UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STACIA HALL, *et al.*, **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA BOARD OF ELECTIONS,** **Defendant.**	**No. 1:23-cv-01261-ABJ**

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

The District of Columbia (District) on behalf of Defendant District of Columbia Board of Elections moves this Court under Federal Rules of Civil Procedure 12(b)(1) and (6) to dismiss Plaintiffs' Complaint [1-1] for lack of jurisdiction or failure to state a claim. A memorandum of points and authorities and proposed order are attached. Because this Motion is dispositive, the District has not sought Plaintiffs' consent. *See* LCvR 7(m).

Date: June 7, 2023.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Since the dawn of the Republic, federal, state, and local governments have extended the franchise to otherwise qualified residents—not just citizens. Like many jurisdictions before it, the District recently amended its election laws so all qualified residents, regardless of citizenship, may vote in elections for District offices and measures. Casting aside the historical pedigree of this legislation, Plaintiffs (U.S. citizens) attack the constitutionality of the District's extension of the franchise under a smattering of ahistorical and unsound theories. In doing so, Plaintiffs urge this Court to strip the right to vote from tens of thousands of qualified Washingtonians.

The Court should reject Plaintiffs' challenge. At the threshold, Plaintiffs lack standing because their only alleged injury—that the votes of citizens will be "diluted" by expanding the electorate—is a classic generalized grievance and, in any event, not the type of vote dilution courts recognize as sufficient for standing. On the merits, all claims fail—as a matter of constitutional history and constitutional law. For starters, the long history of unquestioned enfranchisement of non-citizens makes it highly doubtful that the practice is somehow now unconstitutional, and governing precedent only reinforces the point. Plaintiffs' vote dilution theory is not the stuff of substantive due process as it does not rest on a carefully defined "fundamental right," and Plaintiffs have alleged no facts suggesting that non-citizen voting fails rational basis review. Plaintiffs' equal protection claims fare no better because the District's facially neutral election laws do not discriminate against anyone, and nothing in Plaintiffs' Complaint suggests that the legislature acted with discriminatory intent. Finally, Plaintiffs' "right to citizen self-government" claim lacks merit for myriad reasons, not the least of which is that no such judicially enforceable right exists. Thus, the Court should dismiss the Complaint for lack of standing or failure to state a claim.

BACKGROUND

District law prescribes qualifications to vote. D.C. Code §§ 1-1001.07(a), 1-1001.02(2). Those qualifications had included, as relevant here, that the voter was a U.S. citizen, had resided in the District prior to the election, and did not claim voting residence or the right to vote in any state or territory. *Id.* § 1-1001.02(2)(B), (C) (2022). Recently, the Council of the District of Columbia (Council) unanimously passed (save one absent vote) the Local Resident Voting Rights Amendment Act of 2022 (the Act), D.C. Law 24-242, 69 D.C. Reg. 14,601 (Dec. 2, 2022), which amends these voter qualifications. Namely, the Act removes a citizenship requirement for "local election[s]," *i.e.*, elections for District government positions (like the Mayor) as well as initiatives, referenda, recalls, or charter amendment measures. *Id.* § 2 (codified at D.C. Code § 1-1001.02(2)(B), (34)). The Act further provides that District voters may not claim voting residence or the right to vote in another country. *Id.* (codified at D.C. Code § 1-1001.02(2)(C)). In sum, District law now allows all residents to vote in local elections, if they meet other existing requirements.

In passing the Act, the Council explained that its purpose was "to expand voting rights in local elections." Council of the Dist. of Columbia, Comm. on the Jud. & Pub. Safety, *Report on B24-0300, the "Local Resident Voting Rights Amendment Act of 2022"* 2 (Sept. 27, 2022) (Comm. Rep.). The Council found that "[n]on-citizen residents are neighbors, friends, colleagues, classmates, business owners, and District taxpayers, and they are impacted by local laws just as much as citizen residents are." *Id.* at 3. Accordingly, the Council concluded that "[n]on-citizens, like citizens, deserve the opportunity to have a voice in the issues that affect them and to participate in electing the representatives who make decisions on their behalf." *Id.*

The Council also considered whether the District's Board of Elections (Board) could effectively administer the Act. *Id.* at 8–9; *see* D.C. Code § 1-1001.05 (delegating responsibility

for administering elections to the Board). In particular, the Council considered whether only legal permanent residents should be allowed to vote. Comm. Rep. 7. The Council decided, however, to extend the right to vote to all non-citizens, regardless of specific immigration status. *Id.* The Council reasoned that doing so was "easier to administer" for the Board because the Board would not need to verify complex or changing immigration statuses. *Id.* at 8. Further, the Council explained that extending the vote to all non-citizens prevented the Council "from having to distinguish between 'worthy' and 'unworthy' noncitizens based on immigration status, an arbitrary category as it relates to participation and investment in the community." *Id.*

All said, the Council heard from more than 50 members of the public when considering the bill. *Id.*, Attach. C. But Plaintiffs were not among them. *Id.* Plaintiffs are seven U.S. citizens who reside and are registered to vote in the District, two of which were one-time, unsuccessful candidates for District office. Compl. ¶¶ 13–19. Instead of participating in the democratic process, Plaintiffs sued the Board to challenge the Act in the Superior Court of the District of Columbia. *Id.* ¶¶ 1–8.

Plaintiffs allege that the Act violates (1) the substantive due process guarantee of the Fifth Amendment, (2) the equal protection guarantee of the Fifth Amendment by discriminating based on citizenship, (3) the equal protection guarantee of the Fifth Amendment by discriminating based on national origin, and (4) the right of citizens to self-government of an unspecified constitutional provision. Compl. ¶¶ 55–70. Plaintiffs seek declaratory and injunctive relief. *Id.*, Prayer. The District removed to this Court. Notice of Removal [1].

LEGAL STANDARDS

A complaint must be dismissed for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1), (h)(3). To survive a Rule 12(b)(1) motion, the plaintiff bears the burden of establishing jurisdiction. *Bronner on Behalf of Am. Stud. Ass'n v. Duggan*, 962 F.3d 596, 602 (D.C. Cir.

2020). Generally, the Court accepts "well-pled factual allegations" while "disregard[ing] any legal conclusions, legal contentions couched as factual allegations, and unsupported factual allegations." *Gulf Coast Mar. Supply, Inc. v. United States*, 867 F.3d 123, 128 (D.C. Cir. 2017). If, however, the defendant disputes the complaint's factual allegations, "the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Feldman v. FDIC*, 879 F.3d 347, 351 (D.C. Cir. 2018) (internal quotation marks omitted) (quoting *Phoenix Consulting v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)).

A complaint also must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts need not accept as true conclusory "assertions devoid of further factual enhancement," *Iqbal*, 556 U.S. at 679, or "legal conclusions," *Pueschel v. Chao*, 955 F.3d 163, 166 (D.C. Cir. 2020).

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs fail at the threshold to establish standing. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) ("[A] plaintiff seeking relief in federal court must first demonstrate that he has standing to do so . . . ."). "A plaintiff has standing only if he can 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Plaintiffs here allege only one theory of standing: by allowing non-citizen residents to vote in future District elections, the Act dilutes the voting

power of citizen-residents like Plaintiffs. Compl. ¶¶ 34, 46–47, 51. That theory is defective for several reasons.

Most obviously, the Complaint lacks basic allegations required for standing to seek prospective relief, as it does not have "any allegation or showing as to, at a bare minimum, whether any of the plaintiffs intend to vote" in a future election. *Yazzie v. Hobbs*, 977 F.3d 964, 967 (9th Cir. 2020) (per curiam). Nor does the Complaint have any allegation that any plaintiff intends to run for District office in a future election. *See Carney v. Adams*, 141 S. Ct. 493, 500 (2020) (holding that plaintiff lacked standing to challenge judicial selection system when he did not show that he intended to apply). Plaintiffs cannot challenge an electoral system when their Complaint does not even allege that they intend to participate in elections.

But even were that fatal deficiency cured, Plaintiffs would still lack standing as they have not alleged "a personal stake in the outcome [of this case], distinct from a generally available grievance about government." *Gill*, 138 S. Ct. at 1923 (internal quotation marks and citations omitted). Plaintiffs must allege a harm that is "concrete and particularized" to *them*, not "harm to [their] and every citizen's interest in proper application of the Constitution and laws." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 573 (1992). Every citizen-voter in the District has the same interest as Plaintiffs, and all could press the same theory. As a result, Plaintiffs' allegations are "precisely the kind of undifferentiated, generalized grievance" that fails to establish standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

Cases surrounding the 2020 election are illustrative. In those cases, plaintiff voters and candidates from across the map challenged changes in election laws allowing for more mail-in ballots to be counted. *E.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1311–12 (11th Cir. 2020); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 353, 356 (3d Cir. 2020), *vacated as moot*

sub nom. Bognet v. Degraffenreid, 141 S. Ct. 2508 (2021); *Martel v. Condos*, 487 F. Supp. 3d 247, 248–49, 253 (D. Vt. 2020). The plaintiffs alleged that these changes injured them because the allegedly unlawful or potentially fraudulent mail-in votes would dilute their votes. *E.g.*, *Wood*, 981 F.3d at 1314; *Bognet*, 980 F.3d at 353; *Martel*, 487 F. Supp. 3d at 253. Courts held that these plaintiffs lacked standing because "'no single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'" *Wood*, 981 F.3d at 1314 (quoting *Bognet*, 980 F.3d at 356). As these courts explained, "[i]f every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury." *Martel*, 487 F. Supp. 3d at 253.

Plaintiffs' theory here faulters for similar reasons. In the 2020 election cases and here, the government expanded the electorate (there, by allowing for more mail-in votes, here, by allowing votes by all residents), the plaintiffs alleged that this expansion was unconstitutional or unlawful, and the plaintiffs alleged that their injury was vote dilution by the additional votes. So the theory here should fail as previous ones did because Plaintiffs' votes will not be diluted in any particularized way.

Moreover, Plaintiffs misunderstand when vote dilution gives rise to a cognizable injury. "[V]ote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). For example, the Supreme Court has recognized that vote dilution may occur when a state draws legislative maps to either "pack" a minority population into one district (thus depriving them of influence in other districts) or "crack" a minority population across several districts (thus depriving them of majorities in a district). *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993). "[H]arm arises

from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931.

Plaintiffs, however, do not suffer similar harm to voters in packed or cracked districts. Under the Act, votes of citizens weigh the same as votes of non-citizens. The Act does not classify citizens' votes differently or place them at a disadvantage like in packed or cracked districts. *See Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (recognizing an injury where a "classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties"); *Daughtrey v. Carter*, 584 F.2d 1050, 1056 (D.C. Cir. 1978) ("*Baker v. Carr* does not make every alleged dilution of voting rights a sufficient injury to confer standing."); *id.* (holding that plaintiffs lacked standing to bring vote-dilution claim against nationwide expansion of voting rights for draft evaders who had been granted amnesty). "Although [citizens], under Plaintiffs' theory, should make up 100% of the total votes counted and [non-citizens] 0%, there is simply no differential weighing of the votes." *Bognet*, 980 F.3d at 358–59. Absent such differential weighing, "this is not the sort of vote dilution theory that courts have found to support standing." *Hudson v. Haaland*, 843 F. App'x 336, 338 (D.C. Cir. 2021) (per curiam). This Court should dismiss for lack of jurisdiction.

II. The Complaint Fails to State a Claim.

If the Court reaches the merits, the Complaint fails to state a claim. The long, accepted practice of non-citizen enfranchisement should foreclose any claim that the practice is unconstitutional. If history were not enough, Plaintiffs' claims lack merit under governing law.

A. All Claims Fail Because Non-Citizen Voting Has Long Been Accepted as Constitutional.

Plaintiffs allege that non-citizen voting in local elections is unconstitutional, but a long history of non-citizen voting refutes their claims. "When faced with a dispute about the Constitution's meaning or application, '[l]ong settled and established practice is a consideration of great weight.'" *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see also Chiafalo v. Washington*, 140 S. Ct. 2316, 2326–39 (2020) (relying on history and tradition to uphold the constitutionality of states penalizing faithless electors who break their pledge to vote for the state's preferred candidate). For example, the Supreme Court last Term unanimously rejected a First Amendment challenge to a college board's censure of a member largely "because elected bodies in this country have long exercised the power to censure their members." *Houston Cmty. Coll. Sys.*, 142 S. Ct. at 1259. Similarly, here, it cannot be right that non-citizen voting is unconstitutional, under any of the constitutional provisions invoked by Plaintiffs, because non-citizen voting "has been open, widespread, and unchallenged since the early days of the Republic." *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment).

At the Founding, non-citizens voted in American elections in most jurisdictions. *E.g.*, Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 16–17 (2006), https://tinyurl.com/5aepa5bd. "The practice of noncitizen voting first appeared in the colonies, which generally required only that voters be local inhabitants or residents, and not British citizens." Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1399 (1993) (internal quotation marks and citation omitted). "Alien suffrage survived the Revolution in 1776 as many states granted foreigners state 'citizenship,' . . . ." *Id.* at 1400.

The Founders themselves wrote the voting rights of residents, regardless of citizenship, into the first state constitutions. These constitutions inform the federal Constitution's meaning today. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008) (stating that right-to-bear-arms provisions in seven early state constitutions were "strong evidence" of "how the founding generation conceived of the right"). The 1780 Massachusetts Constitution, written by John Adams, provided:

> Every male person being twenty-one years of age, and resident in any particular town in this commonwealth, for the space of one year next preceding, having a freehold estate within the same town, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to vote in the choice of a representative or representatives for the said town.

Mass. Const. pt. 2, ch. I, § 3, art. IV (1780). This constitution thus granted the franchise based on residency, gender, age, and property ownership—not citizenship.[1] A majority of the original states had near identical constitutional provisions. N.J. Const. art. IV (1776); Md. Const. art. II (1776); N.C. Const. art. VII–IX (1776); N.Y. Const. art. VII (1777); S.C. Const. art. I, § 4 (1790); Del. Const. art. IV, § 1 (1792); N.H. Const. pt. 2, art. 27 (1792). Further, several of the first states to enter the Union had such provisions. Ky. Const. art. III, § 1 (1792); Tenn. Const. art. III, § 1 (1796); Ohio Const. art. IV, § 1 (1802); Ill. Const. art. II, § 27 (1818).

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[1] Of course, some of these conditions, like gender and age, would be unconstitutional today. *See, e.g.*, U.S. Const. amend. XV, XIX, XXVI. And it cannot be overlooked that states for much of the Nation's history conditioned the franchise on race. Hayduk, *supra*, at 16. It took years, war, constitutional amendments, popular movements, and legislation to extend the franchise to all races; and the project continues today. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2351–54 (2021) (Kagan, J., dissenting). By citing the provisions above, the District does not condone their unconstitutional and abhorrent conditions. But what is important for this case is that none of these provisions conditioned voting on citizenship, as Plaintiffs suggest is constitutionally required. *Cf. Kanter v. Barr*, 919 F.3d 437, 458 & n.7 (7th Cir. 2019) (Barrett, J., dissenting) (relying on laws disarming slaves and Native Americans to determine the meaning of the Second Amendment while noting that such laws would be unconstitutional under other amendments today); *United States v. Jackson*, --- F.4th ----, ----, No. 22-2870, 2023 WL 3769242, at *5 (8th Cir. June 2, 2023) (same).

Some early constitutions exalted attachment to the community as the important qualification for voting—not citizenship status. The Virginia Constitution's Declaration of Rights, written principally by George Mason, proclaimed that "all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage." Va. Decl. of Rts. § 6 (1776). Other early states had nearly identical provisions. Pa. Decl. of the Rts. of the Inhabitants of the Commw. art. VII (1776); Vt. Const. ch. 1, art. 8 (1793). George Washington echoed these sentiments, writing that "[t]he bosom of America is open to receive not only the opulent & respectable Stranger, but the oppressed & persecuted of all Nations & Religions; whom we shall wellcome to a participation of all our rights & previleges." *Letter from G. Washington to J. Holmes* (Dec. 2, 1783), *in* Founders Online, Nat'l Archives, https://tinyurl.com/2c9995kb. All said, twelve of the original thirteen states allowed non-citizen voting in the Founding period. Hayduk, *supra*, at 19–20. Thus, it is implausible that the Founding generation would have thought non-citizen enfranchisement unconstitutional when the Founders themselves voted alongside non-citizens.

The early federal government also allowed non-citizen voting. Raskin, *supra*, at 1402–03. For example, the Northwest Ordinance enacted by the first Congress provided for elections in the Northwest Territory and that "[1] a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or [2] the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a) (1789). The Ordinance thus "gave freehold aliens who had been residents for two years the right to vote for representatives to territorial legislatures." Raskin, *supra*, at 1402. To take another example, "[i]n the various congressional acts authorizing the election of representatives to statewide constitutional

conventions in Ohio, Indiana, Michigan and Illinois, Congress deliberately extended the right to vote to aliens." *Id.* Such actions by the first and early Congresses "provide[ ] contemporaneous and weighty evidence of the Constitution's meaning." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (internal quotation marks omitted) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)); *see also Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011) (holding that evidence of early congressional enactments adopting recusal rules was "dispositive" against claim that recusal rules were unconstitutional).

Over the next two centuries, non-citizen enfranchisement's prevalence fluctuated, but its constitutionality was never questioned. "During the long history of alien suffrage, neither the Supreme Court nor any lower federal court or state court ever found the practice unconstitutional." Raskin, *supra*, at 1417. Rather, courts in the early Republic recognized and enforced the right of non-citizens to vote, as prescribed by local or state law. *E.g.*, *Stewart v. Foster*, 2 Binn. 110 (Pa. 1809); *Spragins v. Houghton*, 3 Ill. 377, 408 (1840).

In fact, and contrary to Plaintiffs' suggestion, Compl. ¶ 53, the Supreme Court has suggested at several points that the practice *is* constitutional, *see* Raskin, *supra*, at 1417 (noting the Court had "explicitly and repeatedly signalled its acceptance" of "noncitizen voting"). In 1874, the Court observed that "citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage," and in at least ten states, "persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote." *Minor v. Happersett*, 88 U.S. 162, 177 (1874). In the 20th century, the Court explained:

> the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, . . . provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized . . . .

Pope v. Williams, 193 U.S. 621, 632 (1904) (internal citation omitted). More recently, the Court stated that citizenship is a "*permissible* criterion," thus implying that citizenship is not a *necessary* criterion to voting. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (emphasis added). These statements from the Supreme Court cannot be squared with any theory of Plaintiffs.

In sum, local, state, and federal governments have enfranchised non-citizens since the Founding and throughout American history. All the while, courts—including the Supreme Court—have either endorsed non-citizen voting or at least never questioned its constitutionality. And in recent years, localities have reinvigorated the practice. As of April 2023, more than a dozen municipalities across the country have allowed noncitizens to vote in local elections, including many in neighboring Maryland. Ballotpedia, *Laws Permitting Noncitizens to Vote in the United States*, https://tinyurl.com/2kzfpfvp. The District is just the latest jurisdiction to continue the trend. Comm. Rep. 5–6. Given this "[l]ong settled and established practice," Plaintiffs are wrong to contend that the Constitution, via any provision, prohibits non-citizen enfranchisement laws. *Houston Cmty. Coll. Sys.*, 142 S. Ct. at 1259 (internal quotation marks omitted) (quoting *The Pocket Veto Case*, 279 U.S. at 689). Even "[i]f this longstanding practice does not 'put at rest' the question of the Constitution's meaning for the dispute before [the Court], it surely leaves a 'considerable impression.'" *Id.* at 1260 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819)).

B. <u>The Substantive Due Process Claim Fails.</u>

In addition to having no historical foothold, Plaintiffs' claims lack merit under settled judicial precedent, starting with substantive due process. Plaintiffs' substantive due process claim relies on the theory that "diluting the votes of U.S. citizens by enfranchising noncitizens infringes on Plaintiffs' fundamental right to vote." Compl. ¶ 57. But that is the same as their Equal Protection Clause claim, *id.* ¶ 61, and when one constitutional provision already covers a

particular theory, plaintiffs cannot invoke "the more generalized notion of 'substantive due process,'" *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *see also Elkins v. District of Columbia*, 690 F.3d 554, 562 (D.C. Cir. 2012). The Court should thus dismiss this claim as duplicative.

In any event, Plaintiffs have not alleged a substantive due process violation. *See, e.g.*, *Fraternal Ord. of Police v. District of Columbia*, 45 F.4th 954, 962 (D.C. Cir. 2022) ("The doctrine of substantive due process is narrow."). Substantive due process protects fundamental rights—that is, liberty interests "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Laws infringing such rights must satisfy strict scrutiny, but laws implicating other assertedly unenumerated rights need only pass rational basis review. *Id.* at 728. Here, Plaintiffs' claim fails at every turn.

1. Plaintiffs Have Not Invoked a Carefully Defined Fundamental Right.

Plaintiffs cannot establish that a right is fundamental, much less that it has been infringed, without first providing a sufficiently "careful description" of the asserted right. *Glucksberg*, 532 U.S. at 720. This "threshold requirement of a carefully described right" is critical to ensuring "responsible decisionmaking" in the "uncharted area" of substantive due process. *Abigail All. for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 701 n.5, 702 (D.C. Cir. 2007) (en banc) (internal quotation marks omitted). Under this framework, a "broad generalization" will not suffice. *Id.* at 701 n.5. The right instead must be defined with specific reference to the concrete circumstances of the case in which it is invoked. *See Reno v. Flores*, 507 U.S. 292, 300, 302 (1993); *Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148, 1155–56 (D.C. Cir. 2004) (Roberts, J.) (refusing to "ignore" a "plainly pertinent fact" in defining "the asserted fundamental right"). Otherwise, plaintiffs cannot hope to show the violation of a fundamental

constitutional right. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258 (2022) (rejecting "appeals to a broader right" "at a high level of generality").

Several cases help to illustrate this careful description requirement. In *Glucksberg*, the plaintiffs challenged a state law prohibiting physician-assisted suicide on the theory that it violated the fundamental "right to die." 521 U.S. at 722. But the Supreme Court rejected that formulation and instead defined the interest more narrowly as "a right to commit suicide with another's assistance." *Id.* at 724. Likewise, in *Flores*, the plaintiffs argued that detaining undocumented juvenile-arrestees who have no domestic guardians violated the fundamental "right to 'freedom from physical restraint.'" 507 U.S. at 299–300. Yet the Court rejected that definition, too, in favor of the narrower "right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.* at 302. As these decisions make clear, the right asserted in a substantive due process case must be defined with precision in light of the nature of the challenged law and the specific facts alleged. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (focusing "on the allegations in the complaint to determine how petitioner describes the constitutional right at stake").

Plaintiffs here cannot pass this threshold test. They appear to invoke a "right to vote." Compl. ¶ 45. But that abstract description of their asserted interest ignores the context of this suit and thus is too broad to satisfy the "careful description" requirement. *Glucksberg*, 521 U.S. at 720–24; *Flores*, 507 U.S. at 302; *see Hedgepeth*, 386 F.3d at 1155–56 (rejecting plaintiff's broad "right to freedom from restraint" in favor of "the right of freedom of movement when there is probable cause for arrest"). It is also plainly meritless, as "the right to vote, *per se*, is not

a constitutionally protected right." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (internal quotation marks omitted) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)). Properly formulated, the right underlying Plaintiffs' due process claim cannot be, simply, the right to vote, but must instead be defined more narrowly as, for example, a purported right to have one's vote counted without the presence of non-citizens' votes. *See* Compl. ¶¶ 45–46, 57 (alleging that non-citizens' votes will "dilute" the weight of citizens' votes).

That novel interest, however, has little basis in American history or tradition, and certainly lacks the pedigree needed to be deemed "fundamental." *See Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (emphasizing that "the mere novelty" of "a claim is reason enough to doubt that 'substantive due process' sustains it" (quoting *Flores*, 507 U.S. at 303)). As discussed, non-citizen voting has occurred in this country since its founding, and the practice has been recognized as one that the Constitution permits for more than a century. *See* Argument § II.A, *supra*. Given that extensive history, Plaintiffs cannot plausibly claim to possess a deeply rooted individual right to exclude non-citizens from the franchise and therefore cannot plausibly allege a substantive due process violation. *See Osborne*, 557 U.S. at 72 (rejecting substantive due process claim where "no long history" supported the asserted right); *Fox v. District of Columbia*, 851 F. Supp. 2d 20, 32 (D.D.C. 2012) (Berman Jackson, J.) (rejecting the argument that a "post-and-forfeit policy" violated "plaintiffs' substantive due process rights" given "the policy's history and prevalence").

2. <u>The Act Withstands Any Form of Scrutiny.</u>

Because the Act does not burden any fundamental right, it need only satisfy rational basis review. *Glucksberg*, 521 U.S. at 721; *see May v. Town of Mountain Village*, 132 F.3d 576, 580 (10th Cir. 1997) (applying "rational basis test" in upholding "nonresident voting provisions");

Duncan v. Coffee County, 69 F.3d 88, 94 (6th Cir. 1995) (similar, agreeing with the Fifth and Eleventh Circuits). Under that standard, laws are presumptively constitutional and challengers have the "burden 'to negative every conceivable basis which might support' the law." *Gordon v. Holder*, 721 F.3d 638, 656 (D.C. Cir. 2013) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993))). In other words, rational basis review provides that a challenged law "must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis' for the legislative choice." *Sanchez v. Off. of State Superint. of Educ.*, 45 F.4th 388, 396 (D.C. Cir. 2022) (quoting *Beach Commc'ns*, 508 U.S. at 313), *cert. denied*, 143 S. Ct. 579 (2023).

The Act here easily clears this low bar, and nothing in Plaintiffs' Complaint suggests otherwise. As the legislative history makes clear, the Council reasonably concluded that "expand[ing] voting rights in local elections" and granting non-citizens "the opportunity to have a voice in the issues that affect them" would improve democracy in the District. Comm. Rep. 3, 7. That egalitarian choice was eminently rational and unquestionably related to the legitimate government interest in expanding democratic participation. *See Duncan*, 69 F.3d at 94 (finding that the expansion of the franchise "is not irrational" if the newly included voters have "a substantial interest" in the pertinent elections). Nor is there anything fundamentally unfair about the Council's considered judgment to enfranchise non-citizens given that the Act preserves Plaintiffs' ability to cast their own ballots as they wish. *See Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998) (holding that a method of counting ballots caused no "disenfranchisement or meaningful vote dilution" or "fundamental unfairness" when "every ballot submitted was counted and no one was deterred from going to the polls"); *Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 828 (1st Cir. 1980) (per curiam) (similar).

Indeed, even were a fundamental right at stake, the Act would also satisfy strict scrutiny. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (holding that strict scrutiny requires a law "be narrowly tailored, not that it be 'perfectly tailored'" (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (plurality op.))). The District has a compelling interest in democratic self-government, *i.e.*, defining its political community and ensuring that members of that community have a voice in their government. *See Utah Republican Party v. Cox*, 892 F.3d 1066, 1085 (10th Cir. 2018) ("How could it not be true in a representative democracy such as ours that the State has a strong—even compelling—interest in ensuring that the governed have an effective voice in the process of deciding who will govern them?"). And the Act is narrowly tailored to achieve that interest by extending the franchise to Washingtonians who live in and contribute to the District community, particularly considering immigration status is not determinative of whether an individual has an interest in the governance of the community, and given that distinguishing voter eligibility based on immigration statuses (which are complex and changing) would be difficult for the Board to administer. *See* Comm. Rep. 3–4, 7–8. For these reasons, Plaintiffs cannot state a substantive due process claim.

C. The Equal Protection Claims Fail.

Plaintiffs' claims that the Act discriminates against them based on citizenship or national origin in violation of equal protection fail because the Act is facially neutral and has no discriminatory purpose. *See* Compl. ¶¶ 59–66.

1. The Act Is Facially Neutral.

Nothing on the face of the Act treats citizens differently or worse than non-citizens. "[F]acially neutral" actions that "serve legitimate government purposes" "do not run afoul of the Equal Protection Clause." *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 42 (D.C. Cir. 2016). A law is facially neutral when it does not, on its face, treat one class better or differently

from another. *See In re Navy Chaplaincy*, 738 F.3d 425, 428 (D.C. Cir. 2013) (treating policies as facially neutral when none "on its face prefers any religious denomination"). These principles apply with full force to equal protection claims premised on alleged vote dilution. *See, e.g.*, *May*, 132 F.3d at 580 & n.8 (applying rational basis review where legislation expands the right to vote without weighing votes differently); *Duncan*, 69 F.3d at 94 n.3 (explaining that "mere expansion of the class of persons eligible to vote does not, *per se*, imply unconstitutional vote dilution").

Here, all the Act says is that a qualified voter "[i]s a citizen of the United States; except, that this subparagraph shall not apply in a local election." Act § 2. This provision does not single out citizens for disfavored treatment or non-citizens for preferential treatment. The Act did not change citizens' voting rights at all, and it says nothing about national origin. In fact, citizens still receive *more* favorable treatment than non-citizens because they are allowed to vote in local *and* federal elections.[2] Plaintiffs therefore cannot plausibly allege that the Act is facially discriminatory against citizens. As a result, because the Act satisfies rational basis review (as well as strict scrutiny), *see* Argument § II.B.2, *supra*, Plaintiffs cannot claim any violation of equal protection.

2. Plaintiffs Have Not Plausibly Alleged Facts Suggesting That the Act Has a Discriminatory Purpose.

Nor can Plaintiffs plausibly allege that the Act has a discriminatory purpose. When challenging a facially neutral law under equal protection principles, plaintiffs must show that the law is discriminatory in both its effect and purpose. *United States v. Holton*, 116 F.3d 1536, 1548 (D.C. Cir. 1997) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The same

[2] Under federal law, the District cannot allow non-citizens to vote in federal elections. 18 U.S.C. § 611.

principles govern vote dilution claims. As the Supreme Court has explained, equal protection "prohibits *intentional* 'vote dilution.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (emphasis added) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66–67 (1980) (plurality op.)). Claimants asserting vote dilution therefore cannot simply allege that a law has the effect of diluting their votes; they must plausibly allege facts showing that the *purpose* of the law was to dilute their votes. *See id.*; *Rogers v. Lodge*, 458 U.S. 613, 617–18 (1982) (requiring vote-dilution plaintiffs to show that the challenged laws were "'conceived or operated as purposeful devices to further [invidious] discrimination'" (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971))); *Bolden*, 446 U.S. at 67 (rejecting notion that "disproportionate effects alone may establish a claim of unconstitutional racial voter dilution").

Plaintiffs in this case, accordingly, cannot allege a viable equal protection claim simply by asserting that the Act may lead to vote dilution for citizens. Compl. ¶¶ 51–52. They must also plausibly allege that the Council acted with discriminatory intent. Yet nothing in the legislative history—nor anything Plaintiffs put forth in the Complaint—suggests that a purpose of the Act was to dilute citizens' votes or otherwise disadvantage citizens. Indeed, it strains reason to think that the District's popularly elected legislative body intended to harm the vast majority of the District's population, citizens and natural born-Americans. *See* Comm. Rep. 3 (estimating that 15% of the District's population are immigrants). Instead, the Council's purpose was to "expand[ ] voting rights and improve[ ] access to democracy for all District residents," *id.* at 2—a goal of equal treatment for all qualified Washingtonians, which is the exact opposite of an equal protection violation. Although Plaintiffs allege that the "primary motive" "was to aid" immigrants, Compl. ¶ 34, aiding immigrants is not the same as discriminating against non-immigrants. Considering the clear legislative history and "spare facts and allegations" in the

Complaint, the Court cannot infer that the Council was "motivated by discriminatory intent or purpose," so the equal protection claims should be dismissed for this reason too. *Atherton v. D.C. Off. of the Mayor*, 567 F.3d 672, 688 (D.C. Cir. 2009).

Plaintiffs' reliance on *Brown v. Board of Commissioners*, 722 F. Supp. 380 (E.D. Tenn. 1989), is misplaced. Compl. ¶ 47. *Brown* agreed that expansions of the franchise receive only rational basis review. 722 F. Supp. at 398. But *Brown* found that a city charter allowing non-resident property owners to vote in municipal elections lacked a rational basis because "it contain[ed] no limitation of the number of people who can 'vote' on a piece of property or no limitation as to any minimum property value required for the exercise of the franchise." *Id.* at 399. For example, "as many as 23 nonresidents have been registered to vote on a single piece of property." *Id.* As a result, the charter "permit[ted] a nonresident who owns a trivial amount of property to vote in municipal elections," and because such non-residents lacked a "substantial interest" in municipal affairs, the charter did "not further any rational governmental interest." *Id.* Such irrationality is not present here. As the Council found based on empirical data, non-citizen residents have a substantial interest in District elections because, among other things, they reside in the District, pay taxes to the District, work jobs in the District, and send their children to District schools. Comm. Rep. 3–4. Plaintiffs' only case does not support them. The Court should dismiss Plaintiffs' equal protection challenges.

D. <u>The "Right to Citizen Self-Government" Claim Fails.</u>

Finally, Plaintiffs allege that the Act violates their "constitutional right to citizen self-government." Compl. ¶ 68. But Plaintiffs fail to identify any source in the Constitution—or elsewhere—that provides for such a right. Such an omission flunks the most basic test of pleading, failing to provide a "short and plain statement of the claim" or otherwise give the

District "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotation marks and citations omitted).

Besides, there is no such thing as a freestanding, judicially enforceable "right to citizen self-government." Historically, "popular sovereignty in the United States has been a flexible notion, which has not restricted political power by a rigid definition of the People, and certainly not by the legal category of national citizenship." Gerald E. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 145 (1996). And legally, nothing in the Constitution "precludes the states from granting the franchise to noncitizens." Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. Rev. 54, 57 (1997); *see* Michael C. Dorf, *Equal Protection Incorporation*, 88 Va. L. Rev. 951, 977 n.78 (2002) (observing that "alien disenfranchisement" is not "constitutionally required"); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 Sup. Ct. Rev. 47, 85 & n.104 (recognizing that "[n]one" of the "constitutional amendments that touch on voting rights" "requires that the franchise be restricted to citizens").

Plaintiffs nonetheless allege that the "'right to citizen self-government' has been recognized in repeated holdings of the Supreme Court." Compl. ¶ 1. Yet they can muster only two inapposite cases to support their revisionist account—*Foley v. Connelie*, 435 U.S. 291 (1978), and *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982)—both of which involved *equal protection* challenges to state laws governing law-enforcement appointments. *Foley*, 435 U.S. at 300; *Cabell*, 454 U.S. at 444. Neither case references an independent constitutional right to "citizen self-government," and neither case suggests that allowing non-citizens to vote in local elections would be unconstitutional. Plaintiffs' inability to cite a single case, statute, or constitutional provision to support their claim confirms that it should be dismissed.

CONCLUSION

For these reasons, the Court should dismiss the Complaint for lack of jurisdiction or failure to state a claim.

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Respectfully submitted,

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