IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff-Appellant, v. MURIEL BOWSER, *et al.*, Defendants-Appellees.	No. 14-7067

DEFENDANT MURIEL BOWSER'S SUGGESTION OF MOOTNESS AND MOTION TO DISMISS

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INTRODUCTION

The legitimacy of federal judicial power derives in large part from the courts' respect for and adherence to the limits of federal jurisdiction. This case now exceeds those limits.

There is no longer a live controversy between the Council and the Mayor. The Council's claim against former Mayor Vincent Gray was based on his belief that the Budget Autonomy Act was invalid and his refusal to implement it. Because the Council's claim against Mayor Gray was personal to him, under controlling Supreme Court precedent it became moot upon the expiration of his term in office. Mayor Muriel Bowser's March 16, 2015 notice that she shares the Council's view that the Act is valid and, if the judgment restraining her actions is vacated, intends to comply with it confirms that the Council's claim against the Mayor is moot, and also moots the Mayor's counterclaims against the Council.

The separate controversy between the Council and the CFO is not ripe for judicial review. The claim and counterclaims involving the CFO are premised on the existence of a budget, passed in accordance with the Budget Autonomy Act that Congress does not affirmatively approve. Yet, for a number of reasons, such a budget might never come to pass. For instance, Congress might affirmatively approve the District's budget or affirmatively enact a different one, and either action would avoid any controversy between the Council and the CFO. A claim

like this one, which rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all'" is not ripe for review. *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted).

Absent a live controversy, this Court must dismiss the appeal. And because the party pursuing the appeal (the Council) played no part in the circumstances that rendered the case nonjusticiable, the judgment should be vacated. That result is supported by precedent and by this Court's appropriate respect for the District's political process. Because the federal courts lack subject matter jurisdiction over this case, which is both moot and unripe, and because this case was removed from the Superior Court by the defendants, 28 U.S.C. § 1447(c) compels a remand to the Superior Court, which will likely also dismiss the case as nonjusticiable under applicable District law.

ANALYSIS

I. THE CLAIMS INVOLVING THE MAYOR ARE MOOT

Article III demands that an actual controversy exist at all stages of the judicial process. U.S. Const. art. III, § 1; *see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994). Federal appellate courts therefore may not review the merits of a judgment that has become moot while awaiting review. *Id.* The claims in this case involving the Mayor are moot, and thus not subject to review, both because they were personal to former Mayor Gray, who is no longer

in office, and because Mayor Bowser's stated intent to carry out her duties as set forth under the Budget Autonomy Act has confirmed there is no longer any dispute between the District's Mayor and the Council.

Although cases brought against public officials in their official capacities will ordinarily continue against their successors upon their departure from office, cases based on a public official's personal positions or practices may instead be mooted upon the expiration of their term in office. *See, e.g., Spomer v. Littleton*, 414 U.S. 514, 522 & n.10 (1974). Such cases are not saved from mootness by the automatic substitution of a newly elected official. *See Network Project v. Corp. For Pub. Broad.*, 561 F.2d 963, 966 (D.C. Cir. 1977) ("While Federal Civil Rule 25(d)(1) provides for automatic substitution of a successor, . . . it will not keep alive an otherwise moot controversy."). To remain justiciable, such cases must be premised on allegations contained in the complaint that are either generalized enough to reach beyond the outgoing official or specific to the new official. *See Spomer*, 414 U.S. at 521-23; *Network Project*, 561 F.2d at 966-68. The Council's complaint against former Mayor Gray contains neither.

The Council's claim against Mayor Gray was personal to Gray. It was based on his express repudiation of the Budget Autonomy Act's validity and his refusal to enforce it. JA15. The Council supported its claim by citing a letter from Gray to the Council, in which he stated that he planned to "'direct all subordinate agency

District officials not to implement or take actions pursuant to the [Budget Autonomy Act;] . . . veto any [fiscal year 2015] budget transmitted by the Council that is not inclusive of both the local and federal portions of the budget;'" and "'transmit to the Congress and President the full District budget as it stands after the 56th day following transmission to [the Council] of the budget, whether or not the Council has taken a second vote.'" *Id.* (quoting JA38).

Not only was the Council's claim personal to Mayor Gray, but the complaint contains no allegation that his successor would be bound by or adopt his position on the Budget Autonomy Act. *See* JA11-52. The complaint does not reference Gray's successor at all, let alone reference Muriel Bowser. *Id.* Based on the complaint, no live controversy exists between the Council and the current Mayor. *See Network Project*, 561 F.2d at 968 (case not justiciable where, "[o]n the basis of the complaint," court was "unable to say that a live controversy now subsists between appellants and [the successor public official]").

In that respect, this case is on all fours with *Spomer*. There, residents of an Illinois town filed suit against the State's Attorney, both personally and in his official capacity, alleging that he employed racially discriminatory law-enforcement practices. The district court dismissed the complaint, but the Seventh Circuit reversed. Thereafter a new State's Attorney was elected, and substituted into the litigation for his predecessor. The new State's Attorney filed a petition for

a writ of certiorari. The Supreme Court granted the writ but declined to rule on the merits, finding no indication that a live controversy remained. Because "[t]he wrongful conduct charged in the complaint [wa]s personal to [the prior State's Attorney]" and "[n]o charge [wa]s made in the complaint that the policy of the office of State's Attorney [wa]s to follow the intentional practices alleged," it appeared that no ongoing controversy existed. *Spomer*, 414 U.S. at 521. The Court found irrelevant a statement by counsel for the new State's Attorney suggesting that he would continue the practices of his predecessor. Instead, the Court focused solely on the contents of the complaint. Absent allegations specific to the successor State's Attorney, the Court concluded the case could not proceed.

This Court took the same approach to the same effect in *Network Project*. 561 F.2d at 968. As in *Spomer*, the allegations against the original official—that he censored public television broadcasts—were personal to that official. *Id.* at 967. The plaintiffs had not alleged, either implicitly or explicitly, that the complained-of actions would continue after the official's departure. *Id.* Because there were no allegations specific to the new official, or an assertion that it was the department's policy to censor such broadcasts, the case was rendered moot by the replacement of the complained-of public official. *Id.* at 966-68; *accord Am. Civil Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1345-47 (5th Cir. 1981).

Under *Spomer* and *Network Project*, the Council's claim against Mayor Gray was likewise mooted by his exit from office. Just as in those cases, here the allegations in the complaint are based on Gray's personal position with respect to the Budget Autonomy Act, and make no mention of his successor. The personal nature of the allegations against Gray should render the Council's claim against the Mayor moot irrespective of the position since taken by his successor.

In any event, the views of Gray's successor confirm that the claim against the Mayor is no longer justiciable. Mayor Bowser has informed this Court that she believes the Budget Autonomy Act is valid and, if the judgment restraining her actions is vacated, intends to comply with the Act's requirements. That position is long-held. As a Council member, Mayor Bowser introduced and voted for the Budget Autonomy Act, and also voted to institute this litigation. *See* Council of the District of Columbia Legislation, *Local Budget Autonomy Act of 2012: Voting Information* (Dec. 4, 2012), *available at* http://dcclims1.dccouncil.us/lims/legislation.aspx?LegNo=B19-0993; JA14 ("[T]he Council authorized this litigation in its official capacity through the unanimous adoption of the Budget Autonomy Litigation Authorization Resolution of 2014 on March 4, 2014."). And as a mayoral candidate, she continued to proclaim her support of budget autonomy. *See* Muriel Bowser, *Moving Forward Together: Priorities for the District's Future* 41, *available at* http://murielformayor.com/wp-content/uploads/moving-

forward.pdf (last visited Mar. 20, 2015) ("Muriel Bowser is committed to achieving transparent budget autonomy. . . ."); Muriel Bowser, *District of Columbia 2014 Mayoral Candidate Questionnaire*: *"Strengthening Our Local Democracy"* 3 (last visited Mar. 20, 2015), *available at* http://www.dcvote.org/sites/default/files/documents/articles/DC%20Vote%20Questionnaire%20-%20Muriel%20Bowser%20-%20General.pdf ("I am committed to pursuing local budget autonomy."). In light of the Mayor's commitment to comply with the Budget Autonomy Act, no controversy remains between the Council and the Mayor.

For that same reason, the counterclaims by the Mayor against the Council are also moot. Mayor Bowser's agreement with the Council that the Act is valid and should be enforced necessarily moots the Mayor's counterclaims against the Council, just as it moots the Council's claim against the Mayor.

In sum, all the claims between the Council and the Mayor are now moot.

II. THE CLAIMS INVOLVING THE CFO ARE NOT RIPE

Article III precludes courts from adjudicating claims that are unripe. *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 47-48 (D.C. Cir. 1999). The constitutional ripeness requirement demands that a claimed injury be either present or certainly impending. *Id.* at 48 ("constitutional . . . ripeness requirement excludes cases not involving present injury"); *Nat'l Treasury Emps.*

Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) ("Ripeness . . . shares the constitutional requirement of standing that an injury in fact be certainly impending."). A claim is not ripe "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). In that vein, a claim is not ripe if the political branches might take actions to avoid altogether the purported injury. *See, e.g.*, *Boehner v. Anderson*, 30 F.3d 156, 163 (D.C. Cir. 1994) (challenge to Congressional pay-adjustment procedures unripe because, *inter alia*, Congress could avoid the allegedly unconstitutional result); *cf. Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (claim not justiciable when "fully susceptible to political resolution").

Under these established principles, the Council's claim against the CFO is not ripe. The Council sued the CFO after he announced that he would not certify contracts or authorize payments under a budget, adopted pursuant to the Budget Autonomy Act, that was not affirmatively approved by Congress. *See* JA16, JA22, JA41-42. But it is entirely speculative whether the CFO will ever be called upon to take action with respect to such a budget. Any number of events could prevent that situation from materializing during the CFO's tenure in office. Under the Budget Autonomy Act, the District's budget is subject to the same 30-day review period as other District laws. *See* Budget Autonomy Act § 2(e), D.C. Law 19-321,

60 D.C. Reg. 1724, 1724 (2013); Section 602(c)(1), D.C. Code § 1-206.02(c)(1). At the expiration of the 30 days, the budget submitted for Congressional review becomes law absent a joint resolution to the contrary. *See* Section 602(c)(1), D.C. Code § 1-206.02(c)(1) (The "act shall take effect upon the expiration of the 30-calendar-day period . . . unless . . . there has been enacted into law a joint resolution disapproving such act."). Through that process, the District's budget would take effect even if Congress took no action. But Congress may also affirmatively approve a budget for the District through its plenary lawmaking authority over the District, D.C. Code § 1-206.01, or affirmatively reject the District's proposed budget and instead appropriate funds to the District as it sees fit, *see id.* §§ 1-206.01 & 1-206.02(c)(1). And, of course, it may repeal the Budget Autonomy Act outright. *See id.* § 1-206.01. Any of these affirmative actions by Congress would obviate the dispute between the Council and the CFO and avoid any need for judicial intervention. No injury from the CFO's conditional refusal to act is certainly impending.

The claim against the CFO is not rendered justiciable by the complaint's suggestion, echoed at oral argument, that the CFO's "refusal to recognize the Budget Autonomy Act will needlessly deprive the Council of information to which it is entitled in the formulation of its budget." JA23; Oral Argument at 3:48-4:25 (D.C. Cir. Oct. 17, 2014), *available at* http://www.cadc.uscourts.gov/recordings/

recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201410. The CFO's obligation to provide fiscal statements to the Council to support its preparation of a budget is part of his general responsibilities, independent of the Budget Autonomy Act. *See* D.C. Code § 1-204.24d(25); *see also id.* § 1-301.47a. The CFO has never stated that he will refuse to provide those financial statements, and his concerns respecting the Budget Autonomy Act would not suggest or justify such a refusal.

For the same reasons that the Council's claim against the CFO is unripe, the CFO's counterclaims are equally unripe. Any funding of the District by a Budget Autonomy Act budget is far from certain, and it therefore is completely speculative whether the CFO will ever be asked to take the actions that, in his view, could render him and his personnel liable under the Anti-Deficiency Act.

In short, the Council's claim against the CFO is not justiciable because there is no ripe controversy between the Council and the CFO.

III. THE DISTRICT COURT'S JUDGMENT SHOULD BE VACATED

A. The Court Should Vacate The Judgment Respecting The Claims Involving The Mayor

When a case becomes moot while an appeal is pending, "[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). As an equitable remedy, vacatur is warranted when a losing party's opportunity for appeal has been mooted by the "unilateral action of the

party who prevailed below" or the "vagaries of circumstance." *Bancorp*, 513 U.S. at 25; *accord Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (vacatur appropriate "when mootness occurs through happenstance—circumstances not attributable to the parties"). The appellate court has a duty to vacate in such circumstances to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41; *see Columbian Rope Co. v. West*, 142 F.3d 1313, 1318 n.5 (D.C. Cir. 1998) (Vacatur is "'the duty of the appellate court' when a case has become moot through happenstance while appeal was pending." (quoting *Munsingwear*, 340 U.S. at 40)). Vacatur in such circumstances "'clears the path for future relitigation of the issues between the parties.'" *Bancorp*, 513 U.S. at 22 (citation omitted).

Vacatur is warranted here because happenstance—in the form of the completion of former Mayor Gray's term—mooted the Council's claim against the former Mayor. Gray's time in office ended because the voters of the District of Columbia chose not to reelect him. They instead elected Muriel Bowser, who holds a different position regarding the Budget Autonomy Act's validity from that of her predecessor. As a Council member, as a mayoral candidate, and now as Mayor, she has consistently maintained that the Act is valid. And the voters chose

her knowing that position. The mootness of the prior dispute between the Council and the Mayor is thus attributable to the democratic process at work.[1]

To be sure, there are situations where a case has become moot and yet vacatur is not appropriate. The Supreme Court has cautioned, for example, that vacatur is not generally appropriate when mootness results from settlement. *See Bancorp*, 513 U.S. at 25. Limiting vacatur in such circumstances prevents litigants from manipulating the judicial system by "'rolling the dice . . . in the district court' and then 'washing away' any 'unfavorable outcome' through use of settlement and vacatur." *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 351-52 (D.C. Cir. 1997) (quoting *Bancorp*, 513 U.S. at 27-29). Vacatur likewise is disfavored when mootness results from the voluntary action of the party seeking relief from the judgment below. *Bancorp*, 513 U.S. at 24.

None of those situations is present here. The mootness in this case did not result from a settlement or any actions of the Council (the party seeking relief from the judgment below). The Council has actively pursued this appeal and has done nothing—voluntary or otherwise—to render the case moot. To the contrary, this mootness arose as the result of a regularly scheduled mayoral election. A party,

[1] Even if the Court were to attribute the mootness to Mayor Bowser's actions, vacatur would still be appropriate because the mootness would still not have been caused by the party seeking review, but rather by the "unilateral action of the party who prevailed below." *See Bancorp*, 513 U.S. at 25; *see also Munsingwear*, 340 U.S. at 40-41.

like the Council here, which "seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25.

The circumstances here are akin to those in cases where claims are mooted by the enactment of intervening legislation. This Court has found that such circumstances warrant vacatur. *See Nat'l Black Police Ass'n*, 108 F.3d at 351. It has reasoned that "the respect that courts owe other organs of government should make [the courts] wary of impugning the motivations that underlie a legislature's actions," and explained that "[t]he mere fact that a legislature has enacted legislation that moots an appeal, without more, provides no grounds for assuming that the legislature was motivated by such a manipulative purpose." *Id.* at 352. That reasoning is even more compelling here. In addition to the general comity principles that drove this Court's decision in *National Black Police Association*, the historical record—Mayor Bowser's consistent support for the Budget Autonomy Act as a member of the Council and as a mayoral candidate—demonstrates that her intent to implement the Act is her genuine position and not a ruse created for purposes of affecting this litigation.

Because vacatur is an equitable remedy, the effect on the public interest is also important to its application, *e.g.*, *id.* at 353-54, and here the public interest counsels strongly against letting the judgment stand. The people's election of a

Mayor who holds a different position on budget autonomy than her predecessor reflects the workings of the democratic process. The Court should be sensitive to the public interest in avoiding judicial action which stifles the political process by prohibiting the new Mayor from charting her own course.

As the Supreme Court has explained, the power to declare a law unconstitutional is "the most important and delicate duty of th[e] Court [but] is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in a justiciable controversy require the court" to do so. *United States v. Muskrat*, 219 U.S. 346, 361 (1911). So too here. The power of this Court, and the court below, to adjudicate the Budget Autonomy Act's validity is a power dependent on the rights of litigants in a justiciable controversy. The absence of such a controversy not only precludes this Court's review on the merits, but also counsels against letting the district court's judgment stand vis a vis the Mayor. This case raises important and far reaching questions on both subject matter jurisdiction and the merits. With further proceedings precluded by happenstance, the Court should not cement in law an unreviewable decision of such magnitude, with such far-reaching effects.

B. The Court Should Also Vacate The Judgment Respecting The Claims Involving The CFO

When a reviewing court determines that claims adjudicated were not ripe, it must vacate the judgment as to those claims. The Supreme Court recognized this

in *International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, concluding that, in the absence of a "controversy appropriate for adjudication, the judgment of the District Court *must* be vacated." 347 U.S. 222, 224 (1954) (emphasis added); *see Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 512 (1984) ("The issue is hence not ripe for review, and the Court of Appeals' holding that the federal ERISA pre-empts this sanction must therefore be vacated."). This Court likewise has vacated district court decisions that addressed unripe claims. *See, e.g.*, *Truckers United for Safety v. Mead*, 251 F.3d 183, 191 (D.C. Cir. 2001); *Field v. Brown*, 610 F.2d 981, 991 (D.C. Cir. 1979). The same result is warranted here. There being no controversy appropriate for adjudication vis a vis the CFO, the judgment of the district court on claims involving the CFO must be vacated.

IV. THE APPEAL SHOULD BE DISMISSED AND THE CASE REMANDED TO THE D.C. SUPERIOR COURT PURSUANT TO 28 U.S.C. § 1447(C)

Ordinarily, when a court determines that a case on review is not justiciable, it dismisses the appeal and orders the case dismissed. *See, e.g.*, *Truckers United*, 251 F.3d at 192; *see also Field*, 610 F.2d at 991 (ordering district court to dismiss). Where the case is one that was removed from a state (or other, non-federal) court, however, once the appeal is dismissed, 28 U.S.C. § 1447(c) requires remand to the non-federal court rather than outright dismissal of the case. *See, e.g.*, *Bromwell v.*

Mich. Mut. Ins. Co., 115 F.3d 208, 214 (3d Cir. 1997) ("In light of the express language of § 1447(c) and the Supreme Court's reasoning in *International Primate* [*Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991)], we hold that when a federal court has no jurisdiction of a case removed from a state court, it must remand and not dismiss on the ground of futility.").

Section 1447(c) provides that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." As relevant here, questions of ripeness and mootness both go to the subject matter jurisdiction of the federal courts. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013) (moot lawsuit "appropriately dismissed for lack of subject-matter jurisdiction"); *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976) ("The question of ripeness goes to our subject matter jurisdiction . . . ."). Thus, assuming this Court vacates the judgment below after finding that the case is moot as to the Mayor and unripe as to the CFO, there will no longer be a final judgment. And the Court's findings as to mootness and ripeness necessarily mean that the district court lacks subject matter jurisdiction over the case. In these circumstances, the plain language of 1447(c) indicates the appropriate course is a remand to the D.C. Superior Court. *See Int'l Primate*, 500 U.S. at 89 ("'[T]he literal words of § 1447(c) . . . give . . . no discretion to dismiss rather than remand an action.'" (third alteration in original) (quoting *Maine Ass'n*

of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs., 876 F.2d 1051, 1054 (1st Cir. 1989) (Breyer, C.J.))).

Before the Superior Court, the Mayor will take the position that it must dismiss the claims, just as a federal court would, because they are moot as to her and unripe as to the CFO, with every expectation that the Superior Court will agree. *See Settlemire v. Dist. of Columbia Office of Emp. Appeals*, 898 A.2d 902, 904-05 (D.C. 2006) (citing federal law on mootness); *Local 36 Int'l Ass'n of Firefighters v. Rubin*, 999 A.2d 891, 895-96 (D.C. 2010) (citing federal law on ripeness). Even though the result of a remand thus appears self-evident, Section 1447(c) instructs that remand is nevertheless required to allow the D.C. Superior Court to determine for itself the contours of its jurisdiction under local law.

CONCLUSION

For the foregoing reasons, the judgment below should be vacated, the appeal dismissed, and the case remanded to the D.C. Superior Court.

Dated: March 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2015, I caused a copy of the foregoing Suggestion of Mootness and Motion to Dismiss, to be electronically submitted to the Clerk of the Court for filing using the CM/ECF system, which will send notification of such pleading to all registered counsel of record.

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