www.legalaiddc.org
1331 H Street, NW
Suite 350
Washington, DC 20005
(202) 628-1161

Testimony of Fran Swanson
Appellate Fellow, Appellate Advocacy Project
Legal Aid DC

Before the Committee of the Whole
Council of the District of Columbia

Public Hearing Regarding:

Bill 26-0048
"Review of Agency Action Clarification Amendment Act of 2025"

March 26, 2025

Legal Aid DC[1] submits the following testimony regarding B26-0048, "Review of Agency Clarification Amendment Act of 2025". I would like to start by talking about our work with administrative agencies before explaining why the Council should reject, or at a minimum, carefully draft, this legislation to ensure that it does not mistakenly expand deference to agencies in trying to simply preserve it. Deference in the District to agencies has never been reflexive. The District's courts have always required that deference be earned: tied back to, and therefore limited by, the justifications behind deferring to agencies in the first place.

Legal Aid's work often brings us to the District's administrative agencies, which help govern by drafting regulations and adjudicating disputes. Agency decisions touch on every aspect of life in the District. We participate in agency rulemaking, providing comments as a part of an open process. We also represent people in agency adjudications, which determine whether a family can put food on the table through

[1] Legal Aid DC is the oldest and largest general civil legal services program in the District of Columbia. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal legal system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. For more information, visit www.LegalAidDC.org.

SNAP, receive unemployment benefits after an unexpected job loss, or challenge a steep rent increase. These adjudications are high-stakes and difficult to navigate, especially for people without lawyers.

Finally, we seek review of these agency actions in the District's courts. We ask them to decide, for example, whether an agency has violated the laws that the Council has enacted or its own rules. In this way, our courts play a critical role that the Council must preserve.

The general rule in our legal system is that the courts interpret the laws, attempting to implement the expressed intent of the legislature. This legislation addresses a specific exception to that general rule: circumstances when a court defers to an agency's legal interpretation of a statute the agency administers. This is the topic of *Chevron* deference, which the Supreme Court overruled for purposes of federal law last summer.

The District's courts embrace a version of *Chevron* deference and carefully developed it here over decades with regard to the District's agencies. They have yet to decide whether to follow the Supreme Court's lead in getting rid of this kind of deference. If passed, this legislation would result in the Council stepping in and answering that question. The legislation is intended to codify the deference that the District's courts have developed – but there is a real risk that the Council upends this careful balance and expands deference in a way that slams the courthouse doors shut on District residents.

The most prudent course here would be for the Council to allow the courts to develop the law as they deem appropriate. Nothing about the Supreme Court overruling *Chevron* and eliminating deference to *federal* agencies interpreting *federal* laws requires the D.C. courts to do the same – or to alter the *status quo* in any way – for our *local* agencies interpreting our *local* laws. Indeed, the Supreme Court's decision rested on principles of *federal* separation of powers and a statute that is inapplicable to us. And while often looking to federal law, the D.C. Court of Appeals has always charted its own path and developed the law for our unique circumstances. Interrupting this process is unnecessary. The legislation before you shifts tremendous power from the Council and the courts to the executive. This shift in power is likely to harm our most vulnerable residents, by allowing executive agencies to undermine programs that the Council has created. We therefore urge the Council to simply allow the courts to develop the law. As this happens, if the Council disagrees with the actions the courts take, it can step in at that point, instead of now, where concerns are purely hypothetical.

Even if the Council chooses to step in now, it should do so with more nuance than the

law as currently drafted to preserve deference as it currently exists, instead of expanding deference.

Our concerns stem from a fundamental premise: normally, a court answers all questions of law that come before it without regard to what the parties think the law means, so special conditions must exist to justify deferring to what an agency thinks the law means. The District courts, for decades, have therefore always asked: Are the justifications for deference here? Or, put differently, did the agency earn deference here? The Council should ensure that it preserves three core principles of current caselaw in any legislation it passes.

First, Did the Council Answer for Itself What a Term Means?

Courts look at the text of the statute *before* looking to the agency's interpretation. That is because the power to make law is the Council's. When the statute says what a term means, the courts understand that no other part of the government has the power to give a different answer. Only if the Council has left the statute ambiguous about the term's meaning will a court even consider what the agency says the term means, because the Council has given the choice of what it means to the agency administering the statute. The ambiguity inquiry must remain as a distinct, first step in the deference analysis. It ensures that the intent of the legislature is implemented, even when an agency prefers something different.

As drafted, the law before you substantially eliminates that step. Instead of using our courts' familiar, two-step process or using the term "ambiguous," the legislation requires deference to the "reasonable interpretation of a statute or regulation [the Mayor or agency] administers, provided that the interpretation is not plainly wrong, or inconsistent with the statutory or regulatory language or the legislature's intent."[2] This difference

[2] That this inquiry is both first and separate is clear in D.C. Court of Appeals caselaw. *See, e.g.*, *Eldridge v. D.C. Dep't of Human Servs.*, 248 A.3d 146, 155 (D.C. 2021) ("As a rule, if the language of a statute or agency regulation is unambiguous, our inquiry ends there; but where the text allows for more than one reading, we will defer to an agency's interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose." (internal quotation marks omitted)); *Brown-Carson v. D.C. Dep't of Emp. Servs.,* 159 A.3d 303, 307 n.11 (D.C. 2017) ("[B]efore we afford some deference to an agency's interpretation of the statute that it administers at least two conditions must be met: (1) the statutory language in question must be ambiguous, and (2) the agency's interpretation must be reasonable." This ambiguity inquiry is separate, and

matters for how our courts make decisions: When they find a statute unambiguous, they stop there and do not consider whether the agency's interpretation has merit[3]. The legislation should make that clear.

The Second Core Principle is Expertise

Courts look at whether the agency offering the interpretation has special expertise in the question at issue. If the agency does not have expertise in the area, then the court is in a better position to decide what the law means. And if the agency is not an expert in the area, the Council did not mean to delegate deciding what the term means to the agency and it is just like any other term in a statute that courts interpret. Imagine a statute that says that a chemical should stay at safe levels, and the statute is administered by an agency that regulates pollution, with expert scientists running studies for years about that chemical's safety in different environments. That agency has earned deference.

But this special expertise will be missing in many cases. For example, no agency should receive deference in determining whether its processes have provided the fair notice a statute requires. And the District's courts have long recognized that the Office of Administrative Hearings, which hears appeals of many agency determinations made under a wide range of statutes, has no special expertise and is not entitled to deference.

The same is true for the Mayor, which makes the statute's inclusion of an order or decision of the Mayor particularly concerning: Like the Office of Administrative Hearings, the Mayor lacks special expertise required for deference and legislating otherwise would be a significant transfer of the Council's lawmaking power and courts' interpretive power to the Mayor – a transfer of power that goes far beyond what the courts have adopted thus far.

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first, even when the DCCA also uses the "plainly wrong or inconsistent" language. *See Nunnally v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 184 A.3d 855, 858 n.5 (D.C. 2018) ("Where we determine that a statutory term is ambiguous, however, we must defer to an agency's interpretation of that ambiguity that is reasonable and not plainly wrong or inconsistent with the legislature's intent."

[3] *See, e.g.*, *D.C. Dep't of Consumer & Regulatory Affairs v. A&A Rest. Grp.*, 232 A.3d 149, 153 n.5 (D.C. 2020) ("The petitioner argues that we should afford deference to DCRA's interpretation of the licensing statute but, because we do not find the law ambiguous, we do not reach the question of deference to DCRA.").

The Third Core Principle is Process

Our courts ask whether the agency has earned deference by looking at the process that the agency used to arrive at its interpretation. When an interpretation is consistent, considered, and the result of a formal process that followed the agency's rules and the Council's, the agency has earned deference. Did the agency come up with this interpretation in a brief to defend what it has already done, or did it undertake rulemaking, with input from the public?

Does the interpretation reflect the agency's careful engagement with the problem? These questions are vital to good, open government. And knowing that a reviewing court can meaningfully ask these questions leads to better agency decision-making in the first place.

Conclusion

Any legislative effort by the Council to codify deference must be precisely drafted to preserve these and other limitations developed over decades. Legal Aid has been in dialogue with the Office of the Attorney General about our concerns. We have proposed two broad frameworks, both of which we are submitting into the record as an attachment to this written testimony. We look forward to continuing those conversations with the Council and Office of the Attorney General.

Thank you very much for your time. I would be happy to answer any questions you have.

ATTACHMENT

Alternative One: Jayapal-Warren Stop Corporate Capture Act

If a statute that an agency administers is silent or ambiguous as to the proper construction of a particular term or provision or set of terms or provisions, and an agency has followed the applicable procedures of Title 2, Chapter 5, Subchapter I, has otherwise lawfully adjudicated a matter, or has followed the corresponding procedural provisions of the relevant statute, as applicable, a reviewing court shall defer to the agency's reasonable or permissible interpretation of that statute, regardless of the significance of the related agency action or a possible future agency action.

Alternative Two

(i) The purpose of this legislation is to codify District of Columbia law, as it exists on the date of enactment, with respect to deference to an agency's interpretation of a term in a statute it administers and to permit continued development of that body of law.

(ii) In reviewing a rule, order, or decision of an agency in any court or administrative proceeding, including but not limited to proceedings under subsection (a) of this section, the reviewing tribunal shall defer, if a statute is ambiguous as to the meaning of a term, to the reasonable interpretation of the agency that administers the statute.

(iii) The District of Columbia law, as it exists on the date of enactment, with respect to deference to an agency's interpretation of a term in a statute it administers shall not be construed to be altered by this Code section. A reviewing tribunal will continue to consider, among other factors, whether the interpretation is consistent with the statutory language and legislature's intent and the agency's care, consistency, formality, and relative expertness.