IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

VALERIE JABLOW, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2018 CA 005755
	)	
DISTRICT OF COLUMBIA, acting through the OFFICE OF THE MAYOR, MURIEL BOWSER,	)	Judge Elizabeth Wingo
	)	Next: Preliminary Injunction Hrg.
Defendant.	)	Date: September 20, 2018
	)	

PLAINTIFFS' SECOND SUPPLEMENTAL MEMORANDUM SUPPORTING ISSUANCE OF A PRELIMINARY INJUNCTION

COME NOW the Plaintiffs, and file this Second Supplemental Memorandum of Law in Support of their request for a preliminary injunction, and in reply to the District's Opposition, which was filed the evening before the status hearing held on September 14.

The District's Opposition appeared to acknowledge the Complaint in this case has considerable merit, by suddenly revealing the night before the status that the Mayor was reacting by adding five additional persons (2 additional teachers, 1 additional parent and 2 additional students) to her review panel established under D.C. Code § 38-174. According to the District's Opposition, the new 19-member panel "will now include at least three teachers, three representatives from the WTU, four parents, and three students." The Mayor did not subtract any of the members identified by Plaintiffs as non-qualifying, however. The Opposition also said this new panel will hold meetings between now and "October 22 at which time the panel will finalize their recommendations to the Mayor."

A. Plaintiffs Have Standing to Sue, and if they Do Not, *Nobody* Does

The District continues to argue that Plaintiffs lack standing, despite losing this issue at the TRO stage. As the District acknowledges, Plaintiffs assert two different

grounds for standing – (1) their exclusion from consideration for panel seats given to non-qualifying candidates, and (2) the impacts they will face from a flawed process as the constituencies most affected by the selection of a new DCPS Chancellor – a tangible fear given that a similarly-flawed process in 2016 had led to the selection of Antwan Wilson.

With respect the first, the District cites almost no case law, and ultimately tries to wholly reframe the issue, by presenting a "straw man" argument that these Plaintiffs cannot prove the Mayor would have been actually chosen them for this panel. The *actual* standing issue, however, is one the District simply never addresses, much less rebuts: the fact that these Plaintiffs were *disenfranchised*. As teachers, parents and students, these Plaintiffs were supposed to be eligible for *each and every seat* on this review panel. Every seat given to a non-eligible member removed them from consideration for a panel seat they were supposed to be eligible for. Plaintiffs were wrongly excluded from many panel seats, and their influence, and that of their constituencies, was wrongfully diluted.

With respect to the second basis for standing, the District oddly seeks to overcome the D.C. Court of Appeals' binding *en banc* decision in *Greyson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011) (en banc) by citing case law that actually pre-dates *Greyson*, and in particular, *Ctr. for Law and Educ. v. Dep't of Educ.*, 396 F.3d 1152 (D.C. Cir. 2005), which is says is "particularly probative." That opinion from the D.C. Circuit, however – which unlike *Greyson* is not binding on this Court – was not unanimous. The plaintiffs in that case had included non-profit groups plus one single individual, and there was no separate disenfranchisement basis for standing alleged.[1] Even in that context,

[1] The panel in that case was supposed to merely consist of "an equitable balance" of certain specified groups. The argument raised by the plaintiffs was merely that the balance chosen was not "equitable" – not that they had been categorically excluded.

Judge Edwards noted in a separate concurring opinion that while the organizations' lack of standing was evident, "[t]he question whether Lindsey has standing to seek judicial enforcement of her alleged procedural right to a properly constituted Committee raises a much harder issue." 396 F.3d at 1166 (Edwards, J., concurring). He disagreed with the other two judges' assertion that in procedural rights cases, "outside of increased exposure to environmental harms, hypothesized 'increased risk' has never been deemed sufficient 'injury' to satisfy standing requirements." *Id.* And in this case that had warned that an inequitable panel might adopt improper regulations, Judge Edwards found that Lindsey lacked standing only because "at oral argument, Lindsey's counsel conceded that the regulations do not violate the statute." *Id.* at 1168. He found lack of standing, in other words, only because Lindsey's counsel had essentially conceded a lack of actual harm.

That split decision from a non-binding source, issued years before the D.C. Court of Appeals' binding (indeed *en banc*) decision in *Greyson*, does nothing to undermine the latter. As noted in Plaintiffs' Reply Brief in support of their Motion for a TRO, *Greyson* makes clear that Article III injury "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" 15 A.3d at 234, and further stated that this rule is "well established." The D.C. Council, in enacting D.C. Code § 38-174, sought to ensure a direct, undiluted voice in the DCPS Chancellor selection process from the constituencies who would be most affected: teachers, parents, and students. And these Plaintiffs whose voices have been diluted have a viable right to be heard on that claim, particularly after suffering the results of a 2016 search where their input was neutered.

The District's filing also wholly fails to address the reality that if these Plaintiffs lack standing, then no one has standing. This Court should reject the District's extreme

position that nobody has any ability to enforce the Mayor's compliance with this law. The requirements of standing cannot fairly be read as narrowly as the District suggests.

B. The Remaining Issues Also Favor Issuance of a Preliminary Injunction

The remaining arguments raised by the District largely mirror what it previously raised in its briefing in opposition to a TRO. Since most of those issues were previously addressed in Plaintiffs' Reply Brief in Support of a TRO, which has been adopted in support of their request for a preliminary injunction, Plaintiffs' arguments therein will not be repeated here. A few additional points, however, are relevant.

First, the District's citation of *Ctr. for Law & Educ. v. Dep't of Educ.* focuses narrowly on the standing issue and ignores an important, broader point acknowledged therein: that when plaintiffs are alleging injury resulting from violation of a procedural right afforded to them by statute, the courts actually relax the issues of imminence and redressability. *See id.* at 1157 (citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (en banc) (which in turn cites *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 & nn.8-9 (1992)). Once standing is established in this context, in other words, the remaining elements that Plaintiffs must establish are more difficult to defeat.

On those issues – likelihood of success on the merits, irreparable harm (i.e., imminence) and a balancing of the harms and public interest, Plaintiffs will largely stand on the briefing previously filed. But the District's latest briefing does add two points worth making. First, the need for Plaintiffs' requested relief is plainly imminent. The District acknowledges that the current panel is presently quite active and is sitting in an official capacity at various community events. The District also says that the current panel will finalize their recommendation on October 22. Accordingly, it is now apparent

that Plaintiffs' requested injunctive relief must be entered at a point prior to that date, and ideally sooner, so that the current panel will not continue to act in an official capacity.

Finally, the public interest will not be harmed by the injunctive relief sought herein. The selection process need not be delayed at all – for example, a smaller panel comprised only of qualifying members[2] could now proceed with submitting an *undiluted* recommendation to the Mayor on October 22.[3] Moreover, any delay is more attributable to the Mayor's own action in waiting four months until after the primary to appoint a panel, and then appointing a panel that she now appears to acknowledge failed to comply with the statute's requirements. At bottom, Plaintiffs ask for nothing more than that this law be followed. As a result, a preliminary injunction should properly be granted.

This 18th day of September, 2018.

Respectfully submitted,

_/s/ Gregory S. Smith_____
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[2] Neither chair of the current panel or any other former teachers qualify, since "Teacher" is a defined term under D.C. Code § 38.1800.02(34) ("The term 'teacher' means any person employed as a teacher by the Board of Education or by a public charter school").
[3] Nothing would prevent the Mayor from also hearing advice issued from other, excluded members of the panel *informally*, but this statutory panel, speaking as the official voice of teachers, parents and students, would not be diluted. This statute provides a floor, not a ceiling, on the advice that a Mayor should receive. But under D.C. Code § 38-174, the Mayor must receive an undiluted recommendation from these constituencies as her floor, give "great weight" to the WTU's recommendation, and then decide whether to accept it.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Plaintiffs' Second Supplemental Memorandum Supporting Issuance of a Preliminary Injunction is being served on all counsel of record via CaseFileXpress, and also via email on Assistant Attorney General David I. Schifrin.

This 18th day of September, 2018.

/s/ Gregory S. Smith
Gregory S. Smith