No. 09-AA-182

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DAVID J. MALLOF, *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,

Respondent.

On Petition for Review of a Decision of the
District of Columbia Board of Elections and Ethics

BRIEF FOR THE PETITIONERS

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June 29, 2009

* Amanda Hine is admitted in Virginia and is practicing under the supervision of firm principals. Her motion for admission to the District of Columbia bar is pending. If admitted before oral argument, she will argue. If she is not admitted, Mr. Spitzer will argue.

CERTIFICATE PURSUANT TO RULE 28(a)(2)

The parties before the Board of Elections and Ethics were David Mallof, Elizabeth Elliott, John Hanrahan, and Ronald Cocome, all appearing *pro se,* and the Office of Campaign Finance, represented by Kathy Williams. D.C. Councilmember Jack Evans intervened before the Board and was represented by N. William Jarvis.

The petitioners in this Court are David Mallof, Elizabeth Elliott and John Hanrahan; they are represented by Marcia T. Maack and Amanda Hine of Mayer Brown LLP, and Arthur B. Spitzer of the American Civil Liberties Union of the Nation's Capital. The respondent here is the Board of Elections and Ethics, represented by its General Counsel Kenneth J. McGhie.

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ISSUE PRESENTED

Whether the Board of Elections and Ethics erred in dismissing for lack of standing a request to review a decision of the Office of Campaign Finance on a complaint initiated by petitioners, who both voted and actively participated in the election campaign during which the alleged campaign finance violation occurred.

STATEMENT OF THE CASE

Petitioners, who are registered D.C. voters, filed a formal complaint with the Office of Campaign Finance (OCF) on August 13, 2008, alleging violations of District of Columbia campaign finance laws by Councilmember Jack Evans during the 2008 primary election. On September 5, 2008, the OCF initiated a full investigation into whether Evans had improperly used government resources for political purposes. The OCF concluded its investigation and issued an order on November 10, 2008, finding that Evans had not violated campaign finance laws. On December 5, 2008, petitioners timely filed a request for review of that decision with the Board of Elections and Ethics. After holding a hearing on January 14, 2009, the Board issued an order on January 28, 2009, dismissing the request for review on the ground that petitioners did not have standing to seek Board review of the OCF order. Petitioners timely filed a petition for review of the Board's decision in this Court on February 27, 2009, pursuant to D.C. Code § 1001.05.

STATEMENT OF FACTS

This matter arises from an alleged violation of D.C. campaign finance laws by D.C. Councilmember Jack Evans, representative of Ward 2, during the 2008 primary

election. Petitioners David J. Mallof, Elizabeth B. Elliott and John Hanrahan were registered voters in Ward 2 and voted in both the primary and general elections. App. 89, 119, 128. Throughout the course of the primary and general elections, petitioners actively opposed Evans' campaign for reelection. App. 123, 149, 154-55. Petitioners Mallof and Elliott contributed money to his opponent. App. 123, 154. Elliott also served as a precinct captain for an opponent during the primary, App. 154, and, with other members of the community, continued to investigate "the circumstances of the Ward 2 primary" after the election ended for presentation at a D.C. Council hearing. App. 130.[1]

On August 13, 2008, just three weeks before the primary, Evans' campaign committee placed a full-page advertisement in *The Current*, a widely-distributed local weekly newspaper, featuring a large, full-color photograph of candidate Evans posed with Police Chief Cathy Lanier in her official Metropolitan Police Department uniform, under the heading "Working Together for Ward 2" and "Vote for Jack Evans on September 9." App. 184. In response, petitioners filed a formal complaint against Evans with the Office of Campaign Finance (OCF) on August 28, 2008, alleging that his use of this photograph "implied a clear endorsement for [] Evans by Chief Lanier," in violation of D.C. Code § 1-1106.5 (which prohibits the use of government resources to support or oppose a candidate) and various D.C. regulations.[2] App. 2.

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[1] Petitioners are long-time residents of the District of Columbia and actively participate in the community. App. 62, 130. Appellant Elliott, for example, testified during the Board hearing that she was a 29-year resident of that neighborhood and [has] been quite involved for about 10 years" including "serv[ing] in 2001, 2002, both terms as Chair of my Advisory Neighborhood Commission." App. 130.

[2] Relevant regulations are set out in the decision of the Office of Campaign Finance, App. 179-80.

On September 5, 2008, the OCF initiated a full investigation into whether Evans had improperly used government resources for political purposes. App.7.[3] The OCF concluded its investigation on November 14, 2008. App. 7. Although the evidence before the OCF showed that the photograph had been taken by a District employee who was on duty at the time, App.12, the OCF dismissed the petitioners' complaint because "the photograph was not taken for a campaign-related purpose." App. 15. On December 5, 2008, petitioners filed a request for review of that decision with the D.C. Board of Election and Ethics ("the Board") pursuant to 3 DCMR § 3705.4, which states that "[a]ny party adversely affected by an order of the Director [of the Office of Campaign Finance] . . . may obtain review of the order by filing, with the Board of Elections and Ethics, a request[.]"[4] App 44. Evans filed a motion to intervene, which was granted. App. 179. The Board held a pre-hearing conference on January 5, 2009, during which the Board requested that the parties file briefs addressing two issues: 1) whether the petitioners were "adversely affected" by the OCF Order so as to entitle them to Board review under 3 DCMR § 3705.4; and 2) what government resources were used in connection with the taking of the photograph used in the August 13, 2008 campaign advertisement and whether that use violated campaign finance laws. App. 61, 179.

On January 14, 2009, the Board held a hearing on the question of whether the petitioners were "adversely affected" by the OCF ruling and issued a ruling on January 28, 2009. The Board interpreted the phrase "any party adversely affected" by looking to

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[3] Opening a "full investigation" requires a prior finding of "reasonable cause" by the Director. 3 DCMR § 3704.1.

[4] The Office of Campaign Finance is an administrative subdivision of the Board of Elections. Its Director is appointed by the Board and serves at the Board's pleasure. D.C. Code § 1-1103.01(a).

the D.C. Administrative Procedure Act (APA), which states that "[a]ny person . . . adversely affected or aggrieved by an order or decision of the mayor or an agency" is entitled to judicial review thereof. D.C. Code § 2-510. App. 180. This phrase, the Board asserted, "makes clear that one who is adversely affected by an order or decision is aggrieved by that order or decision." App. 180. Having thus equated "adversely affected" with "aggrieved," the Board then turned to an old edition of Black's Law Dictionary for a definition of "aggrieved," finding it defined as "a substantial grievance, a denial of some personal, pecuniary, or property right, or the imposition upon a party of a burden or obligation." App.180. The Board concluded that petitioners did not come within that dictionary definition of a word not even contained in the Board's regulations, and on that ground dismissed their request for review without so much as a glance at case law. App. 180-81.

Petitioners filed a timely Petition for Review in this Court on February 27, 2009.

SUMMARY OF ARGUMENT

The Board's decision should be reversed because the Board erred as a matter of law in determining that petitioners lacked standing to seek the Board's review of a decision by the Office of Campaign Finance.

The Board's conclusion that petitioners were not "adversely affected" because they were not "aggrieved," and that they were not "aggrieved" because they had not been denied "some personal, pecuniary or property right" or personally subjected to the "imposition . . . of a burden or obligation," App. 180 (quoting Black's Law Dictionary 65 (6th ed. 1991), misconceives the law of standing, even on the mistaken assumption that

Article III rules of standing apply to this request for *administrative* review. The Supreme Court and lower courts consistently have found that voters suffer injury in fact, and therefore have standing, when an alleged harm diminishes their ability to affect the electoral process. Here, petitioners voted in both the primary and general elections and were active in opposing Councilmember Evans' reelection. Evans' advertisement falsely implying that he was endorsed by the Chief of Police, and the OCF finding that Evans had not violated the law prohibiting the use of government resources in a political campaign, diminished petitioners' ability to affect the outcome of the 2008 primary election and thereby caused petitioners concrete injury giving rise to standing before the Board.

The Board also erred in assuming, without analysis, that Article III rules of standing apply to petitioners' request for review. Those rules do not necessarily, or ordinarily, control a person's ability to be heard before an administrative agency; what standard applies varies from one context to another and depends upon the statutory and regulatory scheme. Here, the statutory and regulatory scheme show that the OCF is only an arm of the Board of Elections that has no authority to take final administrative action but only makes recommendations to the Board. Read as a whole, the statute and regulations here demonstrate an "intent to cast the standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998).

ARGUMENT

The Board erred in determining that petitioners did not have standing to obtain Board review of the OCF dismissal of the complaint they had filed and actively pursued.

Because the relevant facts in this matter are undisputed, the Board's decision turned entirely on its understanding of the law. Thus here, as in *Randolph v. ING Life Ins. and Annuity Co.*, No. 07-CV-791, 2009 WL 1684470 (D.C. June 18, 2009), "'[w]hether appellants have standing is a question of law which [this Court] consider[s] on appeal *de novo*.'" *Id.* at *2 (quoting *Board of Dirs., Wash. City Orphans Asylum v. Board of Trs., Wash. City Orphans Asylum*, 798 A.2d 1068, 1074 (D.C. 2002)).

I. Petitioners were injured by the OCF's failure to sanction Evans' allegedly unlawful campaign advertisement because the advertisement inhibited their efforts to oppose his reelection.

The Board's decision is faulty in finding that petitioners were not adversely affected by the OCF's dismissal of their complaint. In the Board's own view, a party is adversely affected, and therefore has standing, if it has "a substantial grievance." App. 179. The petitioners certainly have a substantial grievance with the OCF decision, which finds no fault with candidate Evans' arguably unlawful conduct, and which gives a green light to the intentional repetition of such abusive conduct by Councilmember Evans and others in future election campaigns—in which, as politically active citizens and voters, petitioners are likely to participate.[5]

[5] While the merits of petitioners' grievance are not before the Court at this time, the question whether D.C. Code § 1-1106 is violated by a candidate's intentional effort falsely to portray himself as endorsed by the Police Chief by the use of a photograph (such as the one at issue here) that was created by a District of Columbia employee in the course of the employee's official duties, is certainly worthy of consideration by the Board of Elections and by this Court. Under the Board's ruling, only the candidate who engaged in such a course of conduct would have standing to seek Board review of its legality. Of course such a candidate would have no interest in doing so. Indeed, Councilmember Evans argued strenuously against allowing petitioners to proceed here. App. 143-47.

Notwithstanding the Board's excursion into Black's Law Dictionary, the phrase "adversely affected or aggrieved" in the D.C. Administrative Procedure Act is more commonly understood, in parallel with Article III case-and-controversy principles, to require a party to show "that the challenged action has caused [it] injury in fact." *Miller v. District of Columbia Bd. of Zoning Adjustment*, 948 A.2d 571, 574 (D.C. 2008). We discuss in Part II why that requirement for standing to maintain a *lawsuit* does not apply with full force in the context of an *administrative proceeding* before the Board of Elections. But even taking the Board's analogy to the APA at face value, the petitioners here have suffered injury in fact.

It can hardly be denied that the Evans campaign advertisement in fact injured petitioners by undermining their efforts to prevent Evans' reelection. Likewise, the OCF's ruling that Evans did nothing wrong injures petitioners' personal efforts to participate—by financial contributions and volunteer activity, as well as by voting—in an election campaign that operated in a lawful manner. As petitioner Mallof testified, "You want to talk about financial injury? I invested in a fair election conducted by the District of Columbia." App. 151. But what he got was an unfair and allegedly unlawful one.[6]

A. The United States Supreme Court and lower courts have consistently found concrete injury, and standing, where the alleged harm adversely affected a voter's ability to affect the electoral process.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v.*

[6] This assumes that petitioners' allegations of unlawful conduct are true—the proper assumption at this stage of the proceedings.

Sanders, 376 U.S. 1, 17 (1964). It is, therefore, no surprise that the United States Supreme Court has repeatedly recognized that voters, including those attempting to affect the electoral process, have standing to challenge electoral irregularities that undermine the effectiveness of their votes.

This Court's decision in this case should be guided principally by the Supreme Court's decision in *FEC v. Akins*, 524 U.S. 11 (1998). In that case, a group of voters sought judicial review of the Federal Election Commission's dismissal of their administrative complaint, which had alleged that a particular organization should be subject to the Commission's reporting and disclosure requirements. The relevant statute provided that "'[a]ny party aggrieved by an order of the Commission'" could seek judicial review thereof. *Id.* at 19 (quoting 2 U.S.C. § 437g(a)(8)(A)). Analogizing—as the Board did here—to the "adversely affected or aggrieved" provision of the APA, *id.* at 19-20, the Court held that the voters had "suffered a genuine 'injury in fact,'" consisting of their "inability to obtain information" about the subject organization that "would help them . . . to evaluate candidates for public office," *id.* at 21, and therefore ruled that the "voters, have standing to challenge the Commission's determination in court." *Id.* at 13-14.

While *Akins* is particularly relevant here, it is squarely in the mainstream in recognizing the standing of voters to challenge election policies or practices that allegedly harm them. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962) (affected voters have standing to challenge alleged vote dilution); *Burdick v. Takushi*, 937 F.2d 415, 417-18 (9th Cir. 1991), *aff'd*, 504 U.S. 428 (1992) (affected voter has standing to challenge ban on write-in voting). The injury suffered by a voter must be real, but it need not be great;

"[a] plaintiff need not have the franchise wholly denied to suffer injury." *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (affected voters have standing to challenge voter registration methods).

More specific to this case, the courts repeatedly have found concrete injury, and standing, where the alleged harm adversely affects a person's ability to influence an election. For example, in *Joseph v. U.S. Civil Service Commission*, 554 F.2d 1140, 1145-49 (D.C. Cir. 1977), federal employees who were prohibited from participating in campaigns of party candidates challenged a regulation allowing federal employees to participate in campaigns of independent candidates in the same election. Noting that "[s]uccess in any election depends not only on the strength of one's own campaign but also the strength of the opposition's," *id.* at 1147, the court recognized that plaintiffs were "injured when the Commission refuses to allow them to campaign for the candidate [they supported], while permitting federal employees to work in the same election for independent candidates representing opposing political viewpoints." *Id.*

Similarly, in *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) the court heard a challenge to a law requiring ballots to indicate that an incumbent candidate was opposed to term limits unless the candidate had explicitly stated otherwise. The court found that registered voters had standing to bring that challenge because the alleged misinformation that the law would cause would "dilute the effect of that vote if [the voter's] chosen candidate were not fairly presented to the voting public" and would "diminish[] the likelihood that candidates of [the plaintiffs'] choice will prevail in the election." *Id.* at 1123. The court noted that its "primary concern is not the interest of [the] candidate ...

but rather, the interests of the voters who chose to associate together to express their support for [that] candidacy and the views ... espoused." *Id.*

In *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974), the court likewise found that a voter and campaign contributor had standing to challenge an IRS rule that gifts to multiple campaign committees for the same candidate are each entitled to the gift tax exclusion because the rule had "the effect on him of substantially diminishing his ability to affect the electoral process" and that this along with the "alleged diminution of his vote . . . are judicially recognized wrongs and are [] sufficient allegations of actual injury." *Id.* at 898-99. *Tax Analysts* in turn cited *Common Cause v. Democratic National Committee*, 333 F. Supp. 803 (D.D.C. 1971), which involved "an action . . . brought by voters and contributors to force compliance with laws on permissible amounts of political contributions and campaign expenses. Plaintiffs alleged that if the candidates they supported complied with the laws while others did not, their efforts and their votes would be diluted or nullified." 376 F. Supp. at 898. Standing was found based on plaintiffs' "'plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Id.* (quoting *Common Cause,* 333 F. Supp. at 808 (in turn quoting *Baker v. Carr*, 369 U.S. at 207)).[7]

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[7] *See also Schulz v. Williams*, 44 F.3d 48, 53 (2d. Cir. 1994) (political party had standing to challenge improper placement of a candidate on the ballot because "competition on the ballot from candidates that . . . were able to 'avoid complying with the Election Laws' and a resulting loss of votes" constituted a concrete injury); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989) (loss of "opportunity to compete equally for votes in an election" is sufficient injury for standing requirement); *Bachur v. Democratic Nat'l Party*, 666 F. Supp. 763, 770-72 (D. Md.) ("The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."), *rev'd on other grounds*, 836 F.2d 837 (4th Cir. 1987).

B. Applying established law to this case shows that petitioners suffered injury from OCF's failure to sanction Councilmember Evans' activities because it diminished their ability to affect the electoral process.

Applying these established principles to this case, it is clear that petitioners suffered concrete injury from candidate Evans' alleged violation of the law prohibiting use of government resources to aid his campaign, and from OCF's failure to sanction that alleged violation, because it diminished their ability to affect the electoral process.

Throughout the course of the primary and general election campaigns, petitioners actively opposed Evans' reelection. All of the petitioners are registered voters in Ward 2 and voted in both the primary and general elections. App. 89, 119, 128. Petitioners Mallof and Elliott contributed money to candidates opposing Evans. App. 123, 154. Appellant Elliott also served as a precinct captain for Evans' opponent. App. 154. The Evans campaign advertisement directly injured petitioners' efforts to oppose Evans' candidacy by falsely implying that the Chief of Police endorsed Evans. *See Joseph*, 554 F.2d at 1145-49 (success "depends not only on the strength of one's own campaign but also on the strength of the opposition's."). That misrepresentation had the corresponding effect of implying that the Chief did not support the election of opposing candidates, thereby decreasing the likelihood that they would defeat Evans in the primary or general election. The advertisement, and OCF's failure to sanction it, thus diminished petitioners' efforts to affect the election and "dilut[ed] the effect of [their] vote[s]." *Miller*, 169 F.3d at 1123. By seeking review of the OCF appeal, petitioners were "asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Baker*, 369 U.S. at 208.

The facts here are comfortably similar to those in *Akins*. Here, as in *Akins*, the alleged violation and the alleged injury had to do with communications relevant to voters' choices in election campaigns. In *Akins*, the plaintiff voters had standing to seek to compel the Federal Election Commission to enforce a statute, arguably applicable to a particular politically-active organization, requiring that organization to disclose to the FEC, and the FEC to report to the public, certain campaign-related information. Here, the petitioner voters have standing to seek to compel the Board of Elections to enforce a statute, clearly applicable to a particular candidate and arguably violated, prohibiting the use of government resources in creating campaign-related information. In both cases the injury falls "within the zone of interests to be protected or regulated by the statute," *Akins*, 524 U.S. at 20—in *Akins* the interest is in public disclosure of contributions and expenditures; in this case the interest is in preventing government resources from influencing the outcome of election campaigns.

Thus, even assuming that "adversely affected" in 3 DCMR § 3705.3 requires the same showing as is required for access to an Article III court, petitioners have adequately satisfied this standard.[8]

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[8] The argument made above does not conflict in any way with the fundamental First Amendment proposition that the Board of Elections cannot regulate election campaign speech for truth or accuracy. *See* Brief of the American Civil Liberties Union of the National Capital Area as Amicus Curiae in *Citizens Committee for the D.C. Video Lottery Terminal Initiative v. D.C. Board of Elections and Ethics*, 860 A.2d 813, 814 (D.C. 2004). Enforcing a law prohibiting the use of government resources to support candidates' campaigns may have the secondary effect of limiting speech that would otherwise be made with the use of such resources, but that is no different from the secondary speech-limiting effect that would occur by enforcing the law against bank robbery, if the proceeds of a bank robbery were to be used to finance campaign speech.

The Board's decision takes the position that petitioners could have obtained "meaningful redress of their perceived harm" by asking this Court to set aside the result

II. Petitioners had standing under 3 DCMR § 3705.4 even if they might not have standing under Article III.

The Board also erred by assuming, without analysis, that standing to seek *administrative* review under 3 DCMR § 3705.4 must be governed by the same standards that govern standing to seek *judicial* review under the Administrative Procedure Act, as constrained by Title III of the Constitution.[9] But that was not a correct assumption, even though the two provisions use some of the same language.

Administrative agencies are not bound by the limitations of Article III. *See, e.g., Gardner v. F.C.C.*, 530 F.2d 1086, 1090 (D.C. Cir. 1976) ("agencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court."); 13B Wright, Miller & Cooper, Federal Practice & Procedure, Juris. 3d § 3531.13 ("Administrative agencies are not established under Article III and should not be bound by judicial rules of standing in determining what parties to admit to adjudicatory or rulemaking proceedings, any more than they are bound by other judicial rules of procedure.").

Moreover, "what constitutes adverse effect or aggrievement varies from statute to statute," *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry*

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of the election as a remedy for the improper advertisement. App. 181. Such a request to this Court would certainly present serious difficulties, which it is unfortunate that the Board does not appear to recognize. Certainly petitioners have not "foregone," *id.*, their right to seek relief on their OCF complaint by failing to have asked this Court to set aside the results of the election.

[9] While "this court, as an Article I court, is not bound by 'case or controversy' requirements based on Article III of the Constitution," it nevertheless "look[s] to federal case law to . . . identify the cases and controversies that [it] may properly consider" under governing statutes such as the APA. *Fisher v. Government Employees Ins. Co.*, 762 A.2d 35, 38 n.7 (D.C. 2000).

Dock Co., 514 U.S. 122, 126 (1995), and is affected "by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme." *Id.* At 127 (internal quotation omitted). Thus, the phrase as it is used in the election regulations must be interpreted within the context and spirit of those regulations, unconstrained by Article III and the incorporation of those concepts into the DC APA.

The question of what "any party adversely affected" means in the context of 3 DCMR § 3705.4 is a question of first impression for this Court. Referring to the dictionary definition of "adverse" (the word actually used in the regulation), rather than the word "aggrieved" as the Board did, we find that a party who is adversely affected by an agency order is someone who participated in the agency proceeding and has "an opposing or contrary interest, concern, or position." Black's Law Dictionary (8th ed. 2004) (definition of "adverse"). Under this definition, petitioners have standing to seek Board review because they participated in the agency proceeding and have an interest or position opposing that of the OCF.

This reading of the phrase is bolstered by the regulation's context and the statutory scheme of which it is a part. Immediately preceding § 3705.4, section 3703.2(b) provides that an OCF investigation can be initiated by a complaint from "*any* employee or resident of the District of Columbia" (emphasis added). Read as a whole, the regulations demonstrate an "intent to cast the standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998) (construing to a similarly-worded election statute allowing any person to file a complaint with an agency and any aggrieved party to appeal that decision).

Even more important, the statute creating the OCF and the Board make plain that the OCF is simply an administrative subdivision of the Board that does not have the authority to make final decisions. The Director of the OCF is not appointed by the Mayor and confirmed by the Council; he or she is appointed by the Board and serves at the Board's pleasure. D.C. Code § 1-1103.01(a). The Board, not the OCF, issues and amends the OCF's regulations. D.C. Code § 1-1103.01(b-1)(1). The Board, and not the OCF, prepares an annual report of the OCF's performance. D.C. Code § 1-1103.01(b-1)(2). Only the Board, and not the OCF, can refer a case of apparent violation for prosecution. D.C. Code § 1-1103.01(c). Any civil litigation must be maintained by the Board in the name of the Board, and not in the name of the OCF. *Id.* The Director of the OCF "shall have no authority concerning the enforcement" of the election laws, but can only make recommendations to the Board. *Id.* The OCF cannot even issue a subpoena except "upon the approval of the Board." D.C. Code § 1-1103.02(a)(2). In short, the OCF is just an office within the Board of Elections, and its "decisions" are only recommendations to the Board. That is why a person can obtain Board review of an OCF decision simply by making "a request." 3 DCMR § 3705.4. The clear import of the statutory scheme is that the OCF is not an agency empowered to take final administrative action; final action must come from the Board. Within that statutory scheme, it makes no sense to erect Article III-like obstacles to review of OCF decisions by the Board.

The Board's interpretation ignores the regulatory and statutory scheme, and instead creates an unbalanced hurdle that complainants must surmount. Under the Board's ruling, only candidates who are the subject of complaints and who lose before the OCF can request review by the Board. Erroneous OCF decisions that the law has been

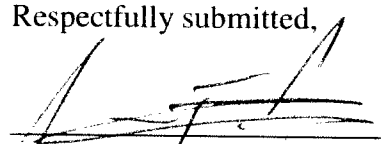
violated can be reviewed, but erroneous OCF decisions that the law has not been violated cannot be reviewed. Such a one-sided construction would severely undermine the law's purpose of insuring that elections are conducted according to law, for the OCF is certainly no less likely to err in favor of a candidate than in favor of a complaining voter or resident.

Accordingly, this court should interpret the phrase "any party adversely affected" in 3 DCMR § 3705.4 to include any person who participated in the OCF proceeding and whose position was rejected by the OCF. Petitioners in this case meet that simple and fair standard.

CONCLUSION

For the reasons explained above, the decision of the Board of Elections and Ethics should be reversed and the case remanded to the Board so that it may review the decision of the Office of Campaign Finance on its merits.

Respectfully submitted,



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June 29, 2009

CERTIFICATE OF SERVICE

I hereby Certify that a copy of the foregoing Brief for the Petitioners was served by first-class mail, postage pre-paid, this 29th day of June, 2009, upon:

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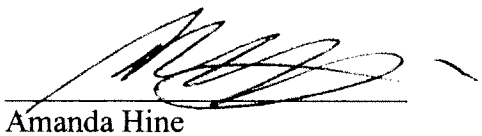

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