No. 20-cv-0714, No. 20-cv-0715

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

HYUN JIN MOON, et al.,

Defendant-Appellants,

v.

THE FAMILY FEDERATION FOR WORLD PEACE AND UNIFICATION INTERNATIONAL, et al.,

Plaintiff-Appellees.

On Appeal from the Superior Court of the District of Columbia, Civil Division (Case No. 2011 CA 003721B, Hon. Laura A. Cordero & Hon. Jennifer M. Anderson)

REPLY BRIEF OF DEFENDANT-APPELLANT UCI

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PRELIMINARY STATEMENT

Plaintiffs stake their brief ("Pl. Br.") on the claim that the decisions below hinge solely on neutral principles having nothing to do with religious disputes over theology or succession. In so submitting to this Court, Plaintiffs are unequivocal. "Throughout the litigation," say Plaintiffs, "the trial court has carefully eschewed wading into any ecclesiastical questions and has exclusively applied neutral principles of law." Pl. Br. 2–3. And Plaintiffs double-and triple-down on their secularized account at every turn. They deny that this case in any way concerns "a supposed succession dispute," questions of "how to interpret Unification Church theology," allegations either "against a religious organization" or against "individuals acting in a ministerial capacity or otherwise carrying out vital religious duties," or any "of the First Amendment concerns animating the ecclesiastical abstention doctrine." *Id*. at 1–2, 29–30.

To credit Plaintiffs' brief, one must think that the Defendants as well as the distinguished *amici* supporting them are paranoid or hallucinating—and that all of the many references to Unification theology and succession that suffuse the decisions and record below are somehow stray irrelevancies. To the contrary, however, the parade of *religious* determinations made below not only drip with *religious* terminology and import, but are *essential* to the court's bottom-line conclusions. Only by blinking reality can Plaintiffs attempt to stave off the result

so clearly compelled by the U.S. Constitution—reversal of the decisions below and dismissal of the litigation.

Take Plaintiffs' underlying theory of what the "Unification Church" is. According to Plaintiffs, "there is no legitimate theological dispute that, in 2010 . . . [Family Federation] was widely understood to be the embodiment of the Unification Church." Pl. Br. 60.[1] But there is in fact sincere dispute about what the "Unification Church" was then and is now. Indeed, Plaintiffs' own expert has an opinion quite different from their latest; according to him, "[t]he Unification Church (UC) refers to an international constellation of churches and related non-profit organizations and for-profit businesses that derive from the messianic ministry of" Reverend Moon. JA.0594; *see* UCI Br. 16. Even Hak Ja Han (Reverend Moon's widow and Family Federation's managing agent) acknowledges that Family Federation is not *the* Unification Church because Family Federation is merely one of the "providential organizations" that "are part of [the] Unification Church." JA.1765; *see* UCI Br. 13–14. By nonetheless blessing Family Federation as the one ordained manifestation of the "Unification Church," the trial

[1] Incoherently, Plaintiffs try to discount the court's pivotal finding that "Unification Church" refers to "the Family Federation for World Peace and Unification International," UCI Br. 30 (citing JA.0320–22), by noting it falls under the heading "Background Facts on the Unification Church." Pl. Br. 59 (quoting JA.0320). But these were among the "FINDINGS OF FACT" underlying the court's legal conclusions and remedies. *See also, e.g.*, JA.0372. And the question of who represents the "true" Unification Church lies at the heart of this dispute.

court not only ignored genuine factual disputes (to say the least) but also decided a profound theological dispute that continues to divide this Movement.

Nor can Plaintiffs rescue the court's misguided conclusion that Reverend Moon was speaking "aspirational[ly]" in proclaiming the "end of the church era" in the mid-1990s. Pl. Br. 60–61; JA.0343. Contrary to Plaintiffs' straw-person, UCI has never argued that the Unification Church ceased to exist. Rather, UCI's point is that the "end of the church era" punctuated the Movement's providential rejection of a "hierarchical, institutionalized church," and that Dr. Moon and the other directors were implementing Reverend Moon's instruction when they amended UCI's articles in 2010. DD Br. 16–17; UCI Br. 14. No matter how the trial court might interpret a fragment of testimony from a single witness, UCI Br. 32 & n.10, it had no constitutional license to deny that Reverend Moon made a watershed announcement (thus spawning Plaintiff Family Federation, in fact) or to divine and announce the true religious import (or supposed lack thereof) of Reverend Moon's religious exhortation.

Such cavalier treatment of this seminal event in the history of the Unification Movement illustrates the peril of judges straying into matters of faith. The court failed to appreciate that Reverend Moon's statements stirred his followers to *action*, not mere "aspiration." *See, e.g.*, JA.2780–81 (Kwak describing the announcement as "incredibly monumental" such that his "jaw

dropped at the time"); JA.2361–62 (Sommer); JA.2883–84 (Dr. Moon); JA.3068–69 (Perea); *see also* JA.1330–34 (Reverend Moon in 1997: "Now is the time for all these old church or church-related signs to come down," because they "limit[] salvation to the individual level."); JA.1283–84.

Other examples jump out from the orders below. Emblematic is the court's recurring, unmistakable rejection of Dr. Moon's claim that he rightly succeeds Reverend Moon as the leader of the Unification Church. Pl. Br. 61–62. Although Plaintiffs assert that "UCI provides no citation" on this point, UCI quoted the court's conclusion that Dr. Moon is "incapable of . . . supporting the Unification Church and its activities." UCI Br. 34 (citing JA.0326, JA.0361–62); JA.0390–91 (concluding that the directors "wanted no part of the Church" and "are hostile to the Unification Church and its leadership"); JA.0325 (stating that Dr. Moon "had a history of taking positions that were at odds with the Unification Church"). The trial court could not have denounced Dr. Moon as *at odds with* the Unification Church without rejecting Dr. Moon's status as the rightful successor to Reverend Moon as the *leader* of the Unification Church. Nor could the court otherwise have faulted the Director Defendants for adhering to the wrong "school of thought" by following Dr. Moon, JA.0391, as the court expressly and repeatedly did.

The same constitutional transgression supplies the trial court's sole basis for distinguishing UCI's donations to KIF and GPF (which the court *condemned*) from

UCI's preceding donations to secular institutions that had no formal affiliation with the Unification Church (which the court *commended*). Although UCI's donative pattern is otherwise indistinguishable from one era to the next, the court relied on the night-and-day distinction that the earlier set of recipients was "founded, supported or approved by Reverend Moon." Pl. Br. 36 (citing JA. 0344–45). In contrast, the trial court deemed unfit those recipients founded, supported, or approved by Dr. Moon, whom the court unconstitutionally (and erroneously) deemed ineligible to fill his father's shoes. JA.0326. Neither Plaintiffs nor the trial court explain why UCI's donations to KIF and GPF were suspect in a way that UCI's donations to, say, The Washington Times—which *equally* lacks any legal affiliation with the Unification Church—are not, *unless* the court resolved the core dispute over religious succession in favor of Plaintiffs, contrary to the First Amendment. UCI Br. 19–21.[2]

[2] Nor do Plaintiffs grapple with other religious-succession problems that beset their case. When they first sued, Plaintiffs did so on the premise that Sean Moon, then-President of Family Federation, was Reverend Moon's rightful successor. UCI Br. 3, 16–17. But Sean has since been ousted, and Hak Ja Han testified he was never designated or competent to be Reverend Moon's successor. JA.3807; JA.3907; DD Br. 11, 22–23. When it issued the Remedies Order, however, the trial court seemed oblivious to Sean's ouster and how it negates the court's stated premises. *See* JA.0380; JA.0322 & n.5 (identifying Sean as "the only one available, aside from Preston Moon, to lead the movement" given that "Reverend Moon 'would only allow a son to . . . lead[] the movement'"). And the trial court neither acknowledged that Hak Ja Han has more recently renounced "Family Federation" in favor of the "Heavenly Parent Church," JA.4142, nor hinted how that reconciles with its finding that *only Family Federation* truly

Plaintiffs attempt to distract this Court by salaciously referring to the KIF donation as "The Heist." Pl. Br. 17. For all their rhetoric, however, Plaintiffs do not deny that *many* of the organizations that received donations from UCI lacked legal affiliation with any Movement entity. At the same time, these organizations were *spiritually* affiliated, created and run by faithful Movement members, and positioned to advance its providential purposes—just as is true of KIF and GPF, as reflected in their corporate documents. UCI Br. 20–21; DD Br. 15–16, 20–21; JA.1010–11; JA.3551; JA.1099. Again, the trial court's distinctions are grounded not in *neutral principles* but forbidden *religious judgments* about rightful succession and what truly "further[s] the Unification Church's goals." JA.0373.

Headings aside, Plaintiffs lack actual facts indicative of any "Heist," or, indeed, anything other than a sincere effort to carry forward Reverend Moon's legacy and vision. Most importantly, Plaintiffs do not deny that (i) Dr. Moon himself caused KIF assets to be brought into UCI in the first place, never intending for them to remain within UCI; (ii) Reverend Moon tasked Dr. Moon with completing the Yeouido Island development project; (iii) a single individual held these development rights before Dr. Moon transferred the Yeouido Island assets into UCI; (iv) the KIF donation proceeded per the counsel of professional advisors

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embodies the Unification Church. JA.0320–22. The dizzying twists of these continuing succession disputes underscore the wisdom of ecclesiastical abstention—and the trial court's mistake in departing from same.

enlisted for this purpose; (v) KIF's articles of incorporation were "almost identical" to UCI's; and (vi) KIF was "run by well-known and devoted" Movement members. UCI Br. 20; DD Br. 20–21. If any donation ever made by UCI under Reverend Moon's tenure compares favorably, Plaintiffs omit to mention it.

As to GPF, Plaintiffs cite the trial court to claim that Dr. Moon formed a "rival nonreligious GPF organization," then diverted funds to it. Pl. Br. 27. But Plaintiffs thereby ignore that neither UPF's nor GPF's corporate documents refer to the Unification Church, and both UPF and GPF were aimed at "building one family under God." JA.1863–86; JA.1854–61; JA.1009–11; JA.2868; JA.2892–93; JA.2899. Although Plaintiffs deny that the court resolved a religious dispute in order to fault donations to GPF (Pl. Br. 42, 44), the court had no other way to overcome the testimony of "all directors . . . that they firmly believed UCI's donations to GPF entities legitimately advanced the mission of the Unification Movement." JA.0407. In finding that "GPF is not affiliated with the Unification Church and is not an activity of the Unification Church," JA.0360, the court was rejecting the directors' "firm[] belie[f]" *not* because it found their belief *insincere*, but because it *disagreed* about the true "mission of the Unification Movement." JA.0407. In this respect, too, the trial court violated the First Amendment.

ARGUMENT

I. PLAINTIFFS FAIL TO REFUTE THAT THE TRIAL COURT'S ORDERS VIOLATED THE FIRST AMENDMENT

Once this Court separates substance from rhetoric, the First Amendment issues here are not close. Without belaboring points made by the Director Defendants and the *amici*, UCI addresses discrete aspects of Plaintiffs' brief.

A. Plaintiffs Distort The Governing First Amendment Principles

Despite stating the parties' agreement on the "settled principles of First Amendment jurisprudence" that govern (Pl. Br. 37), Plaintiffs play fast and loose with those principles in trying to salvage the orders under appeal. For example, Plaintiffs urge a watered-down form of First Amendment scrutiny on the ground that UCI is "not a church." Pl. Br. 37; *see id.* at 2, 29–30, 45. But UCI *is* a religious nonprofit that has a religious mission and governing documents replete with religious terminology. Plaintiffs recognized as much in their complaint, calling UCI a "providential organization." JA.0119. The First Amendment protects UCI as a "religious institution[]" just as it would a "church[]," with undiluted force. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *see St. Joseph Cath. Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 740 (Ky. 2014) ("The definition of religious entity . . . [includes] purported religious organizations [whose] mission is marked by . . . religious characteristics.") (citation omitted).

Plaintiffs also obscure what constitutes a forbidden judicial interpretation of religious terminology. The Supreme Court has long held that the "civil judiciary" may not "determine whether [challenged] actions" represent a "substantial departure from the tenets of faith and practice." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969). Where a case like this "requires a civil court to examine certain religious documents," a court cannot "rely on religious precepts" to resolve the dispute. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

Plaintiffs argue the court "simply compar[ed] the text of the original and amended articles." Pl. Br. 61. But that elides the underlying *religious* judgments at play. The court determined that the "theology and principles of the Unification Movement" differ in theological meaning from the 1980 articles' references to the "Divine Principle," the "Unification Church," and "God." That is unconstitutional. Plaintiffs never explain how the court could conclude as it did without finding that the new terms "substantial[ly] depart[] from the tenets of faith."

B. Plaintiffs Provide No Defense For An Order Removing A Religious Leader From A Religious Institution

The trial court removed the Director Defendants and Dr. Moon—a figure whom many hail as the Fourth Adam and leader of the Church—from leadership of UCI, a religious institution. Plaintiffs identify no precedent for such violent interference with religious leadership. Indeed, it would be difficult to imagine a

more egregious violation of the rule that a court may not "determine the religious leader of a religious institution." *Samuel v. Lakew*, 116 A.3d 1253, 1261 (D.C. 2015). Yet Plaintiffs contend otherwise on the theory that Dr. Moon and the other Director Defendants were acting "in a secular capacity" such that First Amendment precedents supposedly do not apply here. Pl. Br. 62–63.

Plaintiffs are wrong. As the directors of a nonprofit devoted to advancing Unification theology (whether under the 1980 or 2010 articles), the directors are plainly pursuing a religious mission—much like Catholic school teachers, whose mission is to inculcate Catholic values among pupils. *Cf. Our Lady of Guadalupe*, 140 S. Ct. at 2066–69; UCI Br. 35. And Plaintiffs offer no justification for an unheard-of order by a civil court to remove the leaders of a religious institution while granting a rival faction say over their replacements. Especially in the wake of the Remedies Order, no attentive observer can fail to grasp that the trial court has sided with one faction in an ongoing schism over the meaning of Unification theology and the structure of the Unification Church.

II. PLAINTIFFS FAIL TO REFUTE THAT THE TRIAL COURT FATALLY ERRED BY BARRING UCI FROM PARTICIPATING IN THE REMEDIES HEARING

Plaintiffs gloss over the due-process deprivation by denying that UCI: (1) objected to its exclusion; (2) had a cognizable interest; or (3) suffered any meaningful exclusion. But Plaintiffs err on all scores, and the due-process

violation is glaring. Similarly glaring is the court's abuse of discretion in categorically excluding UCI's evidence, which Plaintiffs scarcely try to defend.

A. Plaintiffs Ignore UCI's Repeated Objections To Its Exclusion

Plaintiffs falsely claim that UCI's counsel "did not object" to its exclusion from the Remedies Hearing. Pl. Br. 73. The record shows otherwise. Before the hearing, UCI argued it had interests independent of its directors' interests. JA.2078. During the Remedies Hearing, UCI's counsel renewed that argument, at which point the trial court *agreed* but *nonetheless* excluded UCI from participating. JA.2605–07. Further burnishing the record, UCI objected *again* on the last day of the hearing, JA.3229–32, in a colloquy that Plaintiffs ignore.

Plaintiffs also ignore that the trial court pledged to involve UCI in a future proceeding that would precede reconstitution of UCI's board, only to renege on that pledge. UCI Br. 39–40. It is inconceivable that UCI was required not only to object to its exclusion, as UCI repeatedly did, but also to predict and preempt the trial court's violation of its pledge. *See D.C. v. Howard*, 588 A.2d 683, 688–89 (D.C. 1991) (issue "clearly preserved" when raised in briefing and twice orally).

B. Plaintiffs Cannot Deny UCI's Interest In Its Board's Composition

Plaintiffs dispute UCI's threshold interest in the composition of its board. That is as shocking as it is wrong. The *board* of a nonprofit corporation effectively *is* the nonprofit: The board's decisions profoundly and irrevocably shape the

nonprofit's fate, as courts have agreed. *Compare* UCI Br. 39 n.11 (cataloguing cases), *with* Pl. Br. 74 n.10 (claiming UCI's cases "do not merit a response").

What matters for purposes of triggering due process is UCI's *substantive interest* in the proceeding. Whether UCI is named as a defendant on Count II of the complaint is beside the point. Even if UCI had *not* been sued, it would *still* have been entitled to intervene as a matter of right to protect its substantive interests. *See* D.C. SUPER. CT. CIV. R. 24(a). It follows *a fortiori* that UCI, as a named Defendant, deserved to be heard and permitted to advance its interests in a proceeding that stood to, and in fact did, unseat its board members. Even the trial court recognized that UCI has "an interest" in this respect. JA.2606.

C. Plaintiffs Cannot Obscure The Trial Court's Exclusion Of UCI

Plaintiffs also suggest that UCI was not denied the opportunity to participate because it was included in "status conferences" and "in briefing." Pl. Br. 72, 74. But Plaintiffs do not and cannot dispute that UCI was barred from *presenting evidence* at the Remedies Hearing, an "essential minim[um]" of due process. *Nat'l Broad. Co. v. Fed. Commc'ns Comm'n*, 132 F.2d 545, 561 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943). Lest there be any doubt, the trial court *expressly ruled* that UCI would *not* "get to participate" at the single, all-important evidentiary hearing that preceded the Remedies Order. JA.2606–07. And Plaintiffs themselves

grasped the totality of this exclusion—initially questioning UCI's right even to appeal by citing the very colloquies and rulings they now elide. JA.4254.[3]

Nor can Plaintiffs rationalize that exclusion by claiming that UCI sought to advocate for its best interests "unencumbered" by its "purpose to support the Unification Church." Pl. Br. 74–75. Such circular reasoning is anathema to due process. The question of how to define the "Unification Church" is at the epicenter of the parties' dispute; the trial court could not resolve that question against UCI before hearing UCI's evidence on it. Equally misconceived is Plaintiffs' attempt to defend the trial court as having hypothesized and deemed dispositive that UCI's directors would not act in the "best interests" of UCI as newly constituted. Pl. Br. 74. That rationale came only *post hoc*, in the trial court's stay denial, and makes no sense even now: The trial court could not decide whether to reconstitute UCI without entertaining full and fair proof from UCI—particularly regarding how UCI was faring as constituted and as relevant to its future prospects and best interests.

Plaintiffs do not deny that UCI's evidence showed how the Director Defendants rescued UCI's failing businesses. UCI Br. 41–42. Nor do Plaintiffs explain how—consistent with their account of the trial court's wholly secular analysis—such evidence could be *altogether ignored* when assessing whether

[3] This unconstitutional exclusion supports vacatur irrespective of whether it "necessarily affect[s] the *substantive* outcome of the relevant proceedings." *Kirk v. Com'r of Soc. Sec. Admin.*, 987 F.3d 314, 327 n.19 (4th Cir. 2021).

removal of these individuals in fact serves UCI's best interests. By no means could the trial court properly order that replacements be selected "in conjunction with Plaintiffs" without letting UCI make its case against that incursion.

Plaintiffs further assert that UCI was "in lockstep" with its Co-Defendants. Pl. Br. 74. Not so. UCI has always pressed its distinct interests, JA.2078, as the court recognized by holding the Director Defendants liable to UCI for hundreds of millions of dollars. In no event can Plaintiffs justify *categorical exclusion* of UCI's evidence, including specific items that Plaintiffs concede were both (a) distinct from evidence offered by the Director Defendants and (b) probative of UCI's best interests, particularly its financial interests. *See* UCI Br. 41–42. It would be one thing for the court to exercise discretion to exclude one or another piece of evidence. But its across-the-board, sight-unseen exclusion of any and all evidence UCI might offer was an obvious abuse of discretion. UCI Br. 42.

III. PLAINTIFFS FAIL TO REFUTE THAT THE SUPERIOR COURT VIOLATED D.C. LAW BY REMOVING UCI'S DIRECTORS

Plaintiffs neither refute that removing UCI's board members defies the express terms of D.C.'s governing statute, nor offer any plausible basis for circumventing those express terms.

A. It Remains Clear That D.C. Code § 29-406.09 Applies

Plaintiffs acknowledge that *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994), instructs that D.C. Code § 29-406.09 properly governs any prospective

relief. Pl. Br. 65. Plaintiffs further acknowledge that the Remedies Order is prospective insomuch as it is "injunctive in the jurisdictional sense." Pl. Br. 66. But Plaintiffs' position then descends into mush. As best we can tell, Plaintiffs would distinguish prospective injunctions that "order[] one instance of compliance" from "continuing indefinite injunction[s] against conduct like picketing that is recurring every day." Pl. Br. 66. But Plaintiffs cite no case drawing any such distinction, which is illusory. No one can seriously suggest that the Remedies Order holds for only one instant, while leaving the "removed" directors free to return to their positions the next day. Nor can anyone deny that this removal, whatever its duration, is forward-looking—which is all that matters under *Landgraf* and its predecessors.

Setting aside the prospective nature of the remedy at issue, § 29-406.09 is a remedial statute that would apply retroactively in any event. D.C. Code § 29-406.09 supplied a new remedy unknown to common law. UCI Br. 47–48. "A remedial statute that does not take away vested rights can operate retroactively in the absence of language manifesting a contrary intent." *Edwards v. Lateef*, 558 A.2d 1144, 1147 (D.C. 1989). In a prior case where a statutory amendment created an "additional remedy," this Court reversed a "trial court's holding that application of the amendment . . . would constitute an impermissible, retroactive application of the statute." *Id.* at 1144, 1147. It follows that § 29-406.09 governs here.

B. Plaintiffs Offer No Basis To Second-Guess Duly Enacted Statutes

According to Plaintiffs, the Remedies Order does not "contradict any public policy determination in the D.C. Nonprofit Code." Pl. Br. 66. But D.C. Code § 29-406.09 refutes that, striking a calculated legislative balance between when corporate self-governance should be respected and when it should not. This reflects a paradigmatic legislative judgment, and one that D.C. courts are bound to heed. *See Liu v. U.S. Bank Nat'l Ass'n*, 179 A.3d 871, 881 (D.C. 2018); *see also Lacek v. Washington Hosp. Ctr. Corp.*, 978 A.2d 1194, 1198 (D.C. 2009).

Contrary to the trial court's premise, no claim to "inherent equity power" can overcome "a rule or other authority [that] defines the boundaries of a particular procedural remedy." *D.C. v. Am. Fed'n of Gov't Emps., Loc. 1403*, 19 A.3d 764, 774 n.8 (D.C. 2011) (cleaned up); *see also United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001). Otherwise, a court claiming "equitable" authority could upend any legislative judgment, however considered and express, to proscribe a given remedy.

Further still, the trial court's decision conflicts with the legislature's judgment by undermining the desired consistency and predictability of nonprofit law. The D.C. Nonprofit Corporation Act was enacted to prescribe "detailed provisions [to] give an answer for most problems of corporate existence, so that counsel of nonprofit corporations may readily determine with precision what the

corporation may do and how to do it." S. Rep. No. 87–1357, at 2 (1962). These "clearly defined rights and procedures" provided a "practical and effective solution to the antiquated and patchwork of laws that [then] exist[ed] in the District of Columbia with respect to nonprofit corporations." *Id.* at 3–4. And Plaintiffs do not deny that D.C. continued the trend toward encouraging consistency and predictability by embracing the ABA's third Model Nonprofit Corporation Act, only for the trial court now to sew anomaly. UCI Br. at 44–45.

The trial court's departure is all the more problematic because it disrupts the precise balance the legislature struck in limiting the precise remedy at issue. Private parties seeking to remove a director may do so *only* "in a proceeding commenced by or in the right of the corporation." D.C. Code § 29-406.09(a). And any "proceeding commenced under [§ 29-406.09] to remove a director of a charitable corporation," requires notice to the D.C. Attorney General. *Id.* § 29-406.09(e). Moreover, the demand requirement in D.C. Code § 29-411.03 typically requires 90 days of notice to the corporation before a derivative suit may be filed. These procedures promote judicial economy and "the integrity of corporate self-governance," which "is preserved if the board of directors is given an opportunity from the start to address the issues raised by a discontented shareholder." *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 64–67 (D.C. Cir. 1988); *Estate of Raleigh v. Mitchell*, 947 A.2d 464, 470 n.6 (D.C. 2008) (requirements for

derivative suit are "strict"). The trial court undermined those policies by granting Plaintiffs the relief specified in § 29-406.09 without requiring them to follow the attendant procedures and safeguards.[4]

Plaintiffs do not deny that sister courts enforce provisions like § 29-406.09, limiting removal of any nonprofit's director. UCI Br. 45 n.14. For example, the Supreme Court of Ohio rebuffed efforts by members of a mosque to remove a nonprofit's directors. The members complained they would be left with "no remedy" unless they could convince the Attorney General to intercede on their behalf; the court noted that might "raise an issue for the legislature to address, but [was no] reason to allow [the plaintiffs' claims] to proceed." *State ex rel. Salim v. Ayed*, 22 N.E.3d 1054, 1060 (Ohio 2014). So too here.

Any argument by these Plaintiffs that they are being denied a remedy (Pl. Br. 69) is no stronger than the argument that was rejected in *Ayed*. Notably, D.C. law *permits* the removal of directors in certain, limited circumstances. To the extent Plaintiffs' suit is non-derivative and unsupported by the Attorney General, *see* D.C.

[4] Plaintiffs' discussion of the Home Rule Act confuses a court's subject-matter jurisdiction (per the Home Rule Act) with its remedial power (per § 29-406.09). The trial court's *jurisdiction* extends to "any civil action . . . brought in" D.C. D.C. Code § 11-921(a)(6). But the D.C. Council can and does limit the *specific remedies* available in cases within this jurisdiction. *Estate of Raleigh*, 947 A.2d at 470 nn.6–7. *Shoetan v. Link* turned on the inapposite premise that a law restricting the court's ability to set aside its judgments in certain cases violates the Home Rule Act. 2009 D.C. Super. LEXIS 5, at *11–29 (D.C. Super. Ct. Nov. 13, 2009).

Code § 29-412.20(a)(1)(C), there is nothing unjust or problematic about holding Plaintiffs to the statutory limitations carefully calibrated by the legislature.

C. In Any Event, Plaintiffs Have Not Established "Inherent Equity Authority" For D.C. Courts To Remove Nonprofits' Directors

Even if D.C. Code § 29-406.09 does not apply retroactively, the Superior Court still lacked authority to remove UCI's directors because D.C. courts have never had freestanding authority to remove nonprofit directors. Pl. Br. 69.

No case supports Plaintiffs' contrary position. Pl. Br. 69–70. In *Stern v. Lucy Webb Hayes National Training School for Deaconesses & Missionaries*, the court *declined* to remove any directors. 381 F. Supp. 1003, 1018–19 (D.D.C. 1974). In *Owen v. Board of Directors of Washington City Orphan Asylum*, this Court likewise did *not* remove directors or even consider doing so; it ruled that two parallel, co-equal boards (one of trustees and the other of directors) could continue to coexist per longstanding practice, without one "unilaterally" extinguishing the other. 888 A.2d 255, 259–61, 266, 271 (D.C. 2005). In *George v. Jackson*, the court simply invalidated a procedurally-defective corporate resolution electing new members to a nonprofit board. 2015 WL 12601903, at *4, *6–8 (D.C. Super. Ct. July 7, 2015). *United States v. Mount Vernon Mortgage Corporation* was decided 67 years ago (before D.C.'s Nonprofit Corporation Act), and the court there did not claim equitable power to remove corporate directors. 128 F. Supp. 629, 631 (D.D.C 1954). Because the trustees of a nonprofit "impliedly renounced their

offices," it was "necessary for the court to appoint successor trustees" to fill the vacuum. *Id.* at 636.

In any event, Plaintiffs' reading of these cases still runs smack into § 29-406.09. If, as Plaintiffs contend, D.C. courts *did* have equitable authority to remove a nonprofit's directors, then § 29-406.09 marked a mere *procedural* change to preexisting rights. And "laws which provide for changes in procedure may properly be applied to conduct which predated their enactment." *Duvall v. United States*, 676 A.2d 448, 450 (D.C. 1996). In analogous circumstances, this Court ruled that a "90-day pre-filing notice requirement was intended . . . to improve the legal process in the area of civil justice by encourag[ing] early settlements and facilitat[ing] the parties' ability to reach a settlement," and was thus "remedial, procedural legislation" applicable to a preexisting action. *Lacek*, 978 A.2d at 1198 (cleaned up); *Bowyer v. D.C.*, 779 F. Supp. 2d 159, 165 (D.D.C. 2011) (distinguishing *Bank of America, N.A. v. Griffin*, 2 A.3d 1070 (D.C. 2010)). At most, therefore, Plaintiffs' view of the cases they cite confirms the propriety of heeding § 29-406.09 as "remedial, procedural legislation" applicable here.

CONCLUSION

For the foregoing reasons, this Court should reverse the rulings below and remand this case with instructions to dismiss the case for lack of subject matter jurisdiction, or, in the alternative, vacate the Remedies Order below.

Dated: May 5, 2021

Respectfully submitted,

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