No. 21-CV-543

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
Appellant,

v.

TERRIS, PRAVLIK & MILLIAN, LLP,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE COUNCIL OF THE DISTRICT OF COLUMBIA

IN SUPPORT OF APPELLEE TERRIS, PRAVLIK & MILLIAN, LLP AND AFFIRMANCE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The District of Columbia Charter provides that the legislative power of the District of Columbia is "vested in and exercised by" the Council of the District of Columbia ("Council"). D.C. Code § 1-204.04(a). Having duly enacted section 206(a)(6A) of the District of Columbia's Freedom of Information Act of 1976 ("DC FOIA"), now codified at D.C. Code § 2-536(a)(6A), which compels the public release of the agency budget requests sought by appellee Terris, Pravlik & Millian, LLP ("TPM"), the Council seeks to support TPM's efforts to ensure compliance with that provision of District law and to promote the stated policy of DC FOIA, namely that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Code § 2-531. Further, the Council wishes to address the novel arguments presented by the Mayor[1] that, if accepted by the Court, would turn the separation of powers mandated by the District Charter on

[1] TPM correctly named the District of Columbia as the defendant in its complaint, and the District of Columbia remains the named appellant on appeal. However, it is the Mayor who has taken the specific actions challenged here by TPM, namely the withholding of agency budget requests in violation of D.C. Code § 2-536(a)(6A), and it is the Mayor who has asserted that the documents are privileged as justification for those actions. For that reason, and because the Council – itself a coequal branch of the District of Columbia government – is fundamentally opposed to the asserted legitimacy of the Mayor's actions, this brief refers to the appellant as the Mayor.

its head and threaten the Council's ability to legislate with respect to information directly relevant to its core legislative function of enacting a budget for the District pursuant to D.C. Code § 1-204.46(a). Accordingly, the Council submits this brief as *amicus curiae* pursuant to D.C. App. R. 29(a)[2] to respectfully urge the Court to affirm the trial court's order granting summary judgment for TPM and to hold that: 1) D.C. Code § 2-536(a)(6A) requires the Mayor to disclose agency budget requests like those that the Mayor is improperly withholding from TPM; and 2) this Council-enacted legislation is fully consistent with the separation of powers recognized under the District Charter.

ARGUMENT

I. THE MAYOR'S READING OF DC FOIA DISREGARDS THE PLAIN LANGUAGE OF THE LATER-ENACTED D.C. CODE § 2-536(a)(6A), AS WELL AS THE COUNCIL'S STATED INTENT IN AMENDING DC FOIA TO INCLUDE IT.

In 2004, the Council amended DC FOIA's reading-room provision, D.C. Code § 2-536(a), by adding a new paragraph (6A) that specifically makes public those "[b]udget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process . . . ." The Council's

[2] Consistent with D.C. App. R. 29(a)(2), the Council may submit this brief without consent of the parties or leave of the Court. The Council timely files it no later than seven days following the filing of TPM's brief on January 28, 2022. *See* D.C. App. R. 26(a)(2); D.C. App. R. 29(a)(6).

contemporaneously stated rationale for this amendment was to "expand public access to key budget documents so that residents can participate more fully in the budget dialogue," and to "promote accountability by making the financial operations of the District government more transparent." JA 95. The Mayor, whose predecessor in office signed this provision into law, does not dispute that the agency budget requests sought by TPM fall within the category of documents described by D.C. Code § 2-536(a)(6A). Instead, the Mayor contends that because the provisions of DC FOIA must be read to "work in harmony," App. Br. 19, she is entitled to withhold as privileged a specific class of documents – agency budget requests transmitted to the Office of the Chief Financial Officer ("OCFO")[3] during the budget development process – that the Council expressly mandated be made public when it amended DC FOIA to include D.C. Code § 2-536(a)(6A). This perverse reading of DC FOIA not only would deprive a crucial provision of the statute of meaningful legal effect, but it also would fly in the face of the Council's stated purpose in amending DC FOIA to include it.

Specifically, the Mayor argues that she is entitled to withhold the agency budget requests sought by TPM because they are deliberative in character and because another DC FOIA provision, D.C. Code § 2-534, provides both that

[3] D.C. Code § 2-536(a)(6A) refers to the Office of Budget and Planning, which is a subordinate office within the OCFO. *See* D.C. Code § 1-204.24a(b)(1).

"[i]nter-agency or intra-agency memorandums or letters, . . . which would not be available by law to a party other than a public body in litigation with the public body[,]" D.C. Code § 2-534(a)(4), are among the matters that "may be exempt from disclosure," *id*., and that the deliberative-process privilege is "incorporated under the inter-agency memoranda exemption . . . ," *id.* § 2-534(e). In support of this position, the Mayor primarily relies on *Office of the People's Counsel v. Public Service Commission of the District of Columbia*, 955 A.2d 169 (D.C. 2008) ("*OPC*"), for the proposition that "DC FOIA's exemption provisions prevent the disclosure of documents otherwise mandated to be made available to the public under its publication provision . . . ." App. Br. 16. The Mayor's arguments are unpersuasive for several reasons.

As an initial matter, the facts of this appeal are wholly distinguishable from those presented in *OPC*. In *OPC*, the Court held that it was not unreasonable for the Public Service Commission to withhold, pursuant to D.C. Code § 2-534(a)(1), local-revenue data that public utilities designated as proprietary, notwithstanding the fact that D.C Code § 2-536(a)(5) and (6) require that the District make public certain generic categories of information that arguably subsumed the proprietary

data in question.[4] *Id.* at 176. The Court in *OPC* based this conclusion on the prefatory clause of D.C. Code § 2-536(a), which provides that the information designated therein shall be made public "[w]ithout limiting the meaning of other sections of this subchapter," and concluded that, as a general matter, the public disclosure requirements of D.C. Code § 2-536(a) incorporate the exemptions from disclosure found in D.C. Code § 2-534. *Id.* Critically, however, the broad categories of information subject to disclosure under D.C. Code § 2-536(a)(5) and (6) do not expressly include local-revenue data obtained from public utility companies,[5] and it was therefore possible for the Court in *OPC* to harmonize D.C. Code § 2-534 and D.C. Code § 2-536(a) in a manner consistent with the Public Service Commission's decision to withhold the data in question. *See Providence*

[4] D.C. Code § 2-536(a)(5) makes public "[c]orrespondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party;" and D.C. Code § 2-536(a)(6) makes public "[i]nformation in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies[.]"

[5] Indeed, the Court in *OPC* went so far as to express "doubt about . . . whether public-utility jurisdictional revenue data fall within the scope of information described" in paragraphs (5) and (6), noting that "[i]t is not clear that the revenue data are materials in correspondence with the Commission whereby the Commission determines the rights of any person," and that "we have been presented with no information that suggests that these revenue data are taken from an 'account, voucher, or contract[.]'" 955 A.2d at 176 & n.11 (citing D.C. Code § 2-536(a)(5) and (6)).

Hosp. v. D.C. Dep't of Emp't Servs., 855 A.2d 1108, 1114 (D.C. 2008) ("Each provision of the statute should be given effect, so as not to read any language out of a statute whenever a reasonable interpretation is available that can give meaning to each word in the statute.") (internal quotation marks and citations omitted).

Here, by contrast, D.C. Code § 2-536(a)(6A) unequivocally and specifically designates "[b]udget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process" as public information. The Council's specific, later-in-time designation of these materials as public simply cannot be reconciled with a blanket assertion of the deliberative-process privilege pursuant to D.C. Code § 2-534 to withhold them. Because the interpretation of DC FOIA advocated by the Mayor would deprive this provision of D.C. Code § 2-536(a)(6A) of meaningful legal effect, the Court should reject that clearly disfavored reading of the statute. *See Lewis v. Wash. Hosp. Ctr.*, 77 A.3d 378, 380 (D.C. 2013) (noting that the Court should "consider the statute as a whole, and, if possible, discern an interpretation that will harmonize and accord full force and effect to all of its provisions, without rendering any part meaningless") (internal quotation marks and citation omitted).

The Mayor argues that, under her reading of DC FOIA, there is no conflict inherent in allowing her to withhold agency budget requests as deliberative because "not everything" contained in agency budget submission materials would be subject to withholding, and she lists examples of materials that she asserts are or could be made public by D.C. Code § 2-536(a)(6A).[6] App. Br. 19. However, D.C. Code § 2-536(a)(6A) does not require the publication of budget documents generally, such that the limited disclosure of the materials identified by the Mayor would lend all of the statutory language of D.C. Code § 2-536(a)(6A) at least some legal effect. Instead, D.C. Code § 2-536(a)(6A)'s plain language categorically and

[6] Notably, the majority of the items identified by the Mayor already are required to be produced pursuant to other statutory requirements. Specifically: (1) employee titles and salaries are mandated to be public information in a separate DC FOIA reading-room paragraph, D.C. Code § 2-536(a)(1); (2) budget reprogrammings over a certain dollar threshold must be submitted to the Council for approval, and are publicly noticed, pursuant to D.C. Code § 47-363; (3) the Mayor must transmit the District government's organizational chart to reflect any changes to the District government to the Council pursuant to D.C. Code § 1-315.06; (4) agency performance plans must be transmitted to the Council pursuant to D.C. Code § 1-614.12; and (5) any information to be included in the final budget is mandated to be made public by the District Charter at D.C. Code § 1-204.24d(26). For this additional reason, it is difficult to square the Mayor's suggested reading of D.C. Code § 2-536(a)(6A) with the Council's stated intent in enacting it to "expand public access to key budget documents[,]" and to "mak[e] the financial operations of the District government more transparent." JA 95. *See also Vining v. Council of the Dist. of Columbia*, 140 A.3d 439, 447 (D.C. 2016) (rejecting interpretation of DC FOIA exemption that would allow for only "a sliver of documents" to remain subject to disclosure as being contrary to DC FOIA's "open-government mission").

specifically requires the publication of the "[b]udget requests . . . that agencies . . . transmit to the Office of the Budget and Planning during the budget development process," items that are conspicuously absent from the list of *pro forma* materials identified by the Mayor as subject to disclosure.[7]

In contrast to the Mayor's proffered reading of DC FOIA, which would nullify D.C. Code § 2-536(a)(6A)'s requirement that agency budget requests transmitted to the OCFO during the budget development process be made public, the most reasonable and plain reading of the DC FOIA provisions at issue is that they preclude the Mayor from withholding as deliberative the agency budget requests transmitted to the OCFO during the budget-development process. In support of this reading, the Council wishes to emphasize that it can be true both that: 1) as a general matter and consistent with the *OPC* Court's conclusions, the requirement to publicly disclose the general categories of documents set forth in D.C. Code § 2-536(a) at the time of the original enactment of DC FOIA in 1976 was not intended to require the production of material otherwise exempt from

[7] Moreover, in response to TPM's DC FOIA request, the Mayor did not produce any of the agency budget submission materials that she now identifies as subject to disclosure under D.C. Code § 2-536(a)(6A), but instead only a portion of her final proposed budget to the Council, JA 31-32, a fact that casts further doubt on her *post hoc* efforts to read D.C. Code § 2-534 and D.C. Code § 2-536(a)(6A) together in a manner that somehow does not require the public release of the "[b]udget requests . . . that agencies . . . transmit to the Office of the Budget and Planning during the budget development process[.]" D.C. Code § 2-536(a)(6A).

withholding pursuant to D.C. Code § 2-534; and 2) by amending DC FOIA in 2004 expressly to compel the public disclosure of a class of documents that the Mayor herself describes as "undisputedly both pre-decisional and deliberative," App. Br. 15, the Council abrogated any common-law or statutory privilege that otherwise might pertain to the budget requests, submissions, and reports that agencies transmit as part of the budget proposal process.[8] Such a reading is fully consonant with the Court's decision in *OPC*, as it would permit the Mayor to withhold drafts and other non-final iterations of agency budget requests as deliberative, while the final agency budget requests sought by TPM in this case, *i.e.* those actually "transmit[ted] to the Office of the Budget and Planning during the budget development process," would remain subject to disclosure pursuant to D.C. Code § 2-536(a)(6A).[9]

[8] It is well-established that the Council can abrogate a common-law or statutory privilege, such as the deliberative-process privilege. *See Vining*, 140 A.3d at 446 (observing that deliberative-process privilege is common-law privilege). *See, e.g.*, *Johnson v. United States*, 616 A.2d 1216, 1223 (D.C. 1992) (identifying instances in which Council has abrogated components of common-law marital privilege). *See also Nelson v. Nelson*, 548 A.2d 109, 116 (D.C. 1988) (observing that statute may preclude or abolish common-law tradition).

[9] The Mayor repeatedly refers to the materials sought by TPM pursuant to D.C. Code § 2-536(a)(6A) as "preliminary" budget documents, *e.g.*, App. Br. 1, 5, 6, 7, 10, 12, 13, 19, 22, 28, 30 n.5, 39; to be clear, at issue in this appeal are the final agency budget requests transmitted by certain agencies to the OCFO, not draft or otherwise "preliminary" versions of those documents.

Notably, it is this interpretation of the relationship between D.C. Code § 2-534 and D.C. Code § 2-536(a)(6A) that is the most consistent, both with the plain language of D.C. Code § 2-536(a)(6A) when read within the context of DC FOIA as a whole and with the public policy of DC FOIA "toward expansion of public access." D.C. Code § 2-531; *see also District of Columbia v. Gallagher*, 734 A.2d 1087, 1092 (D.C. 1999) (observing that the Court "will not give effect to a plain language interpretation which is 'plainly at variance with the policy of the legislation as a whole'") (citation omitted).[10] It is also the interpretation that is most consonant with the Court's recognition of "the general principles that if two

[10] The Mayor separately claims that the exemptions from disclosure enumerated in D.C. Code § 2-534 are inoperable "only" when "disclosure is authorized or mandated by other law," which, in the Mayor's view, would not include other provisions of DC FOIA, citing D.C. Code § 2-534(c). App. Br. 17. To be clear, nothing in the text of D.C. Code § 2-534(c), which states affirmatively that "[t]his section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law," purports to establish this provision as the "only" means by which the exemptions set forth in D.C. Code § 2-534 may be rendered inapplicable. Moreover, even if it could be read in that fashion, the Council remains free to legislate the non-applicability of the exemptions set forth at D.C. Code § 2-534 whenever and however it sees fit. *See Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 306 (D.C. 2012) (noting that "[i]t is well established that one legislature cannot bind a future legislature" and that the Council is "free to repeal, amend, or override" its prior legislation) (internal quotation and citation omitted). Thus, nothing in D.C. Code § 2-534(c) precludes the Council from abrogating the deliberative-process privilege as applied to specific categories of documents, which, the Council submits, is precisely what it did when it enacted D.C. Code § 2-536(a)(6A) to require the publication of agency budget requests.

provisions conflict, the more specific statute governs the more general one, and the later supersedes the earlier." *Bridgforth v. Gateway Georgetown Condominium, Inc.*, 214 A.3d 971, 975 (D.C. 2019) (internal quotation marks and citation omitted). And it is also the interpretation that best gives effect to the Council's contemporaneously stated intent in enacting D.C. Code § 2-536(a)(6A) to "expand public access to key budget documents so that residents can participate more fully in the budget dialogue," and to "promote accountability by making the financial operations of the District government more transparent." JA 95. *See Thomas v. Buckley*, 176 A.3d 1277, 1281 (D.C. 2017) (observing that the Court looks to the "legislative history to ensure that [the Court's] interpretation is consistent with legislative intent.") (internal quotation marks and citation omitted).

Notwithstanding the above-cited canons of statutory construction, each of which militates in favor of reading D.C. Code §§ 2-534 and 2-536(a)(6A) together to require the public disclosure of agency budget requests transmitted to the OCFO, the Mayor argues that the Court nevertheless should interpret those provisions of DC FOIA to permit her to withhold those documents because in so doing the Court thereby may avoid grappling with a legal question that implicates the separation of powers under the District Charter. App. Br. 21-22. This argument also lacks merit. First, the Mayor's contention that some unenumerated

power in the Charter entitles her to withhold agency-generated documents that directly implicate the core budgetary functions of the Council, notwithstanding that the Council explicitly has mandated their disclosure, is rebutted at length in Part II of this brief. For now, suffice it to say that requiring the Mayor to produce the documents in question does not give rise to a "serious constitutional doubt," *Mack v. United States*, 6 A.3d 1224, 1233-34 (D.C. 2010) (internal quotation and citation omitted), such that the Court should be dissuaded from resolving a straightforward question of statutory interpretation under DC FOIA. Second, the doctrine of constitutional (or in this case, Charter) avoidance identified by the Mayor "is intended as 'a means of giving effect to congressional [or, in this case, Council] intent, not of subverting it.'" *Id.* at 1234 (quoting *Clark v. Martinez*, 543 U.S. 371, 382 (2005)). "It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress [or, in this case, the Council] did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. Here, however, the statutory interpretation of DC FOIA advocated by the Mayor would deprive D.C. Code § 2-536(a)(6A) of a significant measure of legal effect, and the Mayor's reading of that provision therefore is not a "plausible" one. Moreover, it is amply evident that the Council's intent in enacting D.C. Code § 2-536(a)(6A) was to require the disclosure of

agency budget requests documents, and that it did not perceive any impediment to doing so that is rooted in the Charter's separation of powers.[11]

For all the foregoing reasons, the Council respectfully submits that the most logical reading of DC FOIA, the one that best gives effect to all of its provisions and best respects the stated intent of the Council when it amended it to include D.C. Code § 2-536(a)(6A), is that the Mayor may not withhold as deliberative the "[b]udget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process . . . ." D.C. Code § 2-536(a)(6A).

II. THE MAYOR'S CONTENTION THAT SHE MAY WITHHOLD AGENCY BUDGET REQUESTS PURSUANT TO HER INHERENT EXECUTIVE AUTHORITY IS UNSUPPORTED BY AND INCONSISTENT WITH THE DISTRICT CHARTER.

The Mayor argues in the alternative that, even if D.C. Code § 2-536(a)(6A) requires her to disclose the agency budget requests sought by TPM, she nevertheless need not do so because they are subject to an implied executive privilege, and compelled disclosure would violate the separation of powers

[11] Indeed, in D.C. Code § 47-318.05a, another Council-enacted provision signed into law by the Mayor's predecessor in office, the Council separately requires the Mayor to provide it with the same agency budget requests that the Mayor now claims that she is entitled to withhold, further underscoring that the Council could not have contemplated that a separation-of-powers violation would result from compelling the disclosure of those materials outside the executive branch.

established by the District Charter. App. Br. 22. As a general matter, the Council may "enact legislation that restricts the actions of the Mayor," *Francis v. Recycling Solutions, Inc.*, 695 A.2d 63, 73 (D.C. 1997), and this Court has recognized that, in light of Congress's "broad delegation of authority and the policy of the Home Rule Act, . . . limitations on the Council's legislative authority will be construed narrowly." *Washington, D.C. Ass'n of Realtors*, *Inc.*, 44 A.3d at 303. However, the Mayor asserts that because the Charter grants her the "explicit" and "exclusive" power to prepare an annual budget proposal, agency budget requests transmitted during the process of developing that budget proposal are beyond the reach of the Council's legislative authority. App. Br. 29-31. As discussed below, this argument is belied by the text and history of the Charter, the prior decisions of this Court, and persuasive authority from other jurisdictions.

The District Charter establishes, "as a general proposition, the familiar tripartite structure of government for the District." *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992). But it is well-established that the principle of separation of powers does not embrace the "archaic view" that would "require[e] three airtight departments of government." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (internal quotation marks and citation omitted). Rather, the principle permits a "flexible Madisonian approach," whereby the coordinate branches of

government have "a degree of overlapping responsibility, a duty of interdependence as well as independence[,]" *Brawner v. United States*, 745 A.2d 354, 357-58 (D.C. 2000) (quoting *Mistretta v. United States*, 488 U.S. 361, 381 (1989)). Thus, a separation-of-powers violation occurs only when one branch of government "impermissibly burden[s]" or "unduly interfere[s] with," the performance of a constitutionally assigned function of another branch.[12] *Bergman*, 986 A.2d at 1230 (citing *Hessey*, 584 A.2d at 6); *see also Nixon*, 433 U.S. at 443; *District of Columbia v. Fitzgerald*, 953 A.2d 288, 292 (D.C. 2008) (*en banc* order) (observing that encroachment or aggrandizement precluded by separation of powers is present only "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, or where one branch of government undermines the authority and independence of one or

[12] In *Bergman v. District of Columbia*, for example, the Court concluded that the Council's enactment of an act that, with certain exceptions, made it unlawful for attorneys to solicit business from an individual immediately following a motor vehicle accident did not violate the separation of powers because it did not affect the organization or jurisdiction of the courts, nor did it infringe on the Court's "core functions relating to Bar admissions and the discipline of attorneys," even if it did result in some degree of "overlap" between the respective responsibilities of the Court and the Council. 986 A.2d 1208, 1229-30 (D.C. 2010). Similarly, in *Hessey v. Burden*, the Court concluded that the creation by initiative of an Office of Public Advocate for Assessments and Taxation ("OPA") with the authority to contest tax assessments made by the Mayor did not violate the separation of powers, in part because it was reasonable to view the OPA's role as "collaborating with the Mayor" to "achieve [a] common aim." 584 A.2d 1, 4 (D.C. 1990).

another coordinate branch") (quoting *Mistretta*, 488 U.S. at 381-82) (cleaned up) (emphasis in original).

As the "familiar tripartite framework" articulated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring) ("*Youngstown*") explains, whether the executive has the power to undertake a particular action depends in large measure on whether the legislature has authorized that action, is silent with respect to it, or has prohibited it. *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015). Here, the Mayor is acting in defiance of D.C. Code § 2-536(a)(6A), a duly enacted Council statute that unequivocally requires her to release the agency budget requests sought by TPM. Under the framework posited by Justice Jackson, when the executive "takes measures incompatible with the expressed or implied will of" the legislature, executive power is at its "lowest ebb" as the executive can "rely only on [his or her] own constitutional power minus any constitutional powers of [the legislature] over the matter." *Id*. (quoting *Youngstown*, 343 U.S. at 637-38). For executive action to be valid in such cases, the executive's power must be both "exclusive and conclusive" on the issue, *Zivotofsky*, 576 U.S. at 10 (internal quotation marks and citation omitted), for courts "can sustain exclusive [executive] control . . . only by disabling the [legislature] from acting upon the subject[,]" *Youngstown*, 343 U.S. at 637. As

Justice Jackson cautioned, an executive's "claim to power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638.

In considering whether such an "exclusive and conclusive" source of executive authority exists here, *Zivotofsky*, 576 U.S. at 10, it is appropriate to "examine[] the [Charter's] text and structure, as well as precedent and history bearing on the question." *Id*. Section 442(a) of the Charter provides that "[a]t such time as the Council may direct, the Mayor shall prepare and submit to the Council each year, and make available to the public, an annual budget for the District of Columbia government[.]" D.C. Code § 1-204.42(a) (emphasis added). In turn, the Council adopts by act "the annual budget for the District of Columbia government," *id.* § 1-204.46(a), which is then transmitted to Congress for passive review, *id.* § 1-206.02(c)(1). Once it receives the Mayor's proposed budget, the Council is in no way constrained in accepting, rejecting, or modifying any or all of the Mayor's recommendations. Furthermore, once the Council passes the District's annual budget, the Mayor "is required to support" that enacted budget before the federal government. *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 9 (D.C. 1991) (*en banc*).

In *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*, the *en banc* Court spoke directly to the text of section 442 of the District Charter and the respective roles of the Council and the Mayor in passing the District's budget. 441 A.2d 889, 906 n.31 (D.C. 1981) (*en banc*) ("*CRCC*"). Looking to the prefatory clause of D.C. Code § 1-204.42(a), which directs the Mayor to submit a budget proposal "[a]t such time as the Council may direct," a majority of the judges[13] recognized that the Charter's "fundamental statutory framework" "giv[es] the Council, not the Mayor, ultimate authority (subject to congressional review) over the District's annual budget," and expressly characterized the Mayor's ability to initiate budget proposals as "subordinate to this fundamental prerogative of the Council." *Id.* (emphasis added). For that reason alone, Council legislation relating to the Mayor's role in proposing a budget cannot be read to intrude on a "core" executive function or to implicate any "exclusive and conclusive" authority of the Mayor.[14]

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[13] Seven of the nine judges hearing *CCRC* endorsed this assertion, including the three judges who subscribed to the plurality opinion setting it forth and the four dissenting judges who separately endorsed Part III of the plurality opinion, where it appears. *See id.* at 922 (Gallagher, J., dissenting) ("I agree with Part III of Judge Ferren's opinion where, in net effect, he concludes that a law is a law – including the one before us.").

[14] Earlier in her brief, the Mayor cites *District of Columbia v. Sierra Club*, 670 A.2d 354 (D.C. 1996) for the proposition that the separation of powers is "at its apogee when the court is asked to dictate the Mayor's spending priorities."

Without addressing, or even acknowledging, the Court's decision in *CCRC*, the Mayor attempts to erect an artificial and untenable barrier between her responsibility to propose a budget under D.C. Code § 1-204.42 and the other components of the budget-enactment process set forth in the District Charter. App. Br. 31-32. However, it is not the case that, because the Mayor utilizes agency budget requests to prepare a proposed budget, those same agency budget requests somehow lack a nexus to the Council's responsibility to decide whether and how to adopt, reject, or modify that proposed budget. App. Br. 31-32. Indeed, it would be anomalous for the Mayor, who concedes that her role in the budget process is limited to providing a recommended budget to the Council, App. Br. 29, to be entitled to more accurate information regarding the actual budgetary needs of District agencies than the Council, which has the ultimate responsibility for actually funding those agencies. *See, e.g.*, *Comm. on the Judiciary of U.S. House of Reps. v. McGahn*, 968 F.3d 755, 764 (D.C. Cir. 2020) (*en banc*) ("[T]he Supreme Court has acknowledged the essentiality of information to the effective

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App. Br. 21. However, in *Sierra Club*, the Court expressly distinguished the "core" executive function of "hav[ing] charge of the administration of the financial affairs of the District" and "apportion[ing] all appropriations, funds, and authorizations . . . so as to achieve the most effective and economical use thereof[,]" 670 A.2d at 365 (internal quotation marks and citations omitted), from the "core" legislative function of appropriating such funds in the first instance, *id.* (citing *Quattlebaum v. Barry*, 671 A.2d 881, 885 (D.C. 1995) (*en banc*)).

functioning of Congress . . . Congress must have access to information to perform its constitutional responsibilities.") (emphasis added).

By way of analogy to the federal government, the role of the President in preparing and transmitting a proposed federal budget has never been treated as a core executive function.[15] Instead, the President's budget preparation responsibility arises out of a congressionally enacted statute as a matter of administrative convenience and is not a constitutionally based prerogative of executive power. *See Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 930-31 (D.C. Cir. 1982) (noting that Congress passed Budget and Accounting Act in 1921 to "delegate" authority to President to submit budgetary requests on behalf of Executive Branch to address "disadvantages" of then-existing "uncoordinated system"). Thus, it is reasonable to expect that Congress, when drafting the District Charter, similarly viewed the Mayor's budget proposal authority as a means of aiding the Council in its role as the District's appropriator rather than as a source of any exclusive or conclusive authority. *See, e.g.*, *Dorsey v. D.C. Bd. of Elections & Ethics*, 648 A.2d 675, 677 (D.C. 1994) (observing that

[15] *See, e.g.*, *Wilson*, 615 A.2d at 231 (observing that "it is reasonable to infer from [the District government's] tripartite structure and the vesting of the respective 'power' in each branch that the same general principles should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level")

matters integral to the "power of the purse," such as budget process, are reserved exclusively to the Council).

Moreover, federal and state courts that have confronted assertions of authority similar to those made by the Mayor in this appeal all have held that legislative enactments requiring the public disclosure of preliminary agency budget conversations or requests do not violate the separation of powers. *See Common Cause*, 674 F.2d at 923-24, 935 (rejecting claim based on separation of powers that Nuclear Regulatory Commission ("NRC") was entitled to hold closed sessions to discuss budget preparations and budget requests to Office of Management and Budget ("OMB")); *Capital Info. Group v. State, Office of the Governor*, 923 P.2d 29, 39-40 (Alaska 1996) (rejecting Governor's claim that public disclosure of budget impact memoranda to Alaska's version of OMB violates separation of powers).[16] In contrast, the Mayor's brief fails to identify a single case supporting her argument that the executive branch is allowed to withhold documents related to

[16] Similar to D.C. Code § 2-536(a)(6A), Alaska Statute 37.07.050(g) states that: "All goals and objectives, plans, programs, estimates, budgets, and other documents forwarded to the office of management and budget by a state agency under this section are public information after the date they are forwarded."

the preparation of a proposed budget despite a legislative enactment compelling disclosure.[17] App. Br. 27-28.

The Mayor also argues that requiring her to produce agency budget requests would harm her by precluding her from obtaining candid advice from her subordinates. App. Br. 29. However, both the *Common Cause* and *Capital Information Group* courts weighed and rejected claims that confidentiality concerns justified the executive in withholding budget proposal materials based on the separation of powers.[18] And, the Charter itself makes clear that the Mayor

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[17] The Mayor cites to *New York Times Co. v. Office of Management and Budget*, 531 F. Supp. 3d 118 (D.D.C. 2021) for the proposition that "the executive communications privilege unquestionably protects documents the President solicits or views during the process of preparing the budget," App. Br. 32 n.6, which is not what the court held in that case. In *New York Times*, the plaintiff sought email communications between certain OMB and White House Advisors related not to the preparation of the federal budget, but instead to the hold that then-President Trump placed on already-appropriated financial assistance to Ukraine, 531 F. Supp. 3d at 121-22, and in ordering the production of some documents and approving of the withholding of others over which the presidential communications privilege had been asserted, the court simply restated the general law applicable to that privilege, *id.* at 125-27.

[18] In *Common Cause*, the D.C. Circuit rejected the NRC's claim that secrecy is essential to the President's preparation of the federal budget, noting that the Budget and Accounting Act "makes no reference to confidentiality" and "does not prescribe any method by which he must develop the consolidated budget figures which he submits. Nor does it require that the President's proposals be the only budgetary information available to the public." 674 F.2d at 931-32. Similarly, in *Capital Information Group*, the Alaska Supreme Court recognized that the legislature "implicitly determined that the need for public disclosure outweighs any risk of lack of candor on the agencies' part[,]" and that this "determination was

should have no expectation of confidentiality in connection with the preparation of her budget proposal. To the contrary, the Charter explicitly requires the Mayor, when transmitting her proposed budget to the Council, to disclose the substance of her deliberations with respect to the costs and benefits of alternatives associated with particular budgetary issues identified by the Council. *See* D.C. Code § 1-204.42(a)(6) (requiring that Mayor's proposed budget include "[a]n issue analysis statement consisting of a reasonable number of issues, identified by the Council . . . , having significant revenue or budgetary implications, . . . which shall consider the cost and benefits of alternatives and the rationale behind action recommended or adopted") (emphasis added).

Taking all of the foregoing together, it is clear that the Mayor does not enjoy any "exclusive or conclusive" power with respect to the District budget, *Zivotofsky*, 576 U.S. at 10, and that the Council's enactment of D.C. Code § 2-536(a)(6A) does not usurp any "whole power" of the Mayor's, *Fitzgerald*, 953 A.2d at 292, such that the Mayor is entitled to disregard that duly enacted statute.[19] Requiring the

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entitled to significant weight, given the legislature's constitutional power to allocate executive department functions and duties among the offices, departments, and agencies of the state department." 923 P.2d at 40.

[19] Notably, the Council is not co-opting for itself the responsibility to prepare a proposed budget. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1984) (holding that Congress "cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment" as it "would, in

disclosure of agency budget requests in no way undermines the Mayor's "authority" or "independence," *id.* at 252, nor does it otherwise "prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions[,]"[20] *Nixon*, 433 U.S. at 443. Given that "the allocation of the District's financial resources is a core legislative function," *Washington, D.C. Ass'n of Realtors, Inc.*, 44 A.3d at 305 (internal quotation and citation omitted), and that the Council possesses "ultimate authority (subject to congressional review) over the District's annual budget," *CCRC*, 441 A.2d at 906 n.31, the Mayor's role in the process of developing the District budget cannot help but be "collaborat[ive]," *Hessey*, 584 A.2d at 4, and involve significant "overlap," *Bergman*, 986 A.2d at 1229, with the powers of the Council. Accordingly, no separation-of-powers violation inheres in

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practical terms, reserve in Congress control over the execution of the laws"). The Council is not attempting to bypass or change the Charter budget process, *see Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 95-58 (1983) (holding that statute authorizing one-House veto violated both the bicameral requirement and the Presentment Clause of the Constitution), nor is the Council requiring the Mayor to take a certain policy position within her budget proposal, *see Zivotofsky*, 576 U.S. at 31-32 (holding that Congress may not "aggrandize its power at the expense of another branch by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch" as that would "allow Congress to exercise that exclusive power itself") (cleaned up).

[20] If agency budget requests were released publicly, the Mayor would retain full discretion to express her spending preferences and otherwise fashion her budget proposal as provided for by the Charter; she would remain free to accept, modify, or reject any portions of the agency budget requests that she receives.

the Council's mandate that the budget requests submitted by District agencies during the budget-development process be furnished to the public.[21]

CONCLUSION

For the foregoing reasons, the Council as *amicus curiae* supports affirming the trial court's grant of summary judgment in favor of appellee TPM.

February 8, 2022

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[21] Should the Court agree with the Council that compelling the Mayor to disclose agency budget requests is consistent with the District Charter, the Court need not decide whether a Mayoral "executive communications" privilege exists in the District. App. Br. 23-28. This is so because any "executive communications" privilege is rooted in "constitutional separation of powers principles," *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997), and "derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities," *Nixon*, 433 U.S. at 447. Because the Mayor shares budget authority with the Council and her role in the budget process is a "subordinate" one, *CCRC*, 441 A.2d at 906 n.31, even if the Mayor could assert an executive communications privilege as a general matter, it would not attach to the agency budget requests at issue here.

REDACTION CERTIFICATE DISCLOSURE

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) The acronym "SS#" where the individual's social-security number would have been included;
     (2) The acronym "TID#" where the individuals' taxpayer-identification number would have been included;
     (3) The acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) The year of the individual's birth;
     (5) The minor's initials; and
     (6) The last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Daniel P. Golden
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21-CV-543
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I certify that on February 8, 2022, this *amicus* brief was served through this Court's electronic filing system to

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