

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

Valerie Graham,)	
)	
Challenger,)	
)	Administrative Hearing
v.)	No. 22-015
)	
DC Committee to Build a Better)	Re: Petition Challenge to
Restaurant Industry;)	Initiative Measure No. 82 “District
Ryan O’Leary, Chairman;)	of Columbia Tip Credit Elimination
Adam Eiding, Treasurer,)	Act of 2021”
)	
Respondents.)	
)	

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter came before the Board of Elections (“the Board”) on June 1, 2022 pursuant to a challenge (“Challenge”) brought by Valerie Graham (“Challenger”) to the petition (“Petition”) submitted in support of Initiative Measure No. 82, the “District of Columbia Tip Credit Elimination Act of 2021” (“Initiative”). Board Chairman Gary Thompson and Board members Karyn Greenfield and Mike Gill presided over the hearing. At the hearing, the Challenger was represented by Mr. Andrew J. Kline, Esq., and the Initiative proposer, Ryan O’Leary (“Proposer”), was represented by Mr. Joseph E. Sandler, Esq. This Memorandum Opinion and Order constitutes the Board’s findings of fact and conclusions of law on the Challenge. For reasons set forth in this opinion and order, the Board denies the Challenge.

II. Background

On June 22, 2021, the Proposer submitted the Initiative along with supporting information and documents to the Board. On August 26, 2021, the Board held a hearing to determine whether

the Initiative met proper subject matter requirements as specified in the law,¹ and on August 31, 2021, the Board issued a decision finding that it did. On September 3, 2021, the Board formulated the short title and summary statement for the Initiative with input from interested parties.

On October 1, 2021, the formulations for the Initiative were published in the D.C. Register for a ten-day challenge period.² As there were no challenges to the formulations, they were deemed accepted.³ On October 13, 2021, the Board issued the Petition with the accepted formulations to the Proposer. The Proposer then had 180 days, beginning on October 14, 2021, to circulate the Petition to obtain the requisite number of signatures for ballot access.⁴ Specifically, the Petition needed to contain valid signatures of at least five percent of the registered voters District-wide and in at least five of the District's eight wards.⁵

On February 22, 2022, the Proposer filed the Petition, which contained 7,966 pages and 33,228 signatures. The Board then had three days to conduct a preliminary review of the Petition including as to whether on its face it had sufficient signatures.⁶ The applicable statute provides that the required number of petition signatures needed in each ward and District-wide must be “consistent with the latest official count of registered qualified electors made by the Board 30 days

¹ D.C. Official Code § 1-1001.16(b).

² D.C. Official Code § 1-1001.16(d); 68 D.C. Reg. 10431 (Oct. 1, 2021).

³ D.C. Official Code § 1-1001.16(e)(2).

⁴ In the midst of the Petition circulation period, the D.C. Council passed, on December 29, 2021, the Ward Redistricting Amendment Act of 2021 which modified the boundaries of the District's wards. D.C. Act 24-265 (“2021 Redistricting Act”). The legislation provides that the redistricted wards are to be effective January 1, 2022, for elections held after February 1, 2022. *Id.*

⁵ D.C. Official Code § 1-1001.16(i)-(j).

⁶ D.C. Official Code § 1-1001.16(k)(1).

prior to the submission of ... [the] petition.”⁷ As the Board uses the counts by ward and District-wide reported at the end of each month to establish the number of signatures needed on initiative petitions and the Petition was filed February 22, 2022, the Board used its *D.C. Board of Elections Monthly Report of Voter Registration Statistics Citywide Registration Summary As Of December 31, 2021* (“the December 31, 2021 Report”) to calculate the number of signatures that represents five percent of each ward and District-wide.⁸ That report was produced using the ward boundaries in existence as of December 31, 2021 (*i.e.*, prior to the implementation of new wards boundaries under the 2021 Redistricting Act (*see* note 4 *supra*)).

Following the three-day preliminary review period wherein the Board accepted the Petition, a 30-day independent verification and authentication review of the Petition’s 33,228 signatures by the Board’s Registrar of Voters (“Registrar”) commenced.⁹ That review included a check of every signature on the Petition against the Board’s records to determine if the signer was a registered elector at the address provided on the Petition and to make corrections for duplicates and ward designations. The Board’s review also included, based on a random and statistical sampling method, a verification of whether the signatures in the Petition matched the signatures in the Board’s records.¹⁰ For purposes of this random statistical sampling for the signature authenticity review, the Board’s regulations define, at 3 D.C.M.R. § 1009.4, the random sample universe to be used as the population of valid signatures (*i.e.*, signatures which, based on the

⁷ D.C. Official Code §1-1001.16(i)(2); *see also* D.C. Official Code §1-204.102(a) (requiring that the Board use the “latest official count of registered electors by the Board of Elections and Ethics which was issued 30 or more days prior to submission of the signatures for the particular initiative”).

⁸ D.C. Official Code §1-1001.05(a)(7). The report as of December 31, 2021 was published at 69 D.C. Reg. 532 (Jan. 21, 2022).

⁹ D.C. Official Code § 1-1001.16(o).

¹⁰ D.C. Official Code §1-1001.16(o)(1).

Board's records, are of registered voters at the address indicated on the Petition) except that any signature of questionable validity because it appears to have not been made by the person whose signature it purports to be are not excluded from the random sample.¹¹ To authenticate the signatures, the Board staff compared the signature on the Petition to the voter's signatures (there can be several scans of a voter's signature) that are included in the Board's database. Here again, the benchmark for determining the ward assignment and corresponding ward numerical requirements was the Board's December 31, 2021 Report, and the wards in place prior to the 2021 Redistricting Act. Under law, the 30-day review period was to end on March 24, 2022.

Concurrent with the initiation of the Registrar's review of the Petition, there was a 10-day challenge period (3 D.C.M.R. § 1006.1) during which D.C. voters are provided with an opportunity to review and challenge the Petition. The law requires that challenges be submitted within the 10-day period in a written statement "specifying concisely" the alleged defects in the petition.¹² Challenges must cite alleged signature or circulator defects in the petition "as set forth in the signature validity rules" in chapter 10 of the Board's regulations by petition line and page.¹³ The Board's "Validity of Signatures" regulations provide in pertinent part:

A petition signature shall not be counted as valid in any of the following circumstances:

- (a) The signer's voter registration was designated as inactive on the voter roll at the time the petition was signed;
- (b) The signer, according to the Board's records, is not registered to vote at the address listed on the petition at the time the petition was signed and has

¹¹ *Id.* (omitting from the list of types of signatures not counted in random sample universe 3 D.C.M.R. § 1007.1(i)'s signatures that are invalid because they are not made by the person whose signature it purports to be).

¹² D.C. Official Code §1-1001.16(o)(1).

¹³ 3 D.C.M.R. § 1006.2.

failed to file a change of address form that is received by the Board on or before the date that the petition is filed;

- (c) The signature is a duplicate of a valid signature;
- (d) The signature is not dated;
- (e) The petition does not include the address of the signer;
- (f) The petition does not include the name of the signer where the signature is not sufficiently legible for identification;
- (g) The circulator of the petition sheet was not a qualified petition circulator at the time the petition was signed;
- (h) The circulator of the petition failed to complete all required information in the circulator's affidavit;
- (i) *The signature is not made by the person whose signature it purports to be[.]*

3 D.C.M.R. § 1007.1 (emphasis added).

On March 7, 2022, the Challenger timely filed the Challenge.¹⁴ The Challenge asserted that the Petition does not contain valid signatures from at least five percent of the registered voters in Wards 2, 5, 7, and 8, and therefore does not meet the statutory requirement that it must contain the signatures of at least five percent of the registered voters in at least five of the District's eight wards. For this reason, the Challenge concluded, the Initiative could not be placed on the ballot. The Challenge consists of a 12-page narrative explanation of general categories of signatures which it claims are invalid and four exhibits comprising 193 pages of charts identifying each challenged signature by page and line, and providing for each challenged signature one or more "error" codes indicating the basis of the challenge. For example, the Challenge narrative explains that the code "WA" indicates that signature is challenged because the signer was not registered to

¹⁴ Because the 10-day challenge period ended on Sunday, March 6, 2022, the Board accepted challenges through Monday, March 7, 2022.

vote at the address listed on the Petition at the time the Petition was signed.¹⁵ The Challenge did not include objections to signatures based on 3 D.C.M.R. § 1007.1(i), which provides that a signature should be found invalid if it “is not made by the person whose signature it purports to be,” and there was no claim in the narrative portion of the Challenge that suggested that signatures were being contested because the form of the signature did not match the signer’s printed name. Indeed, the Challenge did not cite to the Board’s signature validity regulations, but instead referred to the regulation that defined the signatures that were to be excluded from the random sample universe.¹⁶

On the morning of March 24, 2022, the last day of the Board’s 30-day review period, counsel for the Challenger e-mailed the Board’s General Counsel a letter in which he raised for the first time the claim that the Board had used the wrong data in determining the number of signatures that needed to be on the Petition. Counsel maintained that, instead of the December 31, 2021 Report, the Board should have generated a report as of January 22, 2022 (*i.e.*, thirty days before the Petition was filed and after the new ward boundaries went into effect) and used that report to calculate the five percent signature requirements. According to the letter, a report as of January 22, 2022 should have been generated from the interactive computerized list of voters that the Board maintains under the Help America Vote Act, 52 U.S.C. § 20901 *et seq.* (“HAVA”) because the legislation designates that data as the “official” list, whereas the statutory provisions related to the Board’s monthly reports do not designate such data as “official.”

¹⁵ Challenge at p. 5, ¶ 25.

¹⁶ That regulation, 3 D.C.M.R. 1009.4, does not include as a reason for invalidating a signature the appearance that the signature is not made by the person whose signature it purports to be. This is because the purpose of the random sampling is to test the form of the signature.

On March 24, 2022, the Board held a Special Meeting to issue a report on the outcome of the 30-day review process. At the onset of the meeting, Counsel for the Challenger raised the issue discussed in his contemporaneously submitted letter regarding the allegation that the Board used the incorrect data report to determine the number of signatures needed. *See* March 24, 2022 meeting transcript (“Tr.”) at pp. 13-16. Executive Director Monica H. Evans reported that the Petition contained 26,935 valid signatures, and was thus able to proceed to the random sample signature verification stage of the verification process. She then reported that, based upon the random sample signature verification process to that point in time, the Petition showed acceptance for Wards 1, 3, and 4 (with 95% confidence)¹⁷, rejection for Wards 5, 7, and 8 (for lack of the requisite valid signatures), and “no decision” for Wards 2 and 6 (for lack of achieving a 95% confidence level one way or the other). In accordance with the Board’s regulations, the Board moved to draw additional samples of 100 and 150 signatures for verification for Wards 2 and 6 so that a final 95% confidence determination could be reached with respect to those wards. Accordingly, the Board adjourned the meeting until 3:00 when it was expected that the verification process for Wards 2 and 6 would be completed.

When the meeting resumed, Executive Director Evans reported that the signatures for Ward 2 had been verified at a 95% confidence level, but that further sampling and testing of Ward 6 was necessary to reach a 95% conclusive result. She recommended that a sample of 150 additional signatures from Ward 6 be drawn for verification so that a 95% confident acceptance or rejection could be reached for Ward 6. The Board accepted the recommendation, and the meeting was adjourned again until 5:30 pm.

Upon reconvening, Executive Director Evans reported that the signatures in Ward 6 still

¹⁷ The Challenge did not include objections to Wards 1, 3, and 4.

could not be verified to a 95% level of confidence. Based on consultations with the Office of Planning's Data Management Division ("DMD"), she advised that further random samples could be pulled and tested until a conclusive result could be reached, but that it was unlikely that the process would be concluded that day, if at all. She also reported that the DMD had recommended that, alternatively, the Board could process all 4,656 valid signatures in Ward 6 (in lieu of the random sampling process) to determine if there were enough valid signatures to meet the 95% level of confidence. While recognizing that the statute requires a decision regarding the Petition's numerical sufficiency within 30 days of its acceptance, the Board noted that its regulations also require that the review process result in a final up or down determination as to whether the Petition should be accepted or rejected. Despite best efforts, that final determination could not be reached within the 30-day timeframe. Faced with the unprecedented likelihood that continued random sampling even of progressively larger sample sizes would, for statistical reasons related to the narrow margin of signatures over the number required for Ward 6, also generate inconclusive results, the Board ordered that the entire universe of valid signatures for Ward 6 be reviewed for signature authentication. Acknowledging the time-consuming nature of this process, the Board emphasized the importance of conducting a complete signature verification review for Ward 6 to establish a conclusive final answer for Ward 6 and thus the Petition as a whole. *Id.* at pp. 51-53.¹⁸ During the March 24 meeting, counsel for the Challenger raised the issue discussed in his contemporaneously submitted letter regarding the allegation that the Board used the incorrect data report to determine the number of signatures needed. *Id.* at pp. 13-16.

On March 28, 2022, the Board held a hearing on the Challenge.¹⁹ At this hearing, counsel

¹⁸ Neither party has pursued the issue of the need to extend the Board's review beyond 30 days.

¹⁹ Also, on March 28, 2022, a few hours before the hearing on the Challenge was to commence, John Bagwell through his counsel, Richard Bianco, Esq., emailed the Board's General Counsel a motion seeking leave to intervene. On

for the Challenger and the Proposer stipulated that the sole remaining issue to be adjudicated with respect to the Challenge was the sufficiency of the Petition as to Ward 2, and agreed to defer consideration of the Challenge as to Ward 2 pending the outcome of the signature authentication for Ward 6.²⁰

When the additional Ward 6 testing was completed, the matter was set for the Board's April 6, 2022 regular meeting.²¹ At that meeting, Executive Director Evans announced that the results of further testing of Ward 6 showed sufficient valid signatures for that ward. Accordingly, the Board announced its finding that the Petition signatures were numerically sufficient in Wards 1, 2, 3, 4, and 6, and certified the Initiative for ballot access in the November 8, 2022 General Election subject to the outcome of the Challenge as to Ward 2.

On April 8, 2022, the Board issued a written order memorializing its finding.²² In the written order, the Board explained that, in January 2022, its voter roll database was adjusted to associate voters with the redistricted wards. As a result, when the Petition was later submitted, Board staff evaluated its signatures based on the post-redistricted ward boundaries. After that review, adjustments were made to align the validated signatures with the pre-redistricted ward boundaries that had been used to define the number of signatures needed in each ward. So, for

April 4, 2022, counsel for the Proposers filed an opposition to the motion. Subsequently, on May 4, 2022, the Board denied Mr. Bagwell's motion.

²⁰ Given that (1) the Challenge was based on insufficient valid signatures in Wards 2, 5, 7, and 8, but did not challenge Ward 6, and (2) the Board review concurred in the Petition's insufficiency as to Wards 5, 7, and 8, the need to consider the Challenge's claims of invalid signatures in Ward 2 could become moot depending on the Board's resolution of Ward 6.

²¹ During the meeting, counsel for the Challenger again raised the issue of the count of voters that was used to determine the ward and District-wide signature requirements. April 6, 2022 Tr. at pp. 67-71.

²² See order at <https://www.dcboe.org/CMSPages/GetFile.aspx?guid=ba6e98fe-fd9a-413c-b2d3-69ee3bfffed6>. The Proposer had sought to have the Initiative placed on the June 21, 2022 Primary Election ballot but that was not possible due to the unprecedented need to test the universe of Ward 6 signatures before a determination on ballot access could be reached.

example, the staff identified 3,500 valid signatures in Ward 2 prior to making ward boundary adjustments and, after making such adjustments, the pool of valid Ward 2 signatures was reduced to 2,907, and the statistical sample for signature authentication in Ward 2 was based on that 2,907 population.

In light of the outcome of the Ward 6 testing, the Challenge with respect to Ward 2 moved forward. Accordingly, the Board's Office of General Counsel scheduled a prehearing conference with the parties on April 29, 2022 pursuant to 3 D.C.M.R. § 415.1. At the outset of the prehearing conference, the Challenger's counsel stated that he wished to preserve her position that the Board was using the wrong data to determine the number of signatures needed on the Petition, and he raised a new claim that the Board's statistical sampling of signatures in Ward 2 for signature authentication purposes was improperly changed. *See discussion infra.*

The Board's General Counsel, staff, and parties also discussed that, based on the December 31, 2021 Report and the Board's findings in the April 6, 2022 Order, the Challenger needed to establish that the Registrar was incorrect with respect to at least 375 Ward 2 signatures that she deemed valid in order to demonstrate that the Petition was numerically insufficient as to that ward.²³ To that end, the Challenger's counsel presented a list of 502²⁴ Ward 2 signatures culled from the Challenge that he maintained were erroneously counted by the Registrar as valid. Counsel asserted that, in addition to the express reasons set forth in the Challenge for contesting those signatures, the Challenge should also be interpreted to include challenges under 3 D.C.M.R. § 1007.1(i) which, again, provides that a signature should be found invalid if it "is not made by the

²³ Five percent of the total number of Ward 2 voters on the report as of December 31, 2022, was 2,532. April 6 Order at 3. The Board's review had concluded that the Petition had 2,907 valid signatures in Ward 2, 375 signatures above the number necessary. *Id.* at 8.

²⁴ Challenger's Counsel subsequently indicated that the actual number of signatures that he maintained the Registrar wrongly deemed valid was 500 instead of 502.

person whose signature it purports to be.” Counsel alternatively argued that, if the Board does not so construe the Challenge, the Challenger should be allowed to amend the Challenge to raise that claim pursuant to 3 D.C.M.R. § 415.1(b).²⁵

Thereafter, the Challenger’s counsel emailed the Board’s General Counsel a revised list of the challenged Ward 2 signatures that included the specific reason, as indicated in the Challenge, for contesting each signature’s validity. The stated reasons on the list for challenging the signatures, and the number of challenged signatures for each, were as follows: the signer was not a registered voter (188), the address on the Petition for the voter did not match the address in the Board’s records (171), the signature was a duplicate of another signature (40), the sole signer of the Petition was also the Petition circulator (61), and the ward for the signature was missing or incorrect (40).

Based on the prehearing conference, the Office of General Counsel issued a prehearing conference order that specified that the Board would consider the following issues at the hearing on the Challenge²⁶:

1. Whether the BOE should construe as a challenge under 3 D.C.M.R. § 1007.1(i) (“[t]he signature is not made by the person whose signature it purports to be ...”) challenges coded in the March 7, 2022 challenge (“Challenge”) as follows:

“NR” which the Challenge stated meant that “the signer, according to the Board’s records, is not registered to vote at the time the petition was signed”;

“WA” which the Challenge stated meant that “the signer, according to the Board’s records, is not registered to vote at the address listed on the petition at the time the petition was signed”;

²⁵ Pursuant to 3 D.C.M.R. § 415.1(b), the Board’s General Counsel may request that the parties appear for a prehearing conference to consider ... [t]he necessity or desirability of amendments to the pleadings[.]”

²⁶ The Board may enter an order which recites the action taken at the conference, including, the amendments allowed to the pleadings. 3 D.C.M.R. § 415.2.

“DU” or “DUP” which the Challenge stated meant that “the signature is a duplicate of a valid signature”;

“SSC” which the Challenge stated meant that “the sole signer was also the circulator of the same petition sheet where the signature appears”.

2. If the Board is not willing to read the Challenge as presenting a challenge under 3 D.C.M.R. § 1007.1(i) (“[t]he signature is not made by the person whose signature it purports to be ...”) where the codes NR, WA, DU, DUP or SSC were used to challenge a signature, whether the Board should grant leave to amend the Challenge so that each of the 500 challenges to Ward 2 signatures include a challenge under 3 D.C.M.R. § 1007.1(i).
3. Whether the [December 31, 2021 Report] (*see* 69 D.C. Reg. 532 (Jan. 21, 2022)) was the proper official count to be used for evaluating the validity of the petition.

Neither party objected to this designation of issues.

At the June 1, 2022 hearing, Marissa Corrente, the Deputy Registrar of Voters (“Deputy Registrar”), presented a report on the Challenge. Because the Registrar had, as part of her 30-day review, considered the 500 contested Ward 2 signatures and presumably found them valid, the Deputy Registrar conducted a limited review of the remaining challenges as part of the Challenge review process. The Deputy Registrar found that 38 signatures identified on the list of 500 challenged signatures had, during the 30-day review process, been found invalid or had been attributed to wards other than Ward 2 and therefore were not part of the 2,907 signatures that had been validated. In addition, she found that 94 signatures were challenged on grounds that are not recognized as a basis for invalidating signatures.²⁷ These rejections reduced the 500 challenged

²⁷ This number was derived from adjustments to two categories of challenges. First, where the sole signer of a Petition page was also the circulator of that page, one signature was rejected for other reasons and two signatures were associated with another ward, leaving 59 of the original 61 signatures. Second, where the ward designation was omitted or incorrect, two signatures were rejected for other reasons and three signatures were associated with another ward, leaving 35 of the original 40 signatures. The Registrar’s decision to count such signatures as valid was sound and consistent with the legislative purpose behind District law on initiatives which establishes that signature defects should be excused in the case of harmless error and disfavors limitations on the right of initiative. *Dankman v. Dist. Bd. of Elections*, 443 A.2d 507, 515 (D.C. 1981); *Hessey v. Burden*, 584 A.2d 1, 3(D.C. 1990). As to the signatures for persons who were also circulators, the statute provides: “Signatures on petition sheets shall not be invalidated because the signer was also the circulator of the same petition sheet on which the signature appears.” D.C. Official Code §1-1001.16(g-1)(2). As to the ward designation omissions and errors, the statute states: “If a person

signatures to 368, or seven below the 375 challenges needed to render the Petition numerically insufficient as to Ward 2. In light of the finding that these few adjustments left the Challenger without enough challenged signatures to prevail, the Deputy Registrar did not reconsider earlier findings as to the validity of the remaining 368 challenges.

Following the presentation of the Registrar’s report, the Board heard from counsel for the parties. The Challenger’s counsel objected to the Registrar’s findings, arguing that the Board incorrectly relied on the December 31, 2021 Report. He again maintained that HAVA and the HAVA-related amendments to the D.C. Code required that the count used to determine the numerical sufficiency of the Petition should be a count derived 30 days prior to the submission of the Petition (*i.e.*, as of January 22, 2022). As no voter statistics report was prepared or issued as of that date, he urged that the count as of January 31, 2022, for which the Board had prepared a report in accordance with its statutory monthly reporting requirement, be used as a proxy. In response to a question by Board Chair Thompson regarding the relevance of *Price v. D.C. Bd. of Elections*, 645 A.2d 594 (D.C. 1994) (“*Price*”), Challenger’s counsel said *Price* was not applicable because it predated HAVA which, in his opinion, represented a change in the law. As to the issue of treating the Challenge as encompassing a challenge based on the form of signature, Challenger’s counsel argued that the liberal rules of pleading required construing an objection for the stated reason that the voter is not registered as indicating that the form of the signature is not for a registered voter. He also questioned the elevation of the Board’s Monthly Reports to the status of “official.”

who signs a petition is found to be a qualified registered elector in a ward other than that which was indicated on the petition sheet, such person shall be counted from the correct ward in determining whether or not an initiative or referendum measure qualifies for the ballot.” D.C. Official Code § 1-1001.16(o)(1). The Board’s ability to count signatures that omit an associated ward designation on grounds of mere formal error was sustained long ago. *Mosley v. Bd. of Elections*, 283 A.2d 210, 211 n. 2 (D.C. 1971).

In response, the Proposer's counsel argued that the Challenge should not be construed to question the validity of signatures based on the position that the signatures were forged and that the Board should not grant leave to amend the Challenge to allow such a challenge. The Proposer's counsel stressed that no evidence had been presented of forgeries, and that the fact that a signature is difficult to decipher is not a reason for assuming criminal conduct. He noted that during, the prehearing conference, the Board's staff compared some of the challenged signatures to the signatures in the Board's records, and in each instance, the signatures matched. As to the argument concerning the data to be used to determine the Petition's sufficiency, he asserted that the statutory language "latest official count made by the Board" cannot be read as requiring the Board to issue counts every day so that there is a count dated 30 days before the date that a petition is submitted. The Proposer's counsel opposed the use of the January 31, 2022 Monthly Report as a proxy for a January 22, 2022 count as contrary to the statutory requirement that the count be issued at least 30 days before the petition submission. Counsel also stated that HAVA was irrelevant and that D.C. law is controlling in this matter. He stressed that the Proposer had relied on the Board's representation that the December 31, 2021 Report controlled and the application of the pre-redistricting wards, and that it would be "enormously unfair" to apply a different count and the redistricted wards to the Petition. He noted that the Board's long-standing practice had been to use the monthly report which issued at least 30 days prior to a petition filing.

In addition, the Challenger's counsel briefly referred to the sample used to authenticate the signatures in Ward 2. Specifically, he alleged that the sampling of signatures in Ward 2 was improper because the sample pool was changed during the testing. The Proposer's counsel argued that this issue was outside the scope of the meeting.

Following argument from counsel, the Board went into executive session to consider the Challenge. After deliberations in executive session, the Board came back on the record and announced that the Challenge was denied and that a written order explaining the reasons for its decision would issue soon.

III. Discussion

We begin our analysis below by addressing a claim by the Challenger that the Board used the wrong data to determine the amount of signatures that represented the five percent of voters in each ward and District-wide and the wards to which signatures should be assigned. Once that threshold issue is resolved, we will address the signature invalidity claims made in the Challenge that apply to the 500 remaining contested Ward 2 signatures. Finally, we consider the Challenger's counsel's claim that the Board used the wrong sample to test the authenticity of the signatures in Ward 2.

a. Challenger's Claims Regarding the Official Count and Redistricting

As discussed above, the statute requires that the Board calculate the number of signatures needed on a petition based on "latest official count of registered electors by the Board of Elections ... which was issued 30 or more days prior to submission of the signatures for the particular initiative." D.C. Official Code §1-204.102(a). Specifically, the Board used its December 31, 2021 Report to determine the requisite number of valid signatures representing five percent of each ward and District-wide because the Petition was submitted on February 22, 2022. To align the wards for the signatures collected with the ward populations in the December 31, 2021 Report, the pre-redistricting ward boundaries that were in existence as of that date were used in designating the wards that would be associated with Petition signatures. Based on the total number of voters by ward and District-wide as set forth in the respective report, the Board staff accepted, during the

three-day preliminary review period which commenced on February 22, 2022, the Petition as numerically sufficient on its face. The December 31, 2021 Report and related pre-redistricting ward boundaries were then applied throughout the Board's 30-day counting and validation process.

In the Challenge, the Challenger made no mention of how the five percent signature requirement by ward and District-wide was calculated. While silent on that issue, the Challenge contained assertions as to the number of valid signatures that were needed by ward and District-wide in order to demonstrate that the Petition was numerically insufficient. The numbers asserted do not align with the December 31, 2021 Report. They also necessarily do not align with the numbers as they existed on January 22, 2022, because no report was generated on that date.

It was not until the last day of the Board's 30-day Petition review process that the Challenger first raised the claim that the Board used the wrong count to determine the Petition's sufficiency. If accepted, this claim would require considerable adjustments to the Registrar's review and numerical sufficiency findings to reflect the changes in ward boundaries imposed by the 2021 Redistricting Act and potentially render the Petition review process chaotic.

To begin with, we reject the Challenger's position as procedurally barred. Pursuant to statute, petition challengers have ten calendar days after a petition is accepted to file a challenge.²⁸ The Board then has 20 days to receive evidence and determine the validity of the challenge.²⁹ Concurrent with the 30-day challenge initiation and resolution period, the Board is to conduct a 30-day independent review of the petition. These time limitations for ballot matters are applied strictly. *White v. D.C. Bd. of Elections & Ethics*, 537 A.2d 1133, 1135 (D.C. 1988) (time limits are particularly important in election cases to maintain stability and continuity in the administration

²⁸ D.C. Official Code §1-1001.16(o)(1).

²⁹ D.C. Official Code § 1-1001.16(o)(1) (incorporating D.C. Official Code § 1-1001.08(o)(2)).

of government). The D.C. Court of Appeals has made clear that these procedures are the “only permitted means” by which an initiative petition may be challenged. *Davies v. D.C. Bd. of Elections & Ethics*, 596 A.2d 992, 994 (D.C. 1991) (quoting *Citizens Against Legalized Gambling v. D.C. Bd. of Elections*, 501 F.Supp. 786, 789 (D.D.C. 1980) (“Plaintiff can show no right to challenge the placement of an initiative on the ballot other than the right established by statute”). It is settled that the ten-day challenge period applies to any concerns directed at petition review procedures. *Lawrence v. D.C. Board of Elections*, 611 A.2d 529, 531 (D.C. 1992) (“Thus, we read broadly the provision of [§ 1-1001.08(o)] allowing challenges to the ‘validity’ of any petition as establishing the mechanism for review of challenges to the placing of a proposed [initiative] on the ballot both as to qualifications and to procedural formalities.” Given that the Challenge contained no discussion whatsoever as to the data that should be used to calculate the Petition’s sufficiency and clearly did not rely on a non-existent January 22, 2022 count, the Challenge cannot reasonably be read as presenting a claim that the Board was applying the wrong pre-redistricting data in determining the Petition’s sufficiency. On the contrary, the Challenge alleged that the number of signatures for the Petition to be numerically sufficient as to Ward 2 was 2,903 (Challenge at p. 4, ¶16), a number very near the 2,907 generated from the December 31, 2021 Report and inconsistent with the use of the redistricted voter roll for calculating the Petition’s ward sufficiency. As in *Davies*, the Challenger’s failure to make any argument regarding the data which should underlie the validation of the Petition signatures within the ten-day challenge period precludes us from entertaining that late claim.³⁰

³⁰ While there is no “good cause” exception for a failure to raise a challenge after the close of the 10-day challenge period, the Challenger offers no explanation for her belated claim regarding the correct report to be used for determining the five percent number of signatures needed by ward and District-wide. In that regard, we note that the Board’s use, for petition signature verification purposes, of the latest Monthly Report of Voter Registration Statistics for the month ending 30 days prior to the filing of a petition is well-established. Indeed, the Board’s most recent decision applying the “latest official count of registered electors by the Board of Elections and Ethics which was issued 30 or more days prior” language reveals that a petition that was filed October 25, 2021 was reviewed based on

Assuming *arguendo* that the Board must address the merits of the Challenger’s claim that the official report that should have been used for evaluating the Petition was a January 22, 2022 report that the Board would have had to have specially run, we disagree. The plain language of the provisions at issue and their history dictates reliance on the Monthly Reports published in the D.C. Register for purposes of determining the five percent of signatures needed by ward for petition sufficiency.

At issue is the relationship between the Board’s duties as to voter roll maintenance and data and the 1978 District’s Charter amendments which included the existing requirement that the calculation of the number of voters per ward needed to ascertain the five percent ballot access threshold must be based on “latest official count of registered electors by the Board of Elections and Ethics which was issued 30 or more days prior to submission of the signatures for the particular initiative.” “Initiative, Referendum, and Recall Charter Amendments Act of 1977,” D.C. Law 2-46, 24 D.C. Reg. 199 (effective March 10, 1978).³¹

In 1982, the election laws were amended to specify that the Board shall:

Publish in the District of Columbia Register on the third Friday of every month, the *total number* of qualified electors registered to vote in the District as of the last day of the month preceding publication. Such notice shall be broken down by ward and political party affiliation, where applicable, and shall list the *total number* of new registrants, party changes, cancellations, changes of names, and/or addresses processed under each category.

the Monthly Report of Voter Registration Statistics as of August 31, 2021. See *Moore v. Henderson*, Case No. 21-004 (Nov. 24, 2021). That decision can be found on the Board’s website at <https://www.dcboe.org/CMSPages/GetFile.aspx?guid=aec081ab-460a-4783-9f4e-76d53672d933>. While *Moore v. Henderson* was a recall petition case, the statutory language regarding the determination of the percent needed for a numerically sufficient recall petition (see D.C. Official Code § 1-204.112) mirrors the language in the initiative legislation.

³¹ D.C. Official Code §1-204.102(a). Compare D.C. Official Code §1-204.112 (concerning recall petitions) and D.C. Official Code §1-1001.16(i)(2) (concerning initiative and referendum petitions) with D.C. Official Code §1-1001.08(i)(1)(B)(3) (“For the purpose of computing nominating petition signature requirements, the Board shall by noon on the 144th day preceding the election post and make available the exact number of qualified registered electors[.]”).

District of Columbia Election Code of 1955 Amendments Act of 1982, D.C. Law 4-120 (emphasis added).³²

Over two decades later, Congress enacted HAVA, which requires that the District and each state maintain one centralized computerized voter registration data system (as opposed to data maintained in disparate ways by county and other jurisdictions within the states) that will constitute their “official voter registration list” (*id.* at § 21083), and which prompted Council legislation creating the following new Board duty:

(a) The Board shall:

(1) Accurately maintain a uniform, interactive computerized voter registration list which shall serve as the official voter registration list for all elections in the District, and shall contain the name, registration information, and a unique identifier assigned for every registered voter in the District. The voter registration list shall be administered pursuant to the Help America Vote Act of 2002 and pertinent federal and local law, and shall be coordinated with other District agency databases;

D.C. Official Code § 1-1001.05(a).

The Challenger maintains that the “official count” for purposes of verifying the Petition should be based on the data in the Board’s computerized voter registration list as it existed on January 22, 2022. In making her claim, the Challenger observes that the term “official” is used in the statute to designate the nature of the computerized list, whereas, that term is not associated in the statute with the Monthly Report. Based on the *D.C. Board of Elections Monthly Report of Voter Registration Statistics Citywide Registration Summary As Of January 31, 2022*, which showed a higher number of registered voters District-wide, the Challenger theorizes that, had the Board created a report of registered voters as of January 22, 2022, the number of valid Petition

³² The current version of this language is effectively identical to the original formulation. See D.C. Official Code §1-1001.05(a)(7).

signatures would be insufficient.³³ She indicates that, for the purpose of determining whether an initiative measure petition meets statutory sufficiency requirements, HAVA mandates the use of a count taken from the Board’s interactive electronic records as it exists 30 days before the petition is submitted, rather than the count indicated in a static monthly report.

Clearly, however, the 1978 Charter amendment’s reference to a “count” could not possibly have meant the then non-existent computerized official list mandated nearly a quarter century later by HAVA and HAVA-conforming amendments to the D.C. Code. Contrary to the Challenger’s position, to conclude that the Council’s 2004 HAVA-related legislation changed the meaning of the term “count” in the Charter is arguably at odds with *Price v. D.C. Bd. of Elections*, 645 A.2d 594 (D.C. 1994). There, the D.C. Court of Appeals addressed a discrepancy between the Charter amendment’s designation of date of the count to be used (*i.e.*, the latest official count made 30 days before the filing of the petition (see D.C. Official Code §1-204.102(a)) and the date of the count identified in election laws subsequently adopted by the Council (*i.e.*, the latest official count made 30 days before the filing of the initiative). The Court held that the Council’s election law could not require use of an official count that differed from the count specified in the Charter amendments. The Court reasoned that the Council lacked the power to change the Charter amendments and it invalidated the election law’s use of the initiative filing date as the demarcation point for determining which official count to use.³⁴ If the Council was unable to change the date specified in the Charter amendments of the registered voter count used for initiative signature

³³ Importantly, using voter registration numbers from January 2022 would significantly impact the determination as to five percent ward signature totals that the Petition had to meet because new ward boundaries were in effect by then. See note 2, *supra*.

³⁴ Subsequently, the elections laws were modified to mirror the Charter. Compare the current D.C. Official Code §1-1001.16(i)(2) with D.C. Official Code §1-204.102(a).

verification purposes, it goes without saying that the Board cannot, as the Challenger would have us, rewrite the Charter amendments to interpret “latest official count” as having a meaning that could not have possibly been contemplated when the Charter amendments were adopted, because that meaning did not exist at such time.

On its face, the term “latest official count” contemplates a routinely kept static record. *Eldridge v. D.C. Dep’t of Human Servs.*, 248 A.3d 146, 155 (D.C. 2021) (“if the language of a statute or agency regulation is unambiguous; our inquiry ends there”). The Challenger’s contrary view renders the term “latest” meaningless. Likewise, insofar as the Monthly Reports must contain the “total numbers” broken down by ward, and total ward numbers are needed to calculate the five percent ward signature requirement for petition sufficiency, it logically follows that the term “official count” (which is ordinarily understood to mean a tally) for purposes of determining petition sufficiency contemplates the Board’s published (*i.e.*, “official”) Monthly Report ward totals. By contrast, the “uniform, interactive computerized voter registration list” which must be maintained to comply with HAVA is not a count, and HAVA does not require the maintenance of total counts by ward or District-wide. There is nothing in the Committee report on the HAVA amendments that indicates that the legislature intended to change the long-established practice of using the Monthly Reports to determine the five percent signature requirement when it conformed the D.C. Code to HAVA’s requirements, or that the legislature intended, as the Challenger’s position indicates, the Board to create additional counts beyond those published in the D.C. Register. Indeed, the Monthly Report has been assumed to be the “official count” for purposes of initiative signature requirements (*see Price, supra*, 645 A.2d at 600 n. 18 (referring to “official count” in the context of monthly rolls), and for the two decades prior to the adoption of the HAVA-related amendment, dozens of initiatives were proposed and their petition signature requirements

set based on the Board's Monthly Reports. The Challenger has incorrectly conflated HAVA list maintenance so as to mean count reports. Accordingly, the term "latest official count" cannot reasonably be understood to mean an interactive computerized list.³⁵

Moreover, the Challenger's position would improperly necessitate the application of the recently passed 2021 Redistricting Act ward boundary changes to the Petition. As noted above, the 2021 Redistricting Act's ward boundary changes became effective January 1, 2022. Applying a count to the Petition that differs from that relied upon by the Proposer in gathering signatures would be unfair and inconsistent with the Board's historical practice of using the published Monthly Reports for determining petition signature requirements, and would call into question the constitutionality of the statute. *See Delaney v. Bartlett*, 370 F.Supp.2d 373, 385 (M.D. N.C. 2004) (finding that law could not be construed as constitutionally valid where inconsistencies in the report used thereunder to determine petition sufficiency caused candidates to bear unequal burdens of ballot access and where relying on the "most recent statistical report" implicated fair notice concerns). Similarly, insofar as the Charter amendments require the application of the December 31, 2021 count to the Petition (which report date preceded the January 1, 2022 effective date for redistricting), applying the new wards to the evaluation of the Petition would impermissibly

³⁵Nor is the use of the December 31, 2021 Report inconsistent with HAVA. The data underlying the Monthly Reports is based on the Board's records which are maintained in accordance with HAVA. There is no inconsistency between using the Monthly Report for the purpose of determining ward and District-wide signature requirements and HAVA. HAVA's computerized list requirement was enacted to insure that election rolls be maintained at the state (as opposed to local) level, not to vary the point in time of the data used for ballot access purposes. As one court explained:

While "[e]arly U.S. elections were conducted almost entirely locally," HAVA changed the game, "shift[ing] some responsibility for conducting elections to the state level." Karen K. Shanton, *The State and Local Role in Election Administration: Duties and Structures*, Cong. Research Serv. 7 (March 4, 2019). As the United States Supreme Court has recognized, Congress requires "[the] State to create and maintain a computerized list of all registered voters" and to "verify voter information contained in registration applications." *Crawford*, 553 U.S. at 192, 128 S.Ct. 1610 (emphasis added).

State ex rel. Zignego v. Wis. Elections Comm'n, 957 N.W.2d 208, 224 (Wis. 2021).

require retroactive application of the 2021 Redistricting Act. *Redman v. Potomac Place Associates, LLC*, 972 A.2d 316, 319 at n. 4 (D.C. 2009) (noting the “well-settled principle that retroactive applications of legislation are not to be presumed absent express legislative language or other clear implication that such retroactivity was intended.” (Citations omitted)).

Finally, the Challenger’s position that the Board must run reports dated 30 days before a petition is submitted to determine the number of signatures needed would lead to impermissibly absurd results. *Cardozo v. United States*, 255 A.3d 979, 992 (D.C. 2021) (noting that absurd results must be rejected even when doing so is contrary to the most natural reading or to the literal interpretation of the statute (citing *Moten v. United States*, 81 A.3d 1274, 1277 (D.C. 2013))). In the instant case, because the period for gathering signatures began on October 14, 2021, well before the ward boundaries were changed by the 2021 Redistricting Act, the Challenger’s position would result in the application of the new ward boundaries to the Petition, thereby placing the Proposer in the untenable position of gathering signatures for wards whose boundaries were, during the time signatures were being gathered, unknown and subject to change.

For all these reasons, we conclude that the “latest official count of registered qualified electors made by the Board 30 days prior to the [petition] submission” could only be understood to mean the December 31, 2021 Report that was published in the D.C. Register. Based on that Monthly Report, the Petition was numerically sufficient as to Ward 2.

b. Claims Regarding Invalid Signatures

As indicated above, the remaining Challenge dispute between the parties is focused on the Challenger’s claims that 500 of the 2,907 Ward 2 signatures accepted as valid by the Registrar are, in fact, invalid.³⁶ We do not believe that Challenger’s position to be that the signers for dozens of

³⁶ In its April 6, 2022 order, the Board accepted the finding that 2,907 Ward 2 signatures were valid. April 6, 2022 Order at 8.

signatures which, for example, the Registrar found to be registered Ward 2 voters on the Board's records, were incorrectly found to be registered voters. Such a position, without some evidence that the Registrar committed gross error in reviewing the signatures, would be patently meritless. Rather, we understand the Challenger's position, particularly given counsel's argument at the June 1, 2022 hearing, to be that the 500 challenges should be read as seeking to invalidate signatures for the reason that they are not sufficiently decipherable to be identified as a registered voter's signature or the signature of the voter living at the address noted on the Petition and so on. That position is premised on the assumption that "the signature is not made by the person whose signature it purports to be," under 3 D.C.M.R. § 1007.1(i).

Contrary to the Challenger's position, the Challenge cannot be fairly read as questioning the authenticity of the signature under 3 D.C.M.R. § 1007.1(i). In pages 5-6 of the Challenge, the Challenger provides the error codes that constituted the basis for questioning a signature's validity. None of those codes relates to the form or authenticity of the signature. In addition, the Challenge relies on 3 D.C.M.R. § 1009.4 which addresses when a "signature will not be counted and included in the random sample universe."³⁷ Section 1009.4 does not even provide as a basis for invalidation the reason that the signature is not made by the person whose signature it purports to be. At no point does the Challenge cite to 3 D.C.M.R. § 1007.1(i) as a grounds for invalidating a signature.

Nor can unspecified liberal pleading requirements provide a means to circumvent the ten-day challenge period and allow the Challenge to be read as making hundreds of signature challenges under 3 D.C.M.R. § 1007.1. As noted above, the Board's regulations require that a challenge "cite[]" the alleged signature or circulator requirement defect by line and page. 3

³⁷ Challenge at p. 2, ¶ 10.

D.C.M.R. § 1006.2(a); *see also* 3 D.C.M.R. § 410.3 (challenges to initiatives “shall contain” the “name(s), if legible, sheet and line number(s) of any challenged signature(s) and the basis for the challenge(s)” and a “clear and concise statement of any other facts which are alleged to constitute a petition defect”). The election laws require that the challenger “specify[] concisely the alleged defects in [the] petition.” D.C. Official Code §1-1001.016(o)(1).

Aside from failing to satisfy the statutory timing requirements for a form of signature challenge, the Challenger failed to produce some meaningful evidence to support her recent claim that would counter the results of the Board’s random sample signature authentication at a 95% level of confidence. The Challenger did not, for example, produce statements from the persons identified as signors on the Petition disavowing having signed, or point to a signature that could be deciphered and did not match the printed name on the petition (as opposed to an indecipherable mark which our records show are often adopted by voters as their signature).³⁸

It would be improper to read, as the Challenger essentially requests, the identification of a signature as contested to indicate an objection to such signature on any conceivable grounds. We cannot reasonably be expected to read the Challenger’s mind and know that her claim that a signature was not valid for the reason that the signer was not a registered voter was intended to encompass a challenge for the reason that the signature did not appear to be that of the signer. Accordingly, we decline to disregard the statute’s deadline for contesting petitions and read the Challenge as raising a claim that its challenges to specific signatures was intended to include a claim that the signature is not made by the person whose signature it purports to be. We further

³⁸ Rather, the reasonableness of the Board’s signature authentication review was bolstered at the prehearing conference when the Board staff presented to the parties, through screen sharing technology, several petition signatures for initial challenges on the list of 500 remaining Ward 2 signatures challenges, and then displayed each of the signatures for that voter that were on file with the Board. This demonstration showed that, with respect to the signature comparisons shown, petition signatures which appear as a largely indecipherable scribble match the scribbled signature used by the voter in other documents contained in the Board’s records.

find that, assuming such claim had been timely asserted, the record does not support crediting such a challenge.³⁹

c. The Challenger's Request to Amend the Challenge

At the prehearing conference, counsel for the Challenger contended that, if the Board would not construe the Challenge to include challenges based on the allegation that the signature is not made by the person whose signature it purports to be under 3 D.C.M.R. § 1007.1(i), the Board should grant leave to the Challenger to amend the Challenge to assert that additional challenge ground under 3 D.C. M. R § 415.1(b). Counsel maintained that amendment was favored by the liberal rules of pleading.

To the extent that the Challenger suggests that liberal pleading rules and the Board's discretion to allow amendments to pleadings is a sufficient basis for allowing an amendment and permitting consideration of form-of-signature challenges at this late date, we reject the Challenger's position. While we have grave doubts as to whether the statutory ten-day challenge period can be circumvented through the regulatory ability to amend pleadings, we need not reach that question because we would not exercise our discretion to grant the amendment requested. The Challenger has offered no good cause showing for her failure to raise within the ten-day challenge period a claim under 3 D.C.M.R. § 1007.1(i) and, as discussed above with regard to the Challenger's failure to present extrinsic evidence of any petition signer disavowing his/her

³⁹ Assuming for the sake of argument that the failure to comply with the statutory requirements for challenging a petition can be excused, no reason has been asserted by the Challenger for failing to present her concern within the ten-day challenge period. Nor is this a case of harmless error given the fundamentally different nature of a review for signature mismatches from the other types of signature challenges. A review for signature mismatches is a far more involved check of signature validity than confirming whether a signer is a registered voter. It requires a comparison of all the signatures of the voter that the Board may have in its records (often there are several signatures for each voter) and exercising judgment as to the form of signature. Had this challenge been timely raised, the Board staff could have been reviewing it as the validity of the signatures at issue were being checked in the ordinary course of the Board's review. The results of such a review at this juncture on 500 signatures would entail a considerable amount of work.

signature and the Board's independent signature verification at a 95% confidence level, the potential merits of her position are unpersuasive.⁴⁰ Moreover, assuming for the sake of argument that we can expand the ten-day challenge period, the proposed amendment to allow form-of-signature challenges fails to meet our pleading amendment timing requirements.⁴¹ Further, our regulations provide that pleading amendments are allowed only by leave of the Board or written consent of the adverse party (3 D.C.M.R. § 413.1), and the Challenger has not secured the written consent of the Proposer to any amendment. Therefore, we decline to allow the Challenger to amend the Challenge to include the objection that the Ward 2 signatures deemed valid were not made by the persons whose signatures they purport to be.

d. The Challenger's Claim that the Sample Pool was Wrong

At the prehearing conference, attorneys Kline and Christopher LaFon appeared on behalf of the Challenger, and attorney Sandler appeared on behalf of the Proposer. At the outset of the conference, Mr. Kline acknowledged that the Challenge was limited to the Ward 2 signatures identified in the original Challenge, but stated that he wanted to preserve two other issues. The first issue was the claim that the Board should not have used the December 31, 2021 Report to

⁴⁰ Compare cases subject to parallel liberal pleading rules *Flax v. Schertler*, 935 A.2d 1091, 1105-06 (D.C. 2007) (affirming denial of leave to amend where, *inter alia*, appellant offered no reason why her first amended complaint could not have included the entirely new claims and amendment would require re-opening discovery and delay trial and citing *Bennett v. Fun & Fitness, Inc.*, 434 A.2d 476, 479 (D.C. 1981) (court may consider the merit of the proposed new claim in determining whether to grant leave to amend)); *Mudd v. Occasions Caterers, Inc.*, 264 A.3d 1191, 1199-1200 (D.C. 2021) (affirming denial of leave to add a new claim where the motion was untimely, required reopening discovery, and all the facts were known to appellant such that he could have proceeded timely); *Redshift, LLC v. Shaw*, 264 A.3d 1182 (D.C. 2021) (trial court has discretion to deny an amendment for undue delay where movant has not put forth any satisfactory reason for the delay such as new information which could not have been uncovered earlier and where the amendment would cause considerable burden on the opposing party in additional discovery).

⁴¹ 3 D.C.M.R. §§ 413.4 and 413.2 (amendments to pleadings in petition challenge cases must be made within 2 days of the initial filing where no responsive pleading is permitted, and, if a response is permitted, before that response is filed).

determine the number of signatures needed on the Petition. The following exchange then took place between the attorneys and the Board's General Counsel, Terri Stroud:

MR. KLINE: And then, the second issue is we believe that the sampling is in error because the universe from which the sample was taken has changed.

MS. STROUD: Could you elaborate on that, Mr. Kline?

MR. KLINE: Sure. It is our understanding that the sample was taken before the adjustments were made to Ward 2 with respect to redistricting, and therefore, the sampling was invalid because the universe changed.

MR. SANDLER: But what is -- I don't under -- is it your position that the universe should be the voters who lived in what was Ward 2 after redistricting, contrary to the position of the Board? Or what is your position on that?

MR. KLINE: Our position is whatever is determined to be the universe of Ward 2 voters, which the Board already determined in connection with the certification, that the sample should be taken from that universe.

MR. LaFON: And just to add to what Andrew was saying, we're referring to, basically, the Board had changed the number of accepted signatures for a purpose of random sampling. They changed from 3,500 to 2,907. There was no random sampling to test for the signature verification done with the decrease. That, of course, would change the dynamic of the error rate that would have been acceptable, particularly given the error rate was 6 percent in the first random sampling with respect to this issue.

March 28, 2022 Tr. at p. 8-9.

Subsequently, the Challenger's counsel did not seek to amend the prehearing conference order to include a description of the above-mentioned issue. No written pleading was ever filed further articulating the Challenger's purported concern with the sampling of Ward 2 for signature authentication.

At the June 1, 2022 hearing, Attorney Kline briefly commented that the sampling of Ward 2 was improperly done because the "sample pool was changed after the sampling was done." He summarily stated that sampling was wrong as a matter of statistics.

Insofar as the Challenger's counsel asserts the sample pool was changed, we note that the only numbers that were presented in connection with this allegation was the mention at the

prehearing conference of a change in the number of accepted Ward 2 signatures from 3,500 to 2,907. It appears that counsel's reference to the 3,500 figure is the number identified in the Board's April 8, 2022 Order at page 8. As indicated by that order, however, the 3,500 signatures were associated with Ward 2 based on the comparison of the Petition signatures to the Board's voter database before Board staff reassigned voters to the correct ward based on the ward the voters were assigned to prior to the Board updating the registry to reflect the new boundaries. Of the 3,500 voters who were initially credited for signing the petition in Ward 2, 651 were residents of Ward 6 and were adjusted into Ward 6 totals. There were 58 Ward 2 residents who were initially given credit in Ward 6 that were subsequently adjusted into Ward 2. The total adjustment in Ward 2 reduced the accepted signatures from 3,500 voters to 2,907.

Moreover, the initial pool of valid Ward 2 signatures that was utilized on March 24, 2022 included 2,782 signatures, not 3,500 signatures. After the updated pool was determined to actually include 2,907 signatures (for reasons explained in the April 8 memorandum and order), the DMD advised that there was no need to do a new random sample for validation, as the random samples of 100 used in the initial statistical calculations were all present in the revised provision of the pool of valid signatures for Ward 2 and thus the number of valid signatures in the previous findings was maintained.

At bottom, it seems that the Challenger's position on this issue is essentially no different than her point regarding the data used to determine the ward signature requirements: that the Board should be relying on the voter roll populations in existence post-redistricting. For the reasons set forth above as to the Board's appropriate use of the December 31, 2021 Report in determining the Petition's numerical sufficiency, the Challenger's claim that the signature authentication sample pool was improperly changed is without merit.

IV. Conclusion

In sum, the Board finds that the Challenge to the Petition failed to demonstrate the minimum number of signature defects which, if valid, would render the proposed Initiative ineligible for ballot access. Accordingly, it is hereby:

ORDERED that the Challenge is **DENIED**. It is

FURTHER ORDERED that the Challenger's collateral claims are **DENIED** as untimely and/or without merit.

The Board issues this written order today, which is consistent with its oral ruling rendered on June 1, 2022.

Dated: June 6, 2022



Gary Thompson
Chairman, Board of Elections