of production, selling and administration incurred during normal trading"); *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 167 (1934) ("operating expenses" are "the cost of producing the service"). Courts regularly apply materially similar definitions of "operating expenses" where, as here, the relevant operating entity is a school, rather than a private business.[2]

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[2] *See Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue*, 679 S.E.2d 913, 919 (S.C. 2009) (applying Black's Law definitions to school "operating expenses"); *Levenstein v. Salafsky*, 414 F.3d 767, 770 (7th Cir. 2005) ("school operating expenses [include] faculty salaries and maintenance"); *Renaissance Acad. for Math & Sci. of Mo., Inc. v. Imagine Schs., Inc.*, 2014 WL 3828558, at *5 (W.D. Mo. Aug. 4, 2014) (referring to "facility payments, equipment lease payments, and other operating expenses"); *Long v. Franklin Cmty. Sch. Corp.*, 2010 WL 3781350, at *4 (S.D. Ind. Sept. 21, 2010) (school corporation's operating expenses

Moreover, unusually direct and explanatory legislative history demonstrates that Congress intended this broad and ordinary definition of "operating expenses" to govern. *See* H.R. Rep. No. 104-689, at 50.

Under this definition, there is no question that three categories of funding that the District provides to traditional public schools without providing corresponding payments to D.C. charter schools are "operating expenses":

Facilities Management and Related Services. The District does not (because it cannot) dispute that it has allocated millions of dollars each year, through funding provided to the Department of General Services but earmarked for public schools, for facilities maintenance and related services without providing equivalent funding on a per-student basis to charter schools. JA214-JA218 (SUF ¶¶ 46-65); *see supra* Statement of the Case III.A. These services fall into three principal categories—facilities management, financial services, and property management—each of which constitutes a core "operating expense."

To begin with, facilities management as provided by the Department of General Services involves "coordinat[ing] the day-to-day operations of District-

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"includ[e] salaries and benefits for teachers, supplies, and utilities"); *Thomas Jefferson Acad. Charter Sch. v. Cleveland Cty. Bd. of Educ.*, 778 S.E.2d 295, 301 (N.C. Ct. App. 2015) (charter school "operating expenses" include "accounting, payroll, purchasing, facilities management, and utilities").

owned properties by: (A) [m]aintaining building assets and equipment; (b) [p]erforming various repairs and non-structural improvements; and (C) [p]roviding janitorial, trash and recycling pickup, postal, and engineering services; provided, that [public schools] shall remain responsible for providing janitorial services at [public schools] facilities." D.C. Code § 10-551.02. Costs incurred in providing these services to ensure that traditional public schools are operational day-to-day are plainly operating expenses.

Moreover, costs incurred for financial services for traditional public schools are also "operating expenses," *see Thomas Jefferson Acad. Charter Sch. v. Cleveland Cty. Bd. of Educ.*, 778 S.E.2d 295, 301(N.C. Ct. App. 2015) ("operating expenses" include "accounting, payroll, [and] purchasing"); *Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue*, 679 S.E.2d 913, 919 (S.C. 2009) ("'operating expenses' has been defined to 'include payroll, sales commissions, … amortization and depreciation, … and taxes'"), as are property management expenses, *see, e.g.*, *Thomas Jefferson Acad. Charter Sch.*, 778 S.E.2d at 301 (charter school "operating expenses" include "facilities management … and utilities"); *Berkeley Cty. Sch. Dist.*, 679 S.E.2d at 919 (operating expenses includes "amortization and depreciation, rent, repairs, and taxes'").

Teacher Pension Funding. As described above, the District acknowledges that it makes substantial payments for pensions of current teachers at traditional public schools without making equal payments for the pensions of current teachers at charter schools. JA218-JA219 (SUF ¶¶ 66-76); *see supra* Statement of the Case III.B. Thus, in FY 2012 alone, traditional public schools received approximately $45 million in funding for teacher pensions that was not accounted for when calculating annual payments for operating expenses to charter schools, JA219 (SUF ¶ 71), which must cover the costs of pension payments from their general allocations.

Employee benefits of this type are plainly a necessary cost of day-to-day operations and thus have long been considered "operating expenses." *See Levenstein*, 414 F.3d at 769 ("school operating expenses [include] faculty salaries"); *Long v. Franklin Cmty. Sch. Corp.*, 2010 WL 3781350, at *4 (S.D. Ind. Sept. 21, 2010) (school corporation's operating expenses "include[e] salaries and benefits for teachers"); *Berkeley Cty. Sch. Dist.*, 679 S.E.2d at 919 ("'operating expenses' has been defined to 'include … employee benefits and pension contributions'").

Supplemental Operating Expense Funding. Finally, there is no dispute that District has provided supplemental funding to traditional public schools in years in

which actual operating expenses exceed the amount of the annual payment. *See* JA219-JA220 (SUF ¶¶ 73-86); *see supra* Statement of the Case III.C. There is no question that these supplemental payments are for educational "operating expenses." Yet, the District has not provided corresponding payments to public charter schools, as required by the School Reform Act's uniform funding mechanism.

* * *

In short, for years the District brazenly has defied the School Reform Act's uniform funding mechanism by paying for facilities management and related services for traditional public schools, but not charter schools; by funding the pensions of current teachers at traditional public schools, but not charter schools; and by making supplemental operating expense payments to traditional public schools, but not charter schools. This stands the funding parity Congress mandated in the School Reform Act on its head. Because these unequal funding practices conflict with the text, structure, history, and purposes of the School Reform Act, as enacted under Congress's Article I authority over the District, the District's funding practices should be declared unlawful.

C. The District Court's Contrary Interpretation Of The School Reform Act Is Unavailing

Against the compelling weight of interpretive evidence establishing that Congress intended uniform funding and despite the District's admission that it provides more funds annually on a per-student basis to traditional public schools than public charter schools, the district court rejected Charter Schools Appellants' legal challenges for three reasons. None is sustainable as a matter of law.

First, the district court held that the School Reform Act "does not … contain language indicating that [payments mandated in the School Reform Act] must be the *only* payments made to [traditional public schools] or charter schools." JA1014. From this flawed premise, the court leaped to the conclusion that the uniform funding mechanism is not the "*exclusive* means of funding the District's educational system." JA1015. Although the court did not identify the source of the District's purported authority to make "operating expense" payments outside of the uniform funding mechanism, presumably the court had in mind the general authority that Congress delegated to the District in the Home Rule Act in 1973. *See* D.C. Code. §§ 1-203.02, 1-204.04(a).

That is flawed several times over. To start, Congress's intent, as expressed in the School Reform Act, defines the scope of the District's authority to act in this sphere. The District has no freestanding authority to legislate. And the District's

general delegated legislative authority (§ 1-203.02) is limited by and conditioned on Congress's "constitutional authority" to act "as legislature for the District, by enacting legislation … on any subject." D.C. Code § 1-206.01; *see id.* § 1-203.02 ("[e]xcept as provided in §[] 1-206.01 …, the legislative power of the District shall extend to all rightful subjects of legislation").

Here, a conclusion that the District's general Home Rule Act authority may be used to override or evade the uniform funding mandate falls short because, as described above, traditional tools of statutory interpretation compel the opposite result: Congress intended the School Reform Act's uniform funding mechanism to be mandatory and exclusive with respect to all "operating expenses." Among other things, it would disregard settled interpretive principles to believe Congress would have bothered to create express exceptions to the uniform funding mechanism if the District were free to disregard it simply by claiming that its unequal funding occurs "outside" that mechanism. *See Hillman*, 569 U.S. at 496.

In addition, the view that the District retains general authority unbounded by the School Reform Act's uniformity requirement runs aground in the face of the familiar interpretive canons that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling," *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932); *Morton v. Mancari*, 417 U.S. 535, 550-

551 (1974) ("a specific statute will not be controlled or nullified by a general one"), and that "a specific policy embodied in a later federal statute should control [judicial] construction of the earlier statute, even though it has not been expressly amended," *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (internal quotation marks and citations omitted). Those canons have significant weight here because it is beyond debate that the School Reform Act's uniform funding mechanism more specifically addresses the District's authority to fund the operating expenses of D.C. public schools and that the School Reform Act was later-enacted.

What is more, saying the uniform funding mechanism is not "exclusive" is another way of saying the mechanism is optional: under this theory, the District may fund "operating expenses" through the uniform funding mechanism or it may not, electing to fund schools unequally through its Home Rule Act authority. That makes little sense and admits of no natural stopping point, as it would permit essentially all operating expense funding to occur outside the uniform funding mechanism. It "would require the suspension of disbelief to ascribe to Congress the design to allow" the District to evade "the careful and thorough" uniform funding mechanism that Congress enacted in the School Reform Act through the exercise of pre-existing, general Home Rule Act authority. *Brown v. Gen. Servs.*

Admin., 425 U.S. 820, 835 (1976) (1964 Civil Rights Act was exclusive remedy for discrimination claims in federal employment, despite absence of explicit exclusivity provision). The District accordingly may not "rely on its general authority" under the Home Rule Act where, as here, "a specific statutory directive" in the School Reform Act "defines the relevant functions of [the District] in a particular area." *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

Second, the district court held that Congress left the statutory phrase "operating expenses" "undefined," which, according to the court, was evidence the District had discretion in its funding practices. JA1016. That does not follow. Congress often leaves statutory terms undefined. When it does, it is ordinarily the job of courts to define those terms by reference to their "ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008). Even in the context of a statute administered by a federal agency, Congress's choice not to define a term does not displace the judiciary's role at *Chevron* step one to construe a statutory term in light of all available tools of statutory construction. It follows necessarily that the absence of a definition is no evidence Congress intended discretion.

That is doubly so because "operating expenses" is a "term[]" commonly used "by accountants, regulators, courts, and commentators" and, under controlling

precedent, should be defined by reference to that accepted meaning. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 371; *see McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 343 (1991). As described above, "operating expenses" has a specialized, well-defined meaning that the district court simply did not grapple with.

Lastly, the district court held that, as to both statutory questions—whether Congress intended the School Reform Act's uniform funding mechanism to be "exclusive" and how Congress defined "operating expenses"—it was obliged to apply "some degree of deference" to the District's construction. JA1020.

That was legal error. No other federal court of which we are aware has ever deferred to the District's interpretation of the School Reform Act or to the District's construction of any Act of Congress enacted pursuant to its plenary legislative authority over the District. The two decisions cited by the district court for the proposition that the District may "regulate 'interstitially' around Congressional statutes," JA1021, do not fairly support that proposition.

Each case predates the Home Rule Act and each stands for the modest proposition that general congressional legislation should not be presumed completely to occupy the field, thus displacing all District authority, unless Congress indicates as much. Thus, in *Maryland & District of Columbia Rifle & Pistol Ass'n v. Washington*, this Court considered an objection that the District

lacked authority to enact gun control laws because Congress had occupied the field by passing a "limited gun control law for the District." 442 F.2d 123, 128-130 (D.C. Cir. 1971). This Court rejected that argument, reasoning that regulation is not "precluded simply because [Congress] has taken some action in reference to the same subject." *Id.* at 130. *Firemen's Insurance Co. v. Washington* addressed a similar preemption question, in the context of insurance regulation. 483 F.2d 1323, 1329 (D.C. Cir. 1973).

Neither decision holds, or even fairly intimates, that the District is entitled to any measure of "deference" in its interpretation of an act of Congress in the exercise of its plenary Article I authority to legislate for the District. Moreover, the district court's reliance on these cases for the notion of "interstitial" authority is misplaced because the School Reform Act does not admit of any relevant gaps in the statutory scheme for the District to fill. As described above, traditional tools of statutory interpretation drive the conclusion that the School Reform Act's uniform funding mechanism is mandatory and exclusive, and that "operating expenses" must be defined in accord with its accepted meaning.

Administrative deference doctrines, such as *Skidmore*, likewise do not support the district court's novel holding. *Skidmore* deference rests on the premise that the "specialized experience" of a federal agency should sometimes lead courts

to defer to an agency's interpretation of an ambiguous statute it has been entrusted to administer, but only if the interpretation has the "'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

Those premises are absent here. Traditional tools of statutory interpretation resolve the statutory questions, leaving no ambiguity. Moreover, the District has failed to offer a coherent interpretation of the School Reform Act, under which the uniform funding mechanism is not exclusive, mandatory, and comprehensive. In addition, the District has no "specialized expertise" that merits judicial deference to its interpretation of a congressional enactment. To the contrary. Congress exercised authority over the District in enacting the School Reform Act precisely because of a manifest crisis in public education the District had been unable to solve. *E.g.*, H.R. Rep. No. 104-455, at 142. Among the solutions imposed upon the District by Congress was the creation of public charter schools, to which the District was required to provide equitable funding. In such circumstances, there is no sound basis for deferring to the District's self-interested interpretation that Congress did not require parity in public education funding.

D. The District's Remaining Defenses Of Its Unequal Funding Practices Are Unpersuasive

Recognizing that its funding practices cannot be squared with the School Reform Act, the District has at times argued that the District has the power to

amend or repeal the School Reform Act or that Congress has acquiesced in and ratified the District's statutory violations. These arguments—which the district court did not reach—are also unconvincing.

1. The District, A Subordinate Entity Exercising Only Delegated Authority, Is Bound By Acts Of Congress Constraining That Authority

The Constitution vests Congress with "plenary" power over the District of Columbia. *Palmore*, 411 U.S. at 397. Although Congress may choose to "delegate its lawmaking authority" to the District, *District of Columbia v. John R. Thompson Co.* 346 U.S. 100, 110 (1953), any such delegation is "precarious," *American Federation of Government Employees v. District of Columbia*, 133 F. Supp. 2d 75, 82 (D.D.C. 2001) ("*AFGE*"). The delegation remains "subject … to the power of Congress at any time to revise, alter, or revoke the authority granted." *Thompson*, 346 U.S at 109. "What this plenary power means, in other words, is that what Congress giveth, Congress can taketh away." *AFGE*, 133 F. Supp. 2d at 82.

This hierarchy is not unique to the relationship between Congress and the District, but is an inherent feature of arrangements where a holder of plenary power delegates some authority to an entity of its own creation. Two such arrangements are particularly relevant here. And courts, including the Supreme Court, have looked to both as analogues for Congress's relationship to the District.

First, territories, like the District, are subject to the plenary legislative power of Congress. As the Supreme Court has observed, grants of authority to Congress over the District and the territories "are phrased in very similar language in the Constitution," and the Court has drawn on its Territories Power jurisprudence in considering Congress's power over the District. *Thompson,* 346 U.S. at 105-106. It is well settled that acts of Congress prescribing municipal law for a territory are "beyond [a] territorial legislature to repeal," and the Supreme Court has described the concept that a territorial legislature could repeal an Act of Congress as "inconceivable." *Murphy v. Utter*, 186 U.S. 95, 109, 110 (1902).

Second, the Supreme Court has repeatedly analogized Congress's power over the District to the power of States over municipalities, *see, e.g.*, *Thompson*, 346 U.S. at 108; *Barnes v. District of Columbia*, 91 U.S. 540, 544 (1875), recognizing that when Congress legislates for the District, it wields "all legislative powers that the legislature of a State might exercise within the State." *Palmore*, 411 U.S. at 397. The legislative authority of a State government extends to granting a municipality "all the powers such a being is capable of receiving" or "strip[ping] it of every power," and the State "may create and recreate these changes as often as it chooses." *Barnes*, 91 U.S. at 544-545. Accordingly,

Congress remains at all times in full control and free to change its mind with respect to the District's governance.

As these analogues makes clear, delegated federal power is subject to revocation or limitation and cannot be used to override an express command issued by the delegating entity. The legislative authority that Congress delegated to the District in the Home Rule Act is no exception. "Since Congress exercises plenary power over the District, it may modify or repeal legislation regarding the District as it sees fit." *AFGE*, 133 F. Supp. 2d at 82. When Congress exercises that plenary authority by enacting substantive limitations on the District's delegated powers, the D.C. government, like the territories, municipalities, and federal agencies it resembles, has no authority to contravene it.

Finally, no principle of law requires Congress to use magic words or issue a clear statement to restrict the District from amending or repealing a statute. In *Shook v. D.C. Financial Responsibility & Management Assistance Authority*, for example, this Court made clear that such an express statement is unnecessary because Home Rule Act delegated authority "can be modified either expressly or impliedly by Congress as it wishes." 132 F.3d 775, 780 (D.C. Cir. 1998).

2. Congress Has Not Empowered The Council To Override The School Reform Act

The School Reform Act is one such exercise of Congress's plenary authority over the District. As Congress's comprehensive and considered response to a public education system in crisis, the School Reform Act unambiguously limits the District's discretion in various ways, as explained above. Most relevant, the School Reform Act requires the District to fund operating expenses for public schools, whether traditional or charter, using a single, clearly defined method: multiplying a "uniform" dollar amount by the number of students actually enrolled at school. There is no evidence that Congress intended to grant the District anything like the power to take or leave these critical provisions at its discretion.

The Home Rule Act does not alter this conclusion. Nothing in the Home Rule Act grants the District the exceptional power to ignore, amend, repeal, or undermine Congress when it exercises its reserved legislative authority, as it did when it passed the School Reform Act. *See* D.C. Code § 1-206.01.

Nor can such a power be implied from other provisions of the Home Rule Act, including D.C. Code § 1-206.02(3), which provides that "[t]he Council shall have no authority … to … amend or repeal any Act of Congress, which concerns the functions of or property of the United States or which is not restricted in its application exclusively in or to the District." The District has previously argued

that limitation on its authority somehow empowers it to alter or amend the School Reform Act.

That is decidedly wrong. As explained above, the Home Rule Act did expressly provide the District with some authority to amend congressional enactments, but only pre-1975 laws. *See* D.C. Code § 1-207.17(b); *supra* Statement of the Case I. Section 1-206.02(3) limits that narrow authority. It does not arrogate to the District the sweeping power to amend, revise, or repeal any congressional statute enacted to govern the District. Indeed, the provision does not affirmatively *authorize* the Council to do anything; rather, it is one of several "Limitations on the Council," and it speaks the language of *prohibition*. *See* D.C. Code § 1-206.02 ("The Council shall have no authority to …"). Moreover, the specific enumeration of a narrower repeal power in § 1-207.17(b)—which, as noted above, grants limited authority to amend or repeal laws that predated the Home Rule Act—precludes reading a separate limitation on that power as a license to amend or repeal acts of Congress that are restricted to the District. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957).

3. Congress Has Not Approved Of Or Acquiesced In The Challenged Funding Disparities

Finally, the District has argued that Congress's silence during the 30-day review of District legislation under the Home Rule Act constitutes congressional acquiescence in the District's unlawful funding practices. That, too, is mistaken.

Congress speaks through legislation, not inaction. Inaction is subject to neither presentment nor bicameral enactment—the constitutional mechanisms by which Congress enacts law. Moreover, such "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *see also Girouard v. United States*, 328 U.S. 61, 69 (1946); *Helvering v. Hallock,* 309 U.S. 106, 119-20 (1940). Because "[n]onaction by Congress is not often a useful guide" to congressional intent, *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983), courts demand "overwhelming evidence of acquiescence," *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng'rs,* 531 U.S. 159, 169 n.5 (2001). Such overwhelming evidence is absent here.[3]

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[3] Moreover, congressional inaction in subsequent years sheds no light on the intent of the Congress that enacted the School Reform Act. *See O'Gilvie v. United States*, 519 U.S. 79, 90 (1996).

Similarly, the District has argued that Congress has approved unequal funding practices because Congress must review the District's proposed annual budget and enact affirmative legislation to appropriate funds to the District. *See* D.C. Code § 1-204.46. But appropriations cannot evince congressional approval unless Congress had "knowledge of the precise course of action alleged to have been acquiesced in." *City of Santa Clara v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978); *see Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002) ("'[T]he appropriation must plainly show a purpose to bestow the *precise* authority which is claimed.'") (quoting *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944)).

No such precise knowledge has been demonstrated here. Among other things, each of the relevant proposed budgets represents to Congress that "[p]ublic charter schools receive the same level of District funding for their enrolled students as students enrolled in the District of Columbia Public Schools, pursuant to the District's Uniform Per Student Funding Formula." JA224-JA225 (SUF ¶¶ 114-116). In light of those statements and especially given that relevant funding inequities are often buried in line items in appendices or other materials beyond the proposed budgets themselves, *see, e.g.*, JA300-JA305, Congress cannot be assumed to have "knowledge of the precise course[s] of action" that the District has taken in contravention of the School Reform Act. *Andrus*, 572 F.2d at 672.

II. THE DISTRICT SYSTEMICALLY VIOLATES THE SCHOOL REFORM ACT BY USING PROJECTED AUDITED ENROLLMENT TO FUND TRADITIONAL PUBLIC SCHOOLS, BUT NOT PUBLIC CHARTER SCHOOLS

The District's legal violations are not limited to those above. In the School Reform Act, Congress mandated that the uniform funding mechanism be based on the number of students "enrolled" at public schools, whether traditional or charter. SRA § 2401(b)(1)(2)(A)-(B). Despite that parallel textual requirement, the District has continued to fund operating expenses to traditional public schools based on *projected* student enrollment, while funding operating expenses to D.C. public charter schools based on *actual* enrollment. This incongruent treatment results in significant overpayments to traditional public schools and frustrates the School Reform Act's guiding principle of uniformity. Contrary to the district court's conclusion, Charter School Appellants have standing to challenge this practice.

A. The District's Use Of Different Methodologies For Calculating Enrollment Violates The School Reform Act

The School Reform Act's uniform funding mechanism is based on the number of students "enrolled" at traditional public schools and D.C. charter schools. SRA § 2401(b)(1)(2)(A),(B). By September 15 each year, traditional public schools and charter schools must "submit a report" to the District with the number of students "enrolled in each grade from kindergarten to grade 12." SRA § 2402(a)(1), (b)(1). Then, by October 15, the District's Board of Education "shall

calculate" the number of students enrolled in each grade. *Id.* § 2402(b)(1). To help ensure accuracy, Congress required an independent audit of the enrollment calculations and mandated that the auditor "provide an opinion as to the accuracy of the information contained in the report." *Id.* § 2402(d).

For public charter schools, the District is then required to make two payments—an "Initial Payment" and a "Final Payment." The District must place the annual payment amount in escrow "not later than 10 days after the date of enactment of an Act making appropriations" for the fiscal year, and transfer an "initial payment" of "an amount equal to 75 percent of the amount of the annual payment for each public charter school" to the individual charter schools no later than October 15. SRA § 2403(a)(1)-(2). By May 1 the following year, the District must transfer "the remainder of the annual payment," *id.* § 2403(a)(2)(B)(i), in a Final Payment. In making the Final Payment, the District must adjust the payment "in an amount equal to 50 percent of the amount provided for each student" who has enrolled or withdrawn since the initial enrollment calculation. *Id.* 2403(a)(2)(B).

The District's funding practices conflict with this statutory scheme. Under current practices, the District makes one annual operating expense payment to traditional public schools, and that is based on "projected" student enrollment.

D.C. Code § 38-2906(a).[4] By contrast, the District makes four quarterly payments to public charter schools—on July 15, October 25, January 15, and April 15, *id.* § 38-2906.02—rather than the two payments required by the School Reform Act. After the July and October payments, if "[an] audit finds that the number of verified resident students enrolled at any public charter school differs from that on which its July 15 and October 15 payments were based," the District "recalculate[s] the appropriate amount of subsequent payments accordingly, adjusting them by the amount of the discrepancy." *Id.* § 38-2906.02(c).

As a result, D.C. public charter schools receive annual operating expense payments tied to *actual* enrollment. Traditional public schools, however, receive funding based on *projected* enrollment because the District inexplicably does not adjust payments to traditional public schools to reflect actual, audited enrollment—as it does for D.C. charter schools. *Compare* D.C. Code. § 38-2906(a) (mandating payment to traditional public schools based on projected enrollment with no mechanism for audited adjustment) *with id.* § 38-2906.02(c) (requiring audited adjustments for public charter schools).

[4] "Beginning in fiscal year 2018, the base for the projections shall be the verified enrollment for the school year preceding the fiscal year for which the appropriation is made." D.C. Code § 38-2906(a).

The District's use of these dissimilar methodologies results in systemic overpayments to traditional public schools because those schools often overestimate their enrollments. *See* JA221-JA224 (SUF ¶¶ 94-113). For example, in FY 2013, traditional public schools overestimated general enrollment by 1,617 students, JA223 (SUF ¶ 108), causing an overpayment to traditional public schools of more than $43 million, JA223 (SUF ¶ 109). These outsized overpayments, of course, skew the uniform per-student funding yardstick when that metric is calculated using actually enrolled students, contrary to the parity requirements of the School Reform Act. Charter School Appellants are entitled to declaratory and injunctive relief holding those practices unlawful.

B. Charter School Appellants Have Standing To Challenge These Violations Of The School Reform Act

The district court did not reach the merits of these legal issues. Rather, the court held that Charter School Appellants lacked standing to challenge the District's statutory violations because they resulted in the "overfunding" of traditional public schools, which, the court surmised, inflicts no injury on Charter School Appellants. JA1024. That is incorrect.

"The irreducible constitutional minimum of [Article III] standing consists of three elements: 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." *Air Line Pilots Ass'n, Int'l v. Chao*, 889 F.3d 785, 788 (D.C. Cir. 2018) (internal quotations and alterations omitted). Moreover, by analogy to the "competitor standing" doctrine—which this Court has never limited to commercial competition between for-profit entities—injury-in-fact exists "when government action illegally structures a competitive environment" and "parties defending concrete interests in that environment suffer legal harm under Article III." *Id.* (internal alterations omitted).

Under this line of precedent, Charter School Appellants have Article III standing. The enrollment methodology practices of the District have created a manifestly imbalanced competitive environment by determining enrollment for traditional public schools on a projected basis, while calculating enrollment for public charter schools on an actual basis. This differential treatment of entities that Congress required to be treated equally directly results in imbalanced per-student funding, *see* JA221-JA224 (SUF ¶¶ 94-113), a direct affront to the School Reform Act's uniform funding mandate. Educational funding is a scarce resource, and the District's use of different methodologies gives traditional public schools a substantial advantage over public charter schools in securing those funds.

This funding inequity results in Article III injury. The District's "illegal[] structur[ing] of [this] competitive environment" (*Air Line Pilots Ass'n, Int'l v.*

Chao, 889 F.3d at 788) for both public education and public education funding injures D.C. public charter schools by impairing their ability to compete fairly. One of the reasons that Congress deemed the public charter school model "a key component of [] comprehensive educational reform" was its judgment that viable public charter schools would "encourage innovation and entrepreneurialism by educators" and foster "healthy competition" in public education. 141 Cong. Rec. at 31,367-31,368.

The District's denial of equal treatment decisively tilts what Congress intended to be a fair playfield against D.C. public charter schools. It is a matter of common sense and basic economics that this funding imbalance affects charter schools' ability, among other things, to retain and pay teachers and staff, as well to attract parents and students to charter schools (and public charter schools live or die based on enrollment). This competitive impairment is thus tangible, and it would be redressed by relief requiring the District to comply with the School Reform Act. If union members, *Air Line Pilots Ass'n*, 889 F.3d at 789; for-profit commercial entities, *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998); and political candidates, *Shays v. Federal Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005), have "competitor standing" to challenge illegal and unequal conditions, Charter School Appellants likewise have standing to challenge

unlawful conduct by the District that interferes with their ability to compete fairly and effectively in providing public education to the District's youth.

CONCLUSION

This Court should reverse the district court's opinion and grant of summary judgment for the District, and direct the entry of summary judgment in favor of Charter School Appellants.

Respectfully submitted,

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ADDENDUM

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CONSTITUTIONAL PROVISIONS

Constitution Article I § 8, Clause 17

* * *

Section 8, Clause 17. Seat of Government; Exclusive Jurisdiction Over Places Purchased

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

* * *

DISTRICT OF COLUMBIA SCHOOL REFORM ACT OF 1995, PUB. L. NO. 104-134, 110 STAT. 1321 (1996)

SEC. 2401. ANNUAL BUDGETS FOR SCHOOLS.

(a) IN GENERAL.—For fiscal year 1997 and for each subsequent fiscal year, the Mayor shall make annual payments from the general fund of the District of Columbia in accordance with the formula established under subsection (b).

(b) FORMULA.—

> (1) IN GENERAL.—The Mayor and the District of Columbia Council, in consultation with the Board of Education and the Superintendent, shall establish not later than 90 days after enactment of this Act, a formula to determine the amount of—
>
> > (A) the annual payment to the Board of Education for the operating expenses of the District of Columbia public schools, which for purposes of this paragraph includes the operating expenses of the Board of Education and the Office of the Superintendent; and

(B) the annual payment to each public charter school for the operating expenses of each public charter school.

(2) FORMULA CALCULATION.—Except as provided in paragraph (3), the amount of the annual payment under paragraph (1) shall be calculated by multiplying a uniform dollar amount used in the formula established under such paragraph by—

(A) the number of students calculated under section 2402 that are enrolled at District of Columbia public schools, in the case of the payment under paragraph (1)(A); or

(B) the number of students calculated under section 2402 that are enrolled at each public charter school, in the case of a payment under paragraph (1)(B).

(3) EXCEPTIONS.—

(A) FORMULA.—Notwithstanding paragraph (2), the Mayor and the District of Columbia Council, in consultation with the Board of Education and the Superintendent, may adjust the formula to increase or decrease the amount of the annual payment to the District of Columbia public schools or each public charter school based on a calculation of—

(i) the number of students served by such schools in certain grade levels; and

(ii) the cost of educating students at such certain grade levels.

(B) PAYMENT.—Notwithstanding paragraph (2), the Mayor and the District of Columbia Council, in consultation with the Board of Education and the Superintendent, may adjust the amount of the annual payment under paragraph (1) to increase the amount of such payment if a District of Columbia public school or a public charter school serves a high number of students—

(i) with special needs; or

(ii) who do not meet minimum literacy standards.

SEC. 2402. CALCULATION OF NUMBER OF STUDENTS.

(a) SCHOOL REPORTING REQUIREMENT.—

(1) IN GENERAL.—Not later than September 15, 1996, and not later than September 15 of each year thereafter, each District of Columbia public school and public charter school shall submit a report to the Mayor and the Board of Education containing the information described in subsection (b) that is applicable to such school.

(2) SPECIAL RULE.—Not later than April 1, 1997, and not later than April 1 of each year thereafter, each public charter school shall submit a report in the same form and manner as described in paragraph (1) to ensure accurate payment under section 2403(a)(2)(B)(ii).

(b) CALCULATION OF NUMBER OF STUDENTS.—Not later than 30 days after the date of the enactment of this Act, and not later than October 15 of each year thereafter, the Board of Education shall calculate the following:

(1) The number of students, including nonresident students and students with special needs, enrolled in each grade from kindergarten through grade 12 of the District of Columbia public schools and in public charter schools, and the number of students whose tuition for enrollment in other schools is paid for with funds available to the District of Columbia public schools.

(2) The amount of fees and tuition assessed and collected from the nonresident students described in paragraph (1).

(3) The number of students, including nonresident students, enrolled in preschool and prekindergarten in the District of Columbia public schools and in public charter schools.

(4) The amount of fees and tuition assessed and collected from the nonresident students described in paragraph (3).

(5) The number of full time equivalent adult students enrolled in adult, community, continuing, and vocational education programs in the District of Columbia public schools and in public charter schools.

(6) The amount of fees and tuition assessed and collected from resident and nonresident adult students described in paragraph (5).

(7) The number of students, including nonresident students, enrolled in nongrade level programs in District of Columbia public schools and in public charter schools.

(8) The amount of fees and tuition assessed and collected from nonresident students described in paragraph (7).

(c) ANNUAL REPORTS.—Not later than 30 days after the date of the enactment of this Act, and not later than October 15 of each year thereafter, the Board of Education shall prepare and submit to the Authority, the Mayor, the District of Columbia Council, the Consensus Commission, the Comptroller General of the United States, and the appropriate congressional committees a report containing a summary of the most recent calculations made under subsection (b).

(d) AUDIT OF INITIAL CALCULATIONS.—

(1) IN GENERAL.—The Board of Education shall arrange with the Authority to provide for the conduct of an independent audit of the initial calculations described in subsection (b).

(2) CONDUCT OF AUDIT.—In conducting the audit, the independent auditor—

(A) shall provide an opinion as to the accuracy of the information contained in the report described in subsection (c); and

(B) shall identify any material weaknesses in the systems, procedures, or methodology used by the Board of Education—

(i) in determining the number of students, including nonresident students, enrolled in the District of Columbia public schools and in public charter schools, and the number of students whose tuition for enrollment in other school systems is paid for by funds available to the District of Columbia public schools; and

(ii) in assessing and collecting fees and tuition from nonresident students.

(3) SUBMISSION OF AUDIT.—Not later than 45 days, or as soon thereafter as is practicable, after the date on which the Authority receives the initial annual report from the Board of Education under subsection (c), the Authority shall submit to the Board of Education, the Mayor, the District of

Columbia Council, and the appropriate congressional committees, the audit conducted under this subsection.

(4) COST OF THE AUDIT.—The Board of Education shall reimburse the Authority for the cost of the independent audit, solely from amounts appropriated to the Board of Education for staff, stipends, and other-than-personal-services of the Board of Education by an Act making appropriations for the District of Columbia.

SEC. 2403. PAYMENTS.

(a) IN GENERAL.—

(1) ESCROW FOR PUBLIC CHARTER SCHOOLS.—Except as provided in subsection (b), for any fiscal year, not later than 10 days after the date of enactment of an Act making appropriations for the District of Columbia for such fiscal year, the Mayor shall place in escrow an amount equal to the aggregate of the amounts determined under section 2401(b)(1)(B) for use only by District of Columbia public charter schools.

(2) TRANSFER OF ESCROW FUNDS.—

(A) INITIAL PAYMENT.—Not later than October 15, 1996, and not later than October 15 of each year thereafter, the Mayor shall transfer, by electronic funds transfer, an amount equal to 75 percent of the amount of the annual payment for each public charter school determined by using the formula established pursuant to section 2401(b) to a bank designated by such school.

(B) FINAL PAYMENT.—

(i) Except as provided in clause (ii), not later than May 1, 1997, and not later than May 1 of each year thereafter, the Mayor shall transfer the remainder of the annual payment for a public charter school in the same manner as the initial payment was made under subparagraph (A).

(ii) Not later than March 15, 1997, and not later than March 15 of each year thereafter, if the enrollment number of a public charter school has changed from the number reported to the

Mayor and the Board of Education, as required under section 2402(a), the Mayor shall increase the payment in an amount equal to 50 percent of the amount provided for each student who has enrolled in such school in excess of such enrollment number, or shall reduce the payment in an amount equal to 50 percent of the amount provided for each student who has withdrawn or dropped out of such school below such enrollment number.

(C) PRO RATA REDUCTION OR INCREASE IN PAYMENTS.—

(i) PRO RATA REDUCTION.—If the funds made available to the District of Columbia Government for the District of Columbia public school system and each public charter school for any fiscal year are insufficient to pay the full amount that such system and each public charter school is eligible to receive under this subtitle for such year, the Mayor shall ratably reduce such amounts for such year on the basis of the formula described in section 2401(b).

(ii) INCREASE.—If additional funds become available for making payments under this subtitle for such fiscal year, amounts that were reduced under subparagraph (A) shall be increased on the same basis as such amounts were reduced.

(D) UNEXPENDED FUNDS.—Any funds that remain in the escrow account for public charter schools on September 30 of a fiscal year shall revert to the general fund of the District of Columbia.

(b) EXCEPTION FOR NEW SCHOOLS.—

(1) AUTHORIZATION.—There are authorized to be appropriated $200,000 for each fiscal year to carry out this subsection.

(2) DISBURSEMENT TO MAYOR.—The Secretary of the Treasury shall make available and disburse to the Mayor, not later than August 1 of each of the fiscal years 1996 through 2000, such funds as have been appropriated under paragraph (1).

(3) ESCROW.—The Mayor shall place in escrow, for use by public charter schools, any sum disbursed under paragraph (2) and not paid under paragraph (4).

(4) PAYMENTS TO SCHOOLS.—The Mayor shall pay to public charter schools described in paragraph (5), in accordance with this subsection, any sum disbursed under paragraph (2).

(5) SCHOOLS DESCRIBED.—The schools referred to in paragraph (4) are public charter schools that—

(A) did not operate as public charter schools during any portion of the fiscal year preceding the fiscal year for which funds are authorized to be appropriated under paragraph (1); and

(B) operated as public charter schools during the fiscal year for which funds are authorized to be appropriated under paragraph (1).

(6) FORMULA.—

(A) 1996.—The amount of the payment to a public charter school described in paragraph (5) that begins operation in fiscal year 1996 shall be calculated by multiplying $6,300 by 1/12 of the total anticipated enrollment as set forth in the petition to establish the public charter school; and

(B) 1997 THROUGH 2000.—The amount of the payment to a public charter school described in paragraph (5) that begins operation in any of fiscal years 1997 through 2000 shall be calculated by multiplying the uniform dollar amount used in the formula established under section 2401(b) by 1/12 of the total anticipated enrollment as set forth in the petition to establish the public charter school.

(7) PAYMENT TO SCHOOLS.—

(A) TRANSFER.—On September 1 of each of the years 1996 through 2000, the Mayor shall transfer, by electronic funds transfer, the amount determined under paragraph (6) for each public charter school from the escrow account established under subsection (a) to a bank designated by each such school.

(B) PRO RATA AND REMAINING FUNDS.—Subparagraphs (C) and (D) of subsection (a)(2) shall apply to payments made under this subsection, except that for purposes of this subparagraph references to District of Columbia public schools in such subparagraphs (C) and (D) shall be read to refer to public charter schools.

DISTRICT OF COLUMBIA CODE

* * *

DC ST § 1-201.02. Purposes.

(a) 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; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

(b) Congress further intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions irrespective of whether the charter for greater self-government provided for in subchapter IV of this chapter is accepted or rejected by the registered qualified electors of the District of Columbia.

DC ST § 1-203.02. Legislative power.

Except as provided in §§ 1-206.01 to 1-206.03, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

* * *

DC ST § 1-206.01. Retention of constitutional authority.

Notwithstanding any other provision of this chapter, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this chapter, including legislation to amend or repeal any law in force in the District prior to or after enactment of this chapter and any act passed by the Council.

* * *

DC ST § 1-207.17. Status of the District.

* * *

(a) All of the territory constituting the permanent seat of the Government of the United States shall continue to be designated as the District of Columbia. The District of Columbia shall remain and continue a body corporate, as provided in § 1-102. Said Corporation shall continue to be charged with all the duties, obligations, responsibilities, and liabilities, and to be vested with all of the powers, rights, privileges, immunities, and assets, respectively, imposed upon and vested in said Corporation or the Commissioner.

(b) No law or regulation which is in force on January 2, 1975 shall be deemed amended or repealed by this chapter except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this chapter, but any such law or regulation may be amended or repealed by act or resolution as authorized in this chapter, or by Act of Congress, except that, notwithstanding the provisions of § 1-207.52, such authority to repeal shall not be construed as authorizing the Council to repeal or otherwise alter, by amendment or otherwise, any provision of subchapter III of chapter 73 of title 5, United States Code in whole or in part.

(c) Nothing contained in this section shall affect the boundary line between the District of Columbia and the Commonwealth of Virginia as the same was established or may be subsequently established under the provisions of title I of the Act of October 31, 1945 (59 Stat. 552).

* * *

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(f), the brief contains 12,901 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Kelly P. Dunbar
KELLY P. DUNBAR

June 14, 2018

CERTIFICATE OF SERVICE

I certify that on June 14, 2018, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Kelly P. Dunbar
KELLY P. DUNBAR