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 COMBINED RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY AND DECLARATION OF STACIA HALL

Months after the District's Motion to Dismiss [8] became ripe, Plaintiffs make a thinly veiled attempt to introduce a brand new theory of standing. Plaintiffs direct the Court's attention to the conclusion in *Fossella v. Adams*, --- N.Y.S.3d ----, No. 2022-05794, slip op. (N.Y. App. Div. Feb. 21, 2024), that candidates had standing to challenge New York City's non-citizen voting law because "those plaintiffs have 'a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast,' as '[a]n inaccurate vote tally is a concrete and particularized injury to candidates,'" *id.* at 11 (quoting *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020)). *See* Pls.' Not. of Supp. Auth. [16] at 1. In tandem with *Fossella*, Plaintiffs submit a declaration from one plaintiff, Stacia Hall, that states she is running for office in the District, Decl. of Pl. Stacia Hall [17] ¶ 9, and, echoing *Fossella*, "[a]s a potential officeholder I have an interest in ensuring that the votes tallied during District of Columbia elections reflect legally cast votes and not an inaccurate final vote tally," *id.* ¶ 14.

It appears that Plaintiffs are belatedly and surreptitiously trying to argue that this one plaintiff has candidate standing like the *Fossella* court recognized. But Plaintiffs never raised

this theory of standing before. Rather, their sole theory of standing was that "plaintiffs have standing because they allege an injury—dilution of *their votes*." Pls.' Opp'n to Def.'s Mot. to Dismiss [12] at 7 (emphasis added); *see also, e.g.*, *id.* at 5 ("Plaintiffs here have standing because the vote dilution injury they allege is not a general complaint about government but one particular to them as individual *voters* . . . ." (emphasis added)); *id.* at 6 ("[H]arm is particularized to each plaintiff, for each plaintiff's *vote* has been diluted." (emphasis added)). In other words, their theory of standing was that, as *voters*, their votes were diluted, not that, as *candidates*, they were injured by an inaccurate vote tally.[1]

"[O]rdinary rules of forfeiture apply to standing." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019). By failing to raise a candidate theory of standing in their opposition, Plaintiffs forfeited that theory. *Id.*; *see also Nguyen v. DHS*, 460 F. Supp. 3d 27, 34 (D.D.C. 2020). And it is especially wrong for Plaintiffs to belatedly introduce a declaration to bolster their new standing theory and attempt to cure their standing deficiencies. *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 615 (D.C. Cir. 2019); *Nguyen*, 460 F. Supp. 3d at 34.

Accordingly, the Court should decline to consider a candidate theory of standing, *Fossella*'s conclusion about candidate standing, and Hall's declaration. If, however, the Court is interested in considering the candidate theory of standing, the District respectfully requests the opportunity to file a short brief addressing that new theory. *See Nguyen*, 460 F. Supp. 3d at 34 (court would not consider untimely affidavits "when Defendants have had no opportunity to respond").

Date: March 11, 2024.

Respectfully submitted,

BRIAN L. SCHWALB

[1] Plaintiffs' original voter theory of standing was rejected by the *Fossella* court, for similar reasons to those advanced in the District's Motion to Dismiss. *Fossella*, slip op. at 8–10.

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