

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

- - - - - x
:
VALERIE JABLOW, : Docket Number: 2018 CAB 005755
Plaintiff, :
: :
vs. : :
: :
DISTRICT OF COLUMBIA, : :
Defendant. : :
: Friday, September 28, 2018
- - - - - x Washington, D.C.

The above-entitled action came on for a hearing before
the Honorable ANTHONY EPSTEIN, Associate Judge, in
Courtroom Number 200.

APPEARANCES:

On Behalf of the Plaintiff:

GREG SMITH, Esquire
Washington, D.C.

On Behalf of the Defendant:

DAVID SCHIFRIN, Esquire
BENJAMIN BRYANT, Esquire
Washington, D.C.

18-05550

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PROCEDINGS

5 | (Pause.)

6 THE DEPUTY CLERK: Your Honor, calling the
7 matter of Valerie Jablow et al versus the District of
8 Columbia, case number 2018 CA 5755. Parties please state
9 your name for the record.

10 MR. SMITH: Your Honor, Greg Smith representing
11 the plaintiffs and with me today is Valerie Jablow, the
12 remaining plaintiff's waive their appearance.

13 THE COURT: Okay, good morning.

14 MR. SMITH: Good morning.

15 MR. SCHIFRIN: Good morning, Your Honor, David
16 Schifrin on behalf of the District. With me is Benjamin
17 Bryant, also on behalf of the District.

18 MR. BRYANT: Good morning.

19 THE COURT: Good morning to you. Please have a
20 seat. I want to begin by addressing two preliminary
21 issues. As you know this case was reassigned to me a week
22 ago. A few days after that, I think it was Mr. Smith and
23 Mr. Schifrin called my chambers together to make sure I
24 was aware that Mr. Schifrin, the assistant attorney
25 general who represents the District had applied for a

1 clerkship with me after the completion on his one year
2 fellowship with the Office of the Attorney General. I was
3 and am aware of his application. As I understand it
4 neither side contends that his pending application
5 requires my disqualification, is that correct Mr. Smith?

6 MR. SMITH: We do not believe it requires your
7 disqualification. We leave to the Court the decision on
8 that. We, or most importantly, do not want your recusal.
9 We'd like to proceed today. The District has indicated
10 that if you believed there was a conflict, they would be
11 willing to have Mr. Schifrin step down and so --

12 THE COURT: Okay.

13 MR. SMITH: -- we leave it in the Court's
14 hands --

15 THE COURT: Okay.

16 MR. SMITH: -- but we would like to proceed
17 today.

18 THE COURT: Okay.

19 MR. BRYANT: Your Honor, the Office of the
20 Attorney General does not have a concern in this issue.

21 THE COURT: Okay. And I don't either, I don't
22 think the fact that Mr. Schifrin submitted the application
23 effects my ability to be fair to both sides.

24 MR. SMITH: Then we have no objection, Your
25 Honor.

1 THE COURT: Okay. The second preliminary issue
2 I want to address is that I grant the motion of the
3 Washington Teacher's Union to file an amicus both under
4 the statute and in general the Union has an interest, both
5 in the appointment of a new chancellor and in the process
6 by which a new chancellor is appointed, considering the
7 plaintiff's consent, the District objects, I don't think
8 considering the Union's brief will prejudice the District
9 and indeed the Union's arguments are consistent with those
10 of the plaintiffs and to a substantial extent duplicate
11 them. With that, let me turn to the preliminary
12 injunction motion, I appreciate everybody's willingness to
13 make yourselves available today. I could not hold the
14 hearing earlier, this has been a complicated week for me
15 including a jury trial that was long scheduled. I
16 understand that both sides have an interest in getting
17 this issue resolved sooner rather than later. The
18 plaintiff stated in her second supplemental memorandum
19 that the current panel will finalize its recommendations
20 on October 22nd. Is that your understanding Mr. Schifrin?

21 MR. SCHIFRIN: The final panel is set to meet
22 October 22nd, that's correct, Your Honor.

1 MR. SCHIFRIN: Your Honor, it's not in our
2 understanding that they'll issue a single recommendation.
3 It's our understanding they'll issue multiple
4 recommendations and we believe that will occur on October
5 22nd, that's when the panel's going to meet. When the
6 panel meets with the Mayor --

7 THE COURT: Okay.

8 MR. SCHIFRIN: -- or what happens after that is
9 undecided.

10 THE COURT: Okay. Well my plan today is hear
11 from both sides and then they can all rule. I have
12 carefully reviewed all the briefs, I've spent a
13 substantial amount of time thinking through the issues. I
14 do have some questions. I don't want either of you to
15 repeat arguments in the briefs which I have read
16 carefully, I will give you a chance after I've asked my
17 questions to emphasize any points you think ought to be
18 emphasized. I first want to address the procedural
19 posture of the case. Mr. Smith, do you think any material
20 facts are in dispute?

21 MR. SMITH: No, Your Honor, I do not, on the
22 core issue and if there were any dispute about that I
23 think there's, it's been completely resolved by the
24 District's own notice of filing which I have a copy of the
25 Court. I know it's before the Court but this categorizes,

1 makes clear who the appointees are and which buckets they
2 fall in and it makes it clear that there are seven
3 candidates that do not fall into the buckets of --

4 THE COURT: Well let me first, candidates or
5 panel members?

6 MR. SMITH: Panel members, did I say candidates?
7 I apologize.

8 THE COURT: Yes.

9 MR. SMITH: Yes, panel members.

10 THE COURT: I'm more concerned who, how many
11 people are in each bucket as you called it? As I
12 understand it, and that's after Judge Clark denied the
13 TRO, the Mayor appointed additional members.

14 MR. SMITH: That's correct.

15 THE COURT: So currently, how many per in DCPS
16 parents are on the review panel?

17 MR. SMITH: According to their own filing --

18 THE COURT: I counted four.

19 MR. SMITH: They have four.

20 THE COURT: Okay.

21 MR. SMITH: That's correct.

22 THE COURT: And three students?

23 MR. SMITH: Three students.

24 THE COURT: Three teachers?

25 MR. SMITH: They list five teachers and we will

1 not take issue with their characterization of --

2 THE COURT: Okay, and --

3 MR. SMITH: -- people falling within that
4 category today.

5 THE COURT: -- at least two of the teachers are
6 union members and representatives, correct?

7 MR. SMITH: At least two.

8 THE COURT: Okay.

9 MR. SMITH: I don't know how many of the five,
10 but we acknowledge they're, based on, we are not
11 contesting their representations when they say that --

12 THE COURT: Okay.

13 MR. SMITH: -- more than one teacher
14 representative is also a representative of the Washington
15 Teacher's Union.

16 THE COURT: Well, let me just ask you now, I was
17 going to get to that in a moment, does that make moot what
18 I would call your numerosity argument that the initial
19 problem was that there was only one?

20 MR. SMITH: I think that's fair, yes.

21 THE COURT: Okay. Let me then ask Mr. Schifrin,
22 do you think there are any material facts in dispute?

23 MR. SCHIFRIN: No, Your Honor, regarding the
24 current panel composition.

25 THE COURT: Okay.

1 MR. SMITH: So --

2 THE COURT: Well, are we doing anything else?

3 Cause I, look I'm not trying to hide the ball here. I
4 mean, under Rule 65A I have the option to consolidate any
5 trial with the hearing today and not issue a preliminary
6 injunction but a final ruling. If there are not facts in
7 dispute and I don't need to hold the trial if the only
8 issues are legal issues about statutory construction and
9 standing and I have all the facts I'm ever going to have
10 to decide those issues, and by the time I schedule a trial
11 the case will be moot because the panel will have
12 completed its work in two or three weeks. I'm just going
13 to ask whether either party, I'll start with you Mr.
14 Smith, thinks I should I don't want to say skip the
15 preliminary injunction or should I decided today just
16 whether to issue a preliminary injunction or should I just
17 decide the issues?

18 || MR. SMITH: Let me just consult with my client --

19 THE COURT: Okay I --

20 MR. SMITH: -- but my guess is we have no
21 objection to that.

22 THE COURT: That's fine. And I'll give you two,
23 Mr. Schifrin and Mr. Bryant a chance to confer as well.

24 || (Pause.)

25 MR. SMITH: Thank you, Your Honor, we're fine

1 proceeding with a final determination at least as to
2 membership issue. We have raised issues of that may
3 require us to come back to the Court as some point if there
4 are issues about for example whether the resume that's been
5 shared with panel members, but I don't think --

6 THE COURT: That's --

7 MR. SMITH: -- we need to decide that today.

8 THE COURT: I don't know, well what's, let's put
9 that aside cause I don't think that was pled in the
10 complaint but be that as it may what is, I want to be
11 clear, I'm not trying to rush anybody along here, but I
12 also don't --

13 MR. SMITH: No, no.

14 THE COURT: -- want to delay things. What's --

15 MR. SMITH: Agreed.

16 THE COURT: -- the District's position?

17 MR. SCHIFRIN: Your Honor, our briefing thus far
18 has focused on the preliminary injunction standard and
19 we'd request an opportunity to brief the complaint fully.

20 (Pause.)

21 THE COURT: Okay, I understand your position.

22 MR. SCHIFRIN: Thank you, Your Honor.

23 THE COURT: Well, I do have a few questions
24 about what I'm going to call the remaining issue which is
25 whether the Mayor can appoint people to the panel who are

1 not parents, students, teachers or union representatives.

2 Do plaintiffs dispute that the Mayor can seek advice
3 relating to the new chancellor from people who are not on
4 the review panel?

5 MR. SMITH: Informally we do not take issue with
6 that, no, Your Honor.

7 THE COURT: Well, if the Mayor can consider the
8 recommendations and opinions of people who are not on the
9 review panel, how does the inclusion on the review panel
10 people who are not in a statutory bucket as you call them
11 adversely affect people who are in a bucket to have their
12 voices heard?

13 MR. SMITH: Why does it matter is a fair
14 question. Let me try to answer that directly. This was a
15 law put in place when the Mayor took over the power to
16 name the DCPS Chancellor.

17 THE COURT: No, I'm --

18 MR. SMITH: It was adopted as a check under the
19 Mayor's power.

20 THE COURT: I understand that, but I'm trying to
21 understand from a practical point of view if I order the
22 Mayor basically to remove you know what I understand is a
23 minority of the panel from the panel --

24 MR. SMITH: Yes.

25 THE COURT: -- then she can still consider their

1 recommendations and opinions and why are, how does that
2 make the I'll call the statutory members for lack of a
3 better term better off?

4 MR. SMITH: Because they make a recommendation
5 and there's a political price to be paid if the Mayor goes
6 against that recommendation. The recommendation has to be
7 from the core groups. Let me give you a --

8 THE COURT: But this, but the recommendation
9 doesn't have to be unanimous, indeed the statute
10 contemplated I mean the Mayor has to just has to consider,
11 not follow but consider the opinions and recommendations
12 of the panel. The Mayor's required to give great weight
13 to the opinion, the recommendation of the Washington
14 Teacher's Union which suggests that there may not be
15 unanimity on or even consensus on the panel and you know
16 to the extent you know the parents on the panel may or may
17 not agree, the students may or may not agree, the teachers
18 may or may not agree. What, so why, I mean and if the
19 Mayor's required and if, I think it's recommendations and
20 opinions in the plural is the way it is, the way 38174B1C
21 is written so even if there's not a unanimous
22 recommendation, even if there's not a majority
23 recommendation, the Mayor's still required isn't she to
24 consider the views of individuals members?

25 MR. SMITH: Well the problem is that there's no

1 clear recommendation of the panel that consists of a
2 recommendation of parents, teachers and the students when
3 you dilute it. Let me give you another example --

4 THE COURT: But how do I know there is going to
5 be? I mean if, I mean you can take a head count and if
6 like the four parents, maybe they'll all agree among
7 themselves, maybe they won't, but if there's a majority
8 report, it'll indicate who joins and who doesn't.

9 MR. SMITH: Well it may or may not say it's in
10 the majority and that it falls within the bucket but the
11 point of this that I'm trying to make is the political
12 price is diluted, Your Honor. Let me give you another
13 example, closer to home. Let's say in these times when
14 we're seeing West Virginia justices purged from the
15 Supreme Court based on spending's. Say we only have some
16 issue about whether court, spending in this court creates
17 an issue and the Mayor is given the ability to appoint the
18 Supreme or the Superior Court administrate but she has to
19 listen to an advisory panel and receive advice from an
20 advisory panel of Superior Court judges. Well suppose
21 that panel of Superior Court judges then consists of a
22 group that's only 12 and then there's 7 people who are not
23 superior court judges and then a majority of those judges
24 feel a certain way about who the city, who the court
25 administrator ought to be but they're out-voted when the

1 larger majority is included. The problem is you don't get
2 a majority of the core groups and --

3 THE COURT: But you're --

4 MR. SMITH: -- and it dilutes --

5 THE COURT: But you're not assured a majority of
6 the core groups anyway and indeed, I mean parents are not
7 monolithic in the District of Columbia. It's not like all
8 DCPS parents agree like what's the, what should the
9 Chancellor be focused on you know graduation rates,
10 testing, teacher evaluations, early childhood education,
11 you know capital improvement. I mean there's a whole,
12 there isn't, I mean if you're suspicious of the Mayor and
13 I'm not suggesting I am, that's not my job, I mean she
14 could stack the panel with parents who aren't
15 representative of the parents as a whole. I don't know
16 what that means and I'm not suggesting at all she did, but
17 I just, as a practical matter, I'm just trying to
18 understand how this matters.

19 MR. SMITH: Well let's look at, the problem is
20 that the political price that was clearly set up as the
21 structure here, these are, that shall make recommendation
22 to the Mayor is what the statute says. The recommendation
23 is required and then the Mayor is set up, she doesn't have
24 to follow the advice, but if she goes against the
25 recommendations of the panel, the panel of core

1 constituencies, then there's a political price to be paid.
2 That political price is muted, it's diluted. We don't
3 know whether she's going against the core constituencies
4 recommendations when the core constituencies may not be
5 the ones who are compromising the majority of the panel.

6 THE COURT: But why, if, I mean certainly
7 nothing prevents a parent member from saying I dissent. I
8 mean they, all the, if the individual members wanted to
9 use your terminology the Mayor to pay the political price,
10 they have plenty of opportunity to say that these other
11 people didn't give me a fair hearing, the panel's a sham
12 and --

13 MR. SMITH: But it dilutes it, Your Honor.

14 THE COURT: -- the recommendation is just bogus.

15 MR. SMITH: That's one parent speaking out as
16 opposed to the whole panel of these. Let's --

17 THE COURT: But --

18 MR. SMITH: I understand what you're saying that
19 maybe it'll have splinters left, but what's, let's take it
20 the other way. Let's say that this panel is 8/2 or I'm
21 sorry, 9 to 3 of the core constituencies, the 12 in favor
22 of one particular candidate, okay? 9 to 3. Three cores
23 of the core constituencies say I'm, we need this candidate
24 and suppose all 7 of the 9 qualifying members side with
25 the 3, the majority at that point would then be comprised

1 7 to 3 of non-qualifying members and that would need a
2 recommendation of the panel. And then the Mayor could say
3 at that point I didn't go against the panel's
4 recommendation, I followed it.

5 THE COURT: And the 7 statutorily mandated
6 members are people on the statutory categories or buckets
7 could say that's a misrepresentation, you really ought to
8 be focusing on the parents, students, teachers and union
9 representatives and the majority of us have a different
10 view.

11 MR. SMITH: But it mutes the political price to
12 be paid. The Mayor can say well I followed the panel's
13 recommendation. The panel was upheld by Judge Epstein as
14 being a valid panel and so I didn't go against the panel,
15 the panel was validated and I went from this group of 10
16 who were on one side even though the other 9 were on the
17 other, I just followed the recommendation of the panel.
18 The political price that the D.C. counsel wanted to be
19 paid if she went against the core constituencies doesn't
20 happen.

21 THE COURT: Okay.

22 MR. SMITH: Let me tell you why this matters.
23 Let's look at the people who are on the panel. Many of the
24 people in these groups on non-qualifying people have been
25 openly opposed to teachers unions.

1 THE COURT: Wait a minute, I'm not going to let
2 you go there because I, this isn't our kind of, I just
3 think it would be totally inappropriate for me to base my
4 interpretation on the statute about whether I agreed or
5 disagreed with the particular, the identity of the
6 particular people that the mayor appointed in either
7 category. I just, I just don't think that's appropriate
8 for me.

22 MR. SMITH: Right.

23 THE COURT: -- prosecutors, criminal defense
24 lawyers, why would, if I'm, if she picks me and I'm on the
25 panel why am I not better off being able to talk to the

1 people who the Mayor has the right to listen to and get
2 advice from and consult with and confer with anyway and
3 obviously you know they have her ear, she's going to
4 listen to them. If they're, if I'm, if they're on the
5 panel with me I get a chance to talk to them directly
6 rather than have them make their recommendations to the
7 Mayor behind my back without any opportunity for me to
8 influence them.

21 THE COURT: Well then the majority of judges or
22 the chief judge can issue a press release and say the
23 Mayor ought to pay a political price --

24 MR. SMITH: Right.

25 THE COURT: -- because instead of getting the

1 best person she got the cheapest person.

2 MR. SMITH: But it's diluted because the judge
3 can rather the Mayor can then say well I followed the
4 recommendation of a judicially approved panel.

5 THE COURT: Well she can't because --

6 MR. SMITH: No because let's, no what --

7 THE COURT: -- it's not --

8 MR. SMITH: All right, well let's take it out of
9 this court --

10 THE COURT: She can say she followed the
11 recommendation of a panel that included judges --

12 MR. SMITH: Okay.

13 THE COURT: -- or that had a majority of the
14 judges but it wasn't.

15 MR. SMITH: All right.

16 THE COURT: It would be false for her to say it
17 was --

18 MR. SMITH: Okay, let's --

19 THE COURT: -- she followed a judicial
20 recommendation.

21 MR. SMITH: Let's change the example slightly.
22 Instead of this court's administrator, let's move over to
23 the Court of Appeals. She gets to appoint the Court of
24 Appeals administrator. If --

25 THE COURT: It doesn't really matter what court

1 we're talking about.

2 MR. SMITH: I'm sorry?

3 THE COURT: It doesn't really matter what court
4 we're talking about.

5 MR. SMITH: It doesn't matter --

6 THE COURT: All right.

7 MR. SMITH: -- but what I'm saying is let's say
8 it's, the issue is the administrator in the Court of
9 Appeals and then I come to you in Superior Court and you
10 don't recuse yourself because it's not your court and you
11 then uphold that panel as being valid even though it has
12 fewer, it has non-judicial members on what's supposed to
13 be a panel of judicial members. The vote is then diluted
14 because the, yes the judges over there can say well hey we
15 were against this but the Mayor will say well it was a
16 valid panel.

17 THE COURT: But why can't --

18 MR. SMITH: I followed the majority panel vote
19 and so you know why are you complaining.

20 THE COURT: Then they, then issue a press
21 release can you believe the Mayor, she stacked the panel
22 so she could get the result she wanted and save a few
23 bucks at the expense of justice.

24 MR. SMITH: Well I understand that there may be
25 plan B arguments that can be made which is basically what

1 you're saying. Maybe it's almost as good politically to
2 be able to issue a press release saying well we were in
3 the minority but hey we object to the Mayor's appointment
4 and she really didn't listen to us. What I'm telling you
5 is I don't think that has the same umph, the same --

6 THE COURT: Okay.

7 MR. SMITH: -- political price to be paid as
8 when the majority and more importantly --

9 THE COURT: Well wait, I understand your
10 argument. Let me ask you a different question.

11 MR. SMITH: Sure.

12 THE COURT: Does the statute permit the Mayor to
13 consider a recommendation or opinion of any panel member
14 if they're not in the majority?

15 MR. SMITH: The, she, yes she considers the
16 recommendation given by the panel. But the panel is
17 supposed to issue --

18 THE COURT: But is she, she's required to
19 consider the recommendations plural --

20 MR. SMITH: Okay.

21 THE COURT: -- an opinions plural.

22 MR. SMITH: Fair enough.

23 THE COURT: I think plural is important.

24 MR. SMITH: Sure.

25 THE COURT: If, can she say suppose the panel

1 splits whatever you know it's 19, 10 to 9, can she say I'm
2 not even going to consider what the 9 members said because
3 they're a minority, I only have to listen to the opinions
4 and recommendations of the majority?

5 MR. SMITH: Nobody's saying the Mayor has to
6 follow recommendation either way.

7 THE COURT: I'm not, that wasn't my question.

8 MR. SMITH: Okay.

9 THE COURT: My question, the statute requires
10 her to consider --

11 MR. SMITH: Right.

12 THE COURT: -- any my question is, is the Mayor,
13 would the Mayor violate the statute if she refuses to
14 consider the views of any member or even to say well it's
15 not unanimous, I can disregard the whole thing.

16 MR. SMITH: I think she has to consider, it's a
17 fair point and --

18 THE COURT: Okay.

19 MR. SMITH: -- consider all recommendations.
20 But more importantly, Judge, I take your point about
21 whether this matters and the significance of it and you
22 know we've been addressing that but the bottom line here
23 frankly is a straight statutory construction argument for
24 us. This doesn't comply with the law, this has to be a
25 panel of --

1 THE COURT: I think I, I think --

2 MR. SMITH: -- these constituencies --

3 THE COURT: Okay.

4 MR. SMITH: -- and of means of. It doesn't mean
5 including. It, they talk about how it doesn't say only or
6 exclusively but of means that and nothing more is needed.
7 When I ask for a bag of M&M's, I don't expect other
8 candidates. If a panel says that a, say there's supposed
9 to be a panel of D.C. residents, you don't expect Maryland
10 residents to be in there just because it includes D.C.
11 residents. If I ask for a glass of water, I don't expect
12 it will include water plus something else. So I really
13 need to say I want a glass of only water or exclusively
14 water when I ask for a glass of water? Use of the word
15 only was unnecessary here, it would've been superfluous.
16 Indeed the District's position would lead to some truly
17 absurd results. 2018 USC section 1 for example, federal
18 statute establishing the Supreme Court of the United
19 States doesn't use the word only or exclusively either, it
20 say the Supreme Court, U.S. Supreme Court shall consist of
21 a chief justice of the United States and eight associate
22 justices. A president can't pack the court because it
23 doesn't say only those nine, on the theory that some new
24 Supreme Court would still include a chief justice and
25 eight associate justices. I don't believe the District

1 yet has provided a single example where of means merely
2 including. Even if they might come up with something it
3 certainly is not typical usage of that term. A glass of
4 water means water. It's a straight path statutory
5 construction argument. All we're asking here is that the
6 statute be enforced as it's written.

7 THE COURT: Okay.

8 MR. SMITH: It's a straight statutory construction
9 argument. The Mayor can listen to these other people,
10 nobody's saying she can't but it supposed to be a panel of
11 these three constituencies and by their own description in
12 their notice of filing, seven people fall into a separate
13 category of community member with a strong interest in
14 DCPS category. In fact both chairs of this panel fall
15 into that category. You were asking about the political
16 price to be paid, both of the chairs, co-chairs of this
17 panel are non-qualifying members so the Mayor has plenty
18 of political arguments she can make if she doesn't follow
19 the true recommendation of the qualifying members. We
20 think that the better approach is to remove the non-
21 qualifying members as official panel members and then if
22 she wants to listen to them informally fine, but if she
23 then gets a recommendation from the panel, maybe it'll
24 then be unanimous. I mean what's the --

25 THE COURT: I think I understand.

1 MR. SMITH: Let me just say one final point?

2 THE COURT: One final point.

3 MR. SMITH: You were asking about whether she
4 needs to consider minority opinions as well and I think
5 that that's fair, but let's look at it that way. Let's
6 say that all 12 of the qualifying members come up with one
7 candidate and the other seven who are non-qualifying come
8 up with a minority report. Under your theory she would
9 have to consider that minority report under the statute --

10 THE COURT: It wasn't theory, it was under --

11 MR. SMITH: No, not your, under the theory --

12

13 THE COURT: It was under your answer to my
14 question.

15 MR. SMITH: I don't mean the, I certainly do not
16 presume --

17 THE COURT: Okay.

18 MR. SMITH: -- that the Court has made any,
19 under the devil advocate --

20 THE COURT: Okay.

21 MR. SMITH: -- theory you put out, you're going
22 to get a minority report from these seven non-qualifying
23 members that should never be officially considered and she
24 could take political refuge in the fact that she was
25 considering the minority report whereas politically the

1 price to be paid should be clear cut if that situation
2 arose. There would be 12 unanimous members --

3 THE COURT: Okay --

4 MR. SMITH: -- saying yes and she goes against
5 it --

6 THE COURT: -- you said one final point and I
7 think I understand.

8 MR. SMITH: -- she's going against them.

9 THE COURT: Okay. Is there anything the
10 District wants to add to its brief? I really --

11 MR. SCHIFRIN: No, Your Honor.

12 THE COURT: Okay.

13 MR. SCHIFRIN: Unless you have any questions for
14 us on our papers.

15 THE COURT: Nope, I make, I just know if either,
16 I'm ready to rule. There's some argument the District
17 made that I don't agree with, but I'll, I think I
18 understand the District's position.

19 MR. SCHIFRIN: Okay.

20 THE COURT: Given that the District doesn't,
21 hasn't agreed to consolidate any trial with today's
22 hearing, I'm going to treat this as a preliminary
23 injunction motion and I conclude that the plaintiffs have
24 not carried their burden to justify preliminary
25 injunction. I applied a familiar four part test for

1 preliminary injunctions, the Supreme Court stated the
2 testing winner be the Natural Resources Defense Council
3 555 US 7, a plaintiff seeking a preliminary injunction
4 must establish one that he is likely to succeed on the
5 merits, two that he is likely to suffer irreparable harm
6 in the absence of a preliminary injunction, three that the
7 balance of equities tips in his favor and four that an
8 injunction is in the public interest.

9 Our Court of Appeals has stated basically the
10 same test in cases like the State of Raleigh 933A2nd83.
11 I'll first address the likelihood of success and I'll
12 connect, in that connection I'll first address the
13 standing issue. In Judge Clark's conclusion that the
14 plaintiffs have standing establishes that the plaintiffs
15 have a substantial argument in favor of standing. I think
16 it's a close call but my view is that the District has
17 better of the argument. The District relies heavily on a
18 D.C. Circuit case, Center for Law and Education, the U.S.
19 Department of Education, 396F3rd1152. That case involved
20 the parents challenge to the makeup of a federal advisory
21 committee on educational issues where the statute required
22 equitable representation of parents. The three judge
23 panel unanimously concluded that the parents, who was the
24 plaintiff, did not have standing. I recognize that
25 federal court decisions are not binding on me however I

1 think Judge Edward's concurrence is quite persuasive and
2 indeed more persuasive than the panel majority. Judge
3 Edwards emphasized several principles. One was that
4 procedural rights are special and I agree with that. 2)
5 that a person who's been accorded a procedural right to
6 protect his concrete interest can assert that right
7 without meeting all the normal standards for
8 redressability and the immediacy in the standing analysis.
9 And it was important to Judge Edwards that the parent was
10 a member of a group that the statute was intended to
11 protect. In our case, the parents, students, teachers and
12 union representatives are members of the class that
13 section 38174B1A is intended to protect.

14 As our Court of Appeals said in the Grayson
15 case, the actual or threatened injury required by Article
16 3 may exist solely by virtue of statutes creating legal
17 rights of the invasion which creates standing. Now
18 getting back to the D.C. Circuit case, even though the
19 parent was a member of a group that the statute was
20 intended to protect, Judge Edwards still concluded and
21 agreed with the majority that the parent did not have
22 standing because she failed to show a distinct risk to her
23 concrete interests.

24 And likewise I think the plaintiffs in this case
25 do not show that the Mayor's eventual selection of a new

1 chancellor would be different if the makeup of the panel
2 were different, only that it might be different and the
3 Mayor's going to pay a political price and I don't think
4 there's any showing that the political price is going to
5 be materially different. I do recognize the D.C. Courts
6 are not governed by the standing requirements in Article
7 3, however cases like Vining versus Executive Board of
8 Health Benefit Exchange Authority 174A3rd272 established
9 that I must apply the standing requirements reasonably
10 strictly.

11 As Vining states, although Congress established
12 the two tribunals pursuant to Article 1 of the
13 Constitution, that being the Court of Appeals and the
14 Superior Court, we conform our exercise of judicial power
15 to the law of Article 3 standing. And Vining adopts the
16 same three elements of standing the Federal Courts apply,
17 injury and fact, causation and redressability and it holds
18 that the burden is on the plaintiff to establish each of
19 these three elements. Applying those standards, the Court
20 of Appeals in Vining concluded that the plaintiff did not
21 have standing. In this case, although the plaintiffs are
22 in a class whose voices the statute is intended to
23 protect, the plaintiffs have not demonstrated a causable
24 connection between the current makeup of the panel and the
25 possibility that the Mayor will select a new chancellor

1 different from the candidate recommended by parents,
2 students, teachers and union representatives on the review
3 panel. Nor have the plaintiffs demonstrated that changing
4 the makeup of the panel would reduce or I'm sorry, would
5 redress any grievance that they may otherwise turn out to
6 have about the Mayor's choice. Parents, students,
7 teachers, and union representatives have a legitimate
8 interest protected by the statute and being heard through
9 the panel however the statute does not give them an
10 interest in excluding people who are not parents,
11 students, teachers and union representatives from being
12 heard.

13 Nor was the statute intended to limit the
14 Mayor's ability to get input from people who are not in a
15 statutory bucket. I say that because the numerosity issue
16 is out that were there enough people in each bucket on the
17 panel, the standing analysis changes and several of
18 plaintiffs standing arguments have fallen by the wayside.

19 One example is the argument that if the Mayor
20 has to appoint more parents, students, teachers or union
21 representatives she might appoint one of the plaintiffs.
22 I note that after the plaintiffs made that argument the
23 Mayor did appoint more people in those categories and her
24 appoints did not include any of the plaintiffs. As I
25 said, I think the District has the better standing

1 argument but I will address the statutory interpretation
2 issue and that's what I'm going to turn to now. First, I
3 will address whether I'm required to defer to the
4 District's interpretation of 174B1A. In its opposition to
5 the TRO application, the District cites Chevron and
6 applies that I should defer to the Mayor's interpretation.
7 I do not agree. The Attorney General's interpretation is
8 not entitled to Chevron deference based on consideration
9 of the factors discussed in 1303 Clifton Street LLC versus
10 District of Columbia 39A3rd25. The Mayor did not adopt a
11 rule or regulation that contains its interpretation of the
12 statute through a formal notice incumbent rule making
13 proceeding or a contested case in conformity with the
14 DCAPA. The Mayor did not issue her interpretation
15 pursuant to an express delegation of rule making authority
16 in the statute. The Mayor did not publish any
17 interpretation nor did the Attorney General. They Mayor
18 and any agency did not announce this interpretation in
19 earlier administrative or judicial proceeding.

20 Indeed, no agency charged with enforcement and
21 implementation of the statute issued the opinion, instead
22 the Attorney General first offered this interpretation in
23 litigation. If the Attorney General's interpretation gets
24 any deference, it is the lesser degree of deference
25 described in Skidmore, 323US134. Under Skidmore, the

1 weight interpreted to an interpretive, once they're an in
2 interpretive rule and here it's just an interpretation in
3 a brief depends on the thoroughness evident in its
4 consideration, the validity of its reasoning, its
5 consistency with earlier and later pronouncements if it's
6 there or not here and all those factors which give it
7 power to persuade. I do not defer to the Attorney
8 General's interpretation of 174B1A but I agree with it. I
9 interpret the statute not to preclude the Mayor from
10 including on the panel people who are not DCPS parents,
11 students, teachers or union representatives. It is
12 important to understand that the Mayor is not required to
13 follow the panel's advice. The statute requires the Mayor
14 only to consider the panel's advice. I think that's a
15 critical distinction between the panel and the Supreme
16 Court.

17 The example that Mr. Smith used, Supreme Court,
18 the executive branch is required to follow the decisions
19 of the majority of the Supreme Court and I think there the
20 requirement that the Supreme Court consist of designated
21 people you know has a different meaning and effect and it
22 should be and the statute should be interpreted
23 differently. The statute requires the Mayor to consider
24 the panel's advice. In that respect, members of the panel
25 do not have a greater right to be heard by the Mayor than

1 any other person whose advice the Mayor wants to consider
2 on a non-binding basis.

3 Interpreting the statute to prevent the Mayor to
4 appoint anyone so long as the review panel includes
5 parents, students, teachers and union representatives is
6 consistent with the general principal that the Mayor can
7 listen to anyone and get advice from anyone. It would
8 raise separation of powers issues, that's, if the
9 legislative branch tried to restrict the Mayor's authority
10 to get input from members or our community or from any
11 national input. It would also raise constitutional issues
12 under the 1st Amendment if the legislature limited the
13 ability of members of our community to communicate their
14 views to the Mayor. I interpret the statute to avoid
15 serious constitutional questions that would arise if the
16 counsel tried to limit the Mayor's ability to get advice
17 from anyone she thought had something worthwhile to say
18 and to limit the 1st Amendment rights of non-members of
19 the review panel to petition the Mayor for or against the
20 appointment of any candidate.

21 It is also important in my view that parents,
22 students, teachers and union representatives are not
23 monolithic groups. Parents, students, teachers and union
24 members who are not on the panel may have different
25 opinions and different insights than those who serve on

1 the panel and those who serve on the panel may disagree
2 among themselves. Parents, students, teachers and union
3 members who are not on the panel have the right to be
4 heard. Members of the review panel who are not parents,
5 students, teachers and union representatives may represent
6 the views of people in these categories who are not on the
7 review panel.

8 Thus, interpreting the statute to allow people
9 who are not parents, students, teachers and union members
10 to serve on the panel furthers the legislative intent to
11 give all parents, students, teachers and union members a
12 voice including people who are not in a statutory bucket
13 does not necessarily limit the influence of panel members
14 who are in these categories or dilute their voice or
15 reduce the political price the Mayor has to pay if she
16 doesn't follow a unanimous or majority recommendation of
17 the panel.

18 Indeed the fact that the Mayor put other people
19 on the panel may be less of a threat than an opportunity
20 for members of the panel who are in a statutory bucket.
21 The current makeup gives parents, students, teachers and
22 union representatives on the panel an opportunity directly
23 to influence the advice that the people whose advice the
24 Mayor values enough to appoint them to the panel. If the
25 Mayor did not think that the other members of the panel

1 had something to contribute, she presumably would not have
2 appointed them to the panel. Excluding non-parents, non-
3 students, non-teachers or non-union members from the panel
4 does not mean that the Mayor cannot consult with them or
5 consider their views. The Mayor will consider their views
6 whether or not they're on the panel. The only practical
7 effect of excluding them from the panel would be that the
8 parents, students, teachers and union representatives on
9 the panel will have less opportunity to persuade the
10 Mayor's other advisors to join with them in the
11 recommendations and opinions of the review panel. That is
12 true whether or not parents, students, teachers and union
13 representatives constitute a majority of the review panel
14 although I note that they do in fact constitute a majority
15 of the current 19 member panel. I recognize that
16 sometimes the legislature's decision to include some
17 people in a statute implies a decision to exclude other
18 people. That is the canon of statutory interpretation
19 known by its Latin words as Expression Unius Est Exclusio
20 Alterius, to include one is to exclude the other. That
21 canon embodies the common sense principle that when a
22 legislature makes an express mention of one thing, the
23 exclusion of others is implied. Quoting from Odeniran, O-
24 D-E-N-I-R-A-N v. Hanley Wood, LLC 985A2nd421, however this
25 interpretative canon is an aide to construction not a rule

1 of law. That's the Court of Appeals in Bank decision, in
2 Jackson, the D.C. Board of Elections and Ethics 999A2nd89,
3 that's in footnote 20. Indeed this maximum must be
4 applied with a considerable measure of caution and it is
5 useful where the context shows that the -- mention of one
6 thing doesn't really necessarily or at least reasonably
7 imply the preclusion of alternatives. That's quoted in
8 Byron 985A2nd at 427. As the Court of Appeals stated two
9 months ago, that canon identifies a relevant consideration
10 but it is far from dispositive. JP versus District of
11 Columbia, 189A3rd of_212, the reason by the Legislature
12 required representation of the panel by DCPS parents,
13 students, teachers and union members is to ensure that the
14 Mayor will hear their voices. The reasons not to prevent
15 the Mayor from hearing other voices. The statutory
16 requirements from the inclusion provide a floor not a
17 ceiling and it's also relevant that the statute does not
18 set a minimum or maximum size for the panel, this is not a
19 zero sum game, one more member who is not a parents,
20 students, teachers and union representative does not mean
21 one fewer member who is. It also distinguishes this
22 situation from the Supreme Court.

23 For these reasons I find that the plaintiffs
24 have not established a substantial likelihood of success
25 on the merits. The second factor in deciding whether to

1 issue a preliminary injunction is whether the plaintiffs
2 would suffer irreparable harm if I do not issue it, in my
3 view the plaintiffs have not demonstrated irreparable harm
4 from the current makeup of the panel. One reason is that
5 the plaintiffs have not shown that changing the makeup
6 would cause the Mayor to select a different chancellor or
7 to pay a different political price for her selection.
8 After all, the Mayor is not required to follow the
9 recommendation and opinions of any panel member or the
10 majority of the panel or even a unanimous panel opinion or
11 recommendation, only to consider them. Nor have the
12 plaintiffs demonstrated the DCPS parents, students,
13 teachers and union representatives on the panel cannot
14 speak effectively and cannot make their voices heard. As
15 I previously mentioned, they constitute a majority of the
16 panel. The voice of DCPS teachers is also protected
17 because the president of the WTU is a member of the panel
18 and she speaks for a substantial portion of all DCPS
19 teachers, moreover the statute does not just encourage but
20 it requires the Mayor to give great weight to any
21 recommendation of the Washington Teachers Union.

22 In addition, as I said before, the makeup of the
23 panel increases the ability of its members who are in a
24 statutory bucket to influence and persuade other advisors
25 to the Mayor who are not in the statutory categories. The

1 third factor in the preliminary injunction analysis is
2 whether more harm will result to the plaintiffs from the
3 denial of the injunction than will result to the defendant
4 from its grant. Here the balance of the equities is
5 roughly even. I do not think that the relief requested by
6 plaintiffs would harm the District in removing from the
7 panel members who are not parents, students, teachers and
8 union representatives could be easily accomplished, the
9 Mayor could still confer and consult with former panel
10 members and consider their views. In addition, the
11 District has not shown that the panel members who are not
12 parents, students, teachers and union representatives have
13 different recommendations or opinions from panel members
14 who are in these four categories.

15 Contrary to the District's suggestion on page 11 of
16 its opposition, granting a preliminary injunction would
17 not impede the Mayor from carrying out her statutory duty
18 to confer with the panel or prevent her from conferring
19 with anyone else. However, for the reasons I have
20 described, the plaintiffs have not demonstrated any
21 substantial harm or irreparable injury caused by the
22 current makeup of the review panel so that balance of
23 equities is relatively even. The last factor is harm to
24 the public interest. The plaintiffs have not shown the
25 issuance of a preliminary injunction could harm the public

1 interest. I think the reasons for this conclusion are at
2 least implicit, but mostly explicit in what I've already
3 said. Requiring the Mayor to remove people from the panel
4 would not serve the public interest. The public does have
5 a strong interest in an open transparent and inclusive
6 process for selection of a new chancellor, the public has
7 a strong interest in ensuring that the Mayor gets input
8 from a full range of people including but not limited to
9 DCS parents, students, teachers and union representatives,
10 the current makeup of the panel is consistent with those
11 public interests and ensures that the Mayor will get input
12 from people in the statutory buckets and that she will
13 consider their views and I think my interpretation of the
14 statute is also consistent with the public interest in
15 protecting the right of the executive branch to obtain
16 input from all members of our community whether or not
17 they happen to be DCPS parents, students, teachers and
18 union representatives. So for those reasons, I deny the
19 plaintiffs motion for a preliminary injunction. I you
20 know but for the District's objection to consolidate the
21 trial with today's hearing, I felt both parties
22 effectively and comprehensively briefed the statutory
23 interpretation issue and I'll just, in terms of what the,
24 how the District wants to proceed I'm not going to require
25 you to tell me today, you know I think you ought to confer

1 with Mr. Smith and see what the next steps would be. I
2 mean I, to be honest I, well I assume nothing the District
3 would say in additional briefing would talk me out of the
4 interpretation of statute.

5 I just candidly, I you know I tried to address
6 including through my discussion of the principal of
7 statutory construction and to include one is to exclude
8 others, the arguments the plaintiff made. If I'm the, so
9 I don't see my decision on that issue changing. I want to
10 be clear on the standing issue, I'm, I think I'm right,
11 I'm pretty sure I'm right, but on the, I haven't had as
12 much time to think that through and I think there's
13 substantial arguments on that, but if you're going to go
14 to the Court of Appeals, you know, well I just, you
15 obviously a denial of the preliminary injunction is an
16 appealable order, but I mean the, if there were any issue
17 that as I'm sitting here today I think is maybe kind of
18 you can maybe persuade me otherwise, it would be the
19 standing issue although I think the District, based on
20 what I've read and the cases I've reviewed I think the
21 District has the better of that argument. So I don't
22 know, is there, is the also the other question is whether
23 this case is going to become moot in three weeks. Do we
24 have a date for an initial scheduling conference? I
25 assume we do. No?

1 THE DEPUTY CLERK: November 16th, Your Honor.

2 THE COURT: November 16th. So unless somebody I
3 mean I encourage you to confer over the next six weeks
4 about what should happen next if anything and then you
5 know if you still want to pursue the case, then we'd be
6 prepared at the initial scheduling conference to you know
7 tell me what initial briefing is appropriate, what
8 additional hearings I should hold and when I should hold
9 them. It's just that there's not discovery open, put this
10 case on a track but I just need to figure out how to
11 finally resolve it. Did you want to say something, Mr.
12 Schifrin?

13 MR. SCHIFRIN: No, Your Honor. I was just going
14 to let Your Honor that we do plan to file a motion to
15 dismiss in this case and we'll do so before the 60 days
16 from the docketing of the complaint, from when we
17 reserved, that was our intention just for --

1 saying you can't do that or shouldn't do that, I just
2 encourage you to talk about it and you know when you've
3 had a chance to think about it individually, talk together
4 about what's the most efficient way to proceed in this
5 court as opposed to the Court of Appeals, that's outside
6 of my control. Okay? Anything else?

7 MR. SMITH: Unless you want me to put objections
8 on the record, Your Honor, I --

9 THE COURT: I know you don't agree with my
10 decision, I respect that, but that's my decision.

11 MR. SMITH: Well understood.

12 THE COURT: Okay.

13 MR. SMITH: Thank you, Your Honor.

14 MR. SCHIFRIN: Thank you, Your Honor.

15 MR. BRYANT: Thank you, Your Honor.

16 THE COURT: Thank you all, you're excused.

17 (Thereupon, the proceeding was concluded.)

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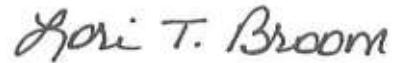
✓ Digitally signed by Lori T. Broom

ELECTRONIC CERTIFICATE

I, Lori T. Broom, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of VALERIE JABLOW V. DISTRICT OF COLUMBIA, Case No. 2018 CAB 005755 in said Court, on the 28th day of September 2018.

I further certify that the foregoing 41 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 4th day of October 2018.



Transcriber