No. 20-1279

IN THE
Supreme Court of the United States

ANGELICA CASTAÑON, *et al.*,
Appellants,
v.
UNITED STATES OF AMERICA, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICI CURIAE* OF DISTRICT OF COLUMBIA HISTORIANS IN SUPPORT OF APPELLANTS

CATHERINE E. STETSON
Counsel of Record
MISTY M. HOWELL
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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STATEMENT OF INTEREST

Amici are professors and scholars of American history who focus their research and writings on the history of the District of Columbia.[1] As historians deeply familiar with the events precipitating the District Clause, the debates of the Constitutional Convention, the state ratification debates, and later legislative efforts with respect to our Nation's Capital, they are

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

authoritative sources regarding the historical questions that bear on the legal issue before this Court. Indeed, the work of one *amicus* was cited repeatedly by the majority and the dissent in *Adams* v. *Clinton*, 90 F. Supp. 2d 35 (D.D.C.) (per curiam), *aff'd*, 531 U.S. 941 (2000). *See id.* at 50 n.25, 51 n.27, 58 n.39 (citing Kenneth R. Bowling, *The Creation of Washington, D.C.: The Idea and Location of the American Capital* (1991)); *id.* at 76–78 nn.8–10, 12, 14, 16–17 (Oberdorfer, J., dissenting in part and concurring in part) (same). *Amici* submit this brief to clarify important aspects of the historical record, most importantly the absence of any evidence that the Framers intended to deny representation to residents of the future District of Columbia.

The scholars joining this brief are[2]:

- Kenneth R. Bowling, Professor Emeritus of History, The George Washington University.
- William C. diGiacomantonio, Chief Historian, U.S. Capitol Historical Society.
- George Derek Musgrove, Associate Professor of History, University of Maryland, Baltimore County.

SUMMARY OF ARGUMENT

Nothing in our Nation's early history establishes that the Constitution bars the residents of the Nation's Capital, currently over 700,000 in number, from exercising one of their most fundamental civil rights. *See* U.S. Bureau of the Census, Dep't of Com., *QuickFacts: District of Columbia*,

[2] All signatories speak for themselves only and not on behalf of their respective institutions. Institutional affiliations are listed for identification purposes.

https://www.census.gov/quickfacts/DC (last visited April 14, 2021). But the three-judge court below approved of this disenfranchisement by effectively inserting the word "only" before the Constitution's provision that "the People of the several States" choose the members of the House of Representatives.

The three-judge court's opinion paid short shrift to constitutional history, oversimplifying Plaintiffs' argument along the way. The court concluded that the Framers did not intend, by their use of "State" in Article I, "to refer to anything but those entities of which the Union then had thirteen and now has fifty." App. 59a. Perhaps that may be so. But this case is not about whether the District is a State. It is about whether citizens of this Nation can be deprived of voting representation in the House simply because they reside in the Nation's Capital and not across the river in Virginia, on a federal enclave in Maryland, or on foreign soil in Toronto. The continued disenfranchisement of District residents is an injustice neither intended by nor an inevitable result of the constitutional design. Nothing in the record of the Constitutional Convention or in the ratification debates suggests that the Framers intended to deny those who reside in the federal "Seat of Government" a voice in selecting that body. To the contrary, the available evidence suggests that the Framers anticipated that the new federal district would one day warrant representation, but understandably did not see a need to resolve the issue while the District itself remained a theoretical construct.

Post-ratification history similarly suggests that residents outside of a State can enjoy voting representation in the House. Indeed, District residents

maintained the vote for a decade after ratification—including after the District transferred to federal control in December of 1800. By way of the Organic Act of 1801, however, Congress took away that representation. And the political context of that Act's passage suggests that the Act failed to provide for District residents' representation not because of any doubt about Congress's authority to afford them the vote, but because the issue lacked urgency at the time. Congress's failure to provide for representation in the Act thus does not indicate that Congress lacked the *power* to do so. In fact, Congress ensured that federal enclave residents maintained the vote—and it did so under the same grant of authority by which it disenfranchised District residents.

In sum, there is no historical support for the argument that the Framers intended to deny representation to those living in the Nation's Capital. But the District's residents continue to be deprived of voting representation in the House. This injustice is neither a purposeful nor inevitable result of the constitutional design. The Court should put a stop to this unconstitutional abrasion.

The Court should note probable jurisdiction.

ARGUMENT

I. THERE IS NO EVIDENCE THAT THE FRAMERS INTENDED TO DENY FEDERAL REPRESENTATION TO DISTRICT RESIDENTS.

1. The Framers' objective in creating a federal "District" did not include or necessitate denying residents a voice in the federal government. Myriad statements during the debates over the draft Constitution

demonstrate how fundamental that principle was to the Founders. As James Madison explained during the Constitutional Convention, "the right of suffrage is certainly one of the fundamental articles of republican Government," and "[a] gradual abridgement of this right has been the mode in which Aristocracies have been built on the ruins of popular forms."[3] At the Pennsylvania ratifying convention, delegate Benjamin Rush pronounced that "there is no security but in a pure and adequate representation; the checks and all the other desiderata of government are nothing but political error without it, and with it, liberty can never be endangered."[4] Alexander Hamilton likewise maintained that "Taxation and represent[ation] go together," 22 DHRC 1734–35 (2008) (notes of Hamilton's speech on June 20, 1788), and that "this Gov[ernment] [is] built—on all the principles of free Gov[ernment]," namely "representation." 23 DHRC 2193 (2009) (notes of Hamilton's speech on July 17, 1788).

The Framers also recognized that the People of this new nation would surely demand this right if it were denied. Oliver Ellsworth, a Connecticut delegate to the Constitutional Convention, cautioned that "[t]he people will not readily subscribe to the Nat[ional] Constitution, if it should subject them to be disenfranchised." 2 *Records of the Federal Convention* 201. Pierce Butler, a South Carolina delegate, similarly

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[3] 2 *The Records of the Federal Convention of 1787* at 203 (Max Farrand ed., 1911), https://memory.loc.gov/ammem/amlaw/lwfr.html ("*Records of the Federal Convention*").

[4] 2 *Documentary History of the Ratification of the Constitution* 433 (John P. Kaminksi et al. eds., Wis. Hist. Soc'y Press 1976), http://digital.library.wisc.edu/1711.dl/History.Constitution ("DHRC").

admonished that "[t]here is no right of which the people are more jealous than that of suffrage" and that limiting the right would risk revolution. *Id.* at 202.

Against this backdrop, any argument that the Framers *affirmatively intended* to deny federal representation to citizens who happen to reside in the Seat of Government carries a heavy burden of proof. And indeed, the historical record of both the District Clause, U.S. Const. art. I, § 8, cl. 17, and the House Composition Clause, *id.* art. I, § 2, cl. 1, support the opposite contention.

The District Clause was born from the Framers' determination that the federal government should not be beholden to the State in which it would be located. This sentiment arose from a June 1783 meeting of the Confederation Congress in Philadelphia. According to the conventional retelling of the "Mutiny" of 1783, *see, e.g.*, *Adams*, 90 F. Supp. 2d at 50 n.25, a group of Continental Army soldiers, angry over their lack of pay, confronted the Congress at the Pennsylvania State House; Pennsylvania refused to provide assistance to repel the mob; and the Congress was forced to reconvene elsewhere. In actuality, the soldiers gathered at the State House to demand pay from the *State* Executive Council, and the Congress attempted to assemble on site (passing through the soldiers to do so) only after the members were called to an emergency session in response. Bowling, *supra*, at 30–34. In any case, the event convinced the Framers that any one State's control over the physical site of the federal government would threaten, as Madison phrased it, the federal government's "necessary independence." James Madison, *Federalist No. 43*, *reprinted in Federalist and Other Constitutional Papers* 239 (E.H. Scott ed.,

1898). *See also, e.g.*, 10 DHRC 1318 (1993) (remarks of James Madison at Virginia convention) ("How could the General Government be guarded from the undue influence of particular States, or from insults, without such exclusive power?").

It was this widespread feeling that spurred the Framers to provide for a "District" to house the new "Seat of the Government," and to empower Congress to adopt "exclusive Legislation, in all Cases whatsoever," over that area. U.S. Const. art. I, § 8, cl. 17. But there is no evidence that *anyone* suggested—at the Constitutional Convention, at any state ratifying convention, or in the hundreds of contemporary articles in the press—that realizing this objective necessitated relegating District residents to second-class citizenry without representation in Congress. As the *Adams* court rightly recognized, the "rationale for the District Clause . . . would not by itself require the exclusion of District residents from the congressional franchise." 90 F. Supp. 2d at 50.

In addition, nothing in the history of the drafting and adoption of the House Composition Clause—which clarified that "the People of the several States" would choose members of the House of Representatives—suggests that it was intended as a prohibition against voting by the residents of the District. Nor is there evidence that the Framers ever adverted to the voting rights of the District's residents when crafting that language. Instead, the Framers' choice of the word "States" in this provision reflected two compromises. First, there was a debate over whether the House should be elected by the "People of the several States" or instead by state legislatures—which was

resolved in favor of direct election by individuals. *See, e.g.*, 1 *Records of the Federal Convention* 48–60.

Second, there was debate over whether voting qualifications should be set at the federal or instead at the state level—which was resolved by letting States decide. *See, e.g.*, 2 *Records of the Federal Convention* 201–206. But at no point during either of those debates did anyone suggest that all residents of the planned federal district would lack representation in the House.

There is thus absent from the historical record any indication that the Framers, profoundly committed to voting representation, intended to disenfranchise District residents.

2. The Framers likely did not think it necessary to provide affirmatively for District representation at the time of ratification. The limited available evidence indicates that the Framers and other supporters of the Constitution assumed that District residents would continue to vote with their former State for at least some period of time. Statements in support of the draft Constitution reflect a belief that the ceding State would protect the rights of its residents living within the ceded land. *See* Bowling, *supra*, at 84 ("Federalists denied that the liberties of the residents of the federal city would be infringed."); *accord Federalist No. 43*, at 239 (Madison explaining that "the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it"). The evidence also suggests that the Framers anticipated that the District residents would eventually require representation as a body, but did not see a need to resolve the issue at that early juncture.

Those two understandings—that residents of the land ceded for the District would retain the franchise, and that the District itself would eventually have representation—are reflected in a proposed constitutional amendment offered by Hamilton at the New York convention. That amendment presumed that residents could continue voting with the State from which the District was carved, but would have given them the right to cast votes *as District residents* once the District's population reached the size necessary for a voting representative under the apportionment rules. 5 *The Papers of Alexander Hamilton* 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (providing that "When the Number of Persons in the District . . . Amount[s] to ____ [an unspecified number] such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body."). That the amendment was not adopted reveals, at most, a disinclination at that particular time to take the matter of representation of the District *qua district* versus representation by way of the ceding States out of future Congresses' hands—a course of action that Hamilton's fellow New York ratifying voters might have found premature or unwise for any number of reasons.

When they drafted the District Clause, the Framers resolved only the District's maximum geographic limits. *See* 3 *Debates In The Several State Conventions on the Adoption of the Federal Constitution* 432 (Jonathan Elliot ed., 1836)[5] (Madison explaining at the Virginia ratifying convention that the district contemplated in the Constitution was "very circumscribed").

[5] *Available at* https://memory.loc.gov/ammem/amlaw/lwed.html.

They did not yet know even the location of the new District, let alone its population; it was not until the Residence Act in 1790, *see infra* at 13–14, that the First Federal Congress selected the location that in 1791 became the District of Columbia. Moreover, it seemed almost certain that, at the time of its creation, the District would have far fewer than 60,000 residents—the minimum then needed to automatically qualify for statehood under the terms of the Northwest Ordinance—and likely that it would have less even than the 30,000 population-to-Representative ratio the Framers established for the House.[6] Ordinance of 1787, ch. 8, § 2, 1 Stat. 50, 53 (1789); U.S. Const. art. I, § 2, cl. 3.

The First Federal Congress, for example, split its time between Philadelphia (population 28,522) and New York City (population 33,131).[7] And at the time many different localities were engaged in lobbying efforts to become the Nation's capital. As Rep. Samuel Livermore remarked to his fellow members in 1789, "[m]any parts of the country appear extremely anxious to have Congress with them. There is Trenton, Germantown, Carlisle, Lancaster, Yorktown, and Reading, [which] have sent us abundance of petitions,

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[6] The specific number was the subject of debate during the Constitutional Convention, and the delegates settled on 30,000 as the lowest ratio they could use without producing a very large and chaotic House.

[7] U.S. Bureau of the Census, Dep't of Com., *Population of the 24 [Largest] Urban Places: 1790* tbl.2 (June 15, 1998), https://www2.census.gov/library/working-papers/1998/demo/pop-twps0027/tab02.txt ("*1790 Census: Population Urban Places*").

setting forth their various advantages."[8] While Rep. Livermore did not mention every locality ever considered, it is telling that none of his listed cities had a population of more than 2,500. *1790 Census: Population Urban Places*, *supra*. It seems implausible in the extreme that cities and States would have been fiercely competing to house the new federal District if the price of winning was expected to be their residents' disenfranchisement.

Further, although the Framers understood that the district population was initially not likely to meet the House population-to-representation threshold, they expected that the population would almost certainly meet that threshold in the future. *See, e.g.*, *Adams*, 90 F. Supp. 2d at 49 n.24 (noting that the founders assumed the district population would "grow substantially" and that Pierre L'Enfant's design for the District "provided for a city of 800,000, which at the time was the size of Paris"). It seems equally implausible that the Framers would have intended, and States would have acceded, to the permanent disenfranchisement of such a large population.

3. In sum, nothing in the Constitutional Convention or in the ratification debates suggests that the Framers intended to deny federal representation to residents of the "District" they envisioned in Article I, section 8, clause 17. Instead, there is ample evidence that the Framers considered the franchise among the most cherished of liberties, and the historical record suggests that the Framers assumed future residents

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[8] 1 *Annals of Cong.* 819 (Joseph Gales ed., 1834) (1789), http://memory.loc.gov/ammem/amlaw/lwac.html ("*Annals of Cong.*").

of the "Seat of Government" would have a voice in selecting that body.

The three-judge court, however, failed to address whether the Framers intended to deprive District residents of voting representation. The court instead answered a distinct and more narrow question: whether the District was a "State." But the court's inquiry should not have ended there: Congress has constitutional authority, "plenary in every respect," to legislatively extend House representation to the District. *Nat'l Mut. Ins. Co. of Dist. of Columbia* v. *Tidewater Transfer Co.*, 337 U.S. 582, 592 (1949) (plurality opinion of Jackson, J.). The relevant inquiry, therefore, is not whether the District is a "State," but whether depriving District residents of voting respresentation violates principles of equal protection and due process, particularly when other non-State residents receive representation.

The three-judge court also line-edited the House Composition Clause—which clarified that "the People of the several States" would choose members of the House of Representatives—to read "*only* the People of the several States" could choose House members. But that reading is fundamentally at odds with the motivation for the Great Compromise: to afford fair and proportional representation to *individual citizens*, regardless of where they lived. As it relates to the House, the States are merely a ministerial conduit to channel their individual citizens' suffrage.

II. POST-RATIFICATION HISTORY DOES NOT ESTABLISH THAT DISTRICT RESIDENTS MUST BE DISENFRANCHISED BECAUSE THEY ARE NOT RESIDENTS OF A STATE.

The events in the decades following ratification likewise provide no support for the proposition that the Framers intended to deprive District residents of the right to vote on account of their not being residents of the "several States." Even after Maryland and Virginia ceded land to the federal government to create the District, residents in that territory continued to vote with their former States for a decade after ratification while those States maintained jurisdiction over the ceded land. And even after the District transferred to federal control, District residents did not lose their representation. It was only when the Sixth Congress passed the Organic Act of 1801 that District residents lost that fundamental entitlement. But Congress's failure to provide for District representation in the Organic Act or subsequent legislation is not probative of the Framers' intent on the issue or Congress's understanding of its own authority, given relevant historical and political circumstances.

1. Subsequent to the Residence Act of 1790 and the formal transfer of the District to federal control in 1800, District residents retained their representation in Congress. And debate around the Organic Act of 1801 recognized that, without more, the Act would result in disenfranchisement of the District's residents. Because of the historic accident of timing, however, a lame-duck Congress proceeded without sufficient amendment. An Act of Congress, not the Constitution, thus deprived District residents of voting representation in the House.

In 1788 and 1789, Maryland and Virginia ceded land to the United States for the new federal district. The First Congress accepted that cession by passing the Residence Act of 1790. That Act provided, however, that "the operation of the laws" of Maryland and Virginia would "not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." Residence Act, ch. 28, § 1, 1 Stat. 130 (1790). Similarly, the States provided that their jurisdiction would "not cease or determine, until Congress . . . shall by law, provide for the government thereof, under their jurisdiction, in the manner provided by" the District Clause. An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, § 3 (1789); An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Act, ch. 45, § 2. The Residence Act identified the first Monday in December of 1800 as the date "the seat of the government of the United States" would "be transferred to the district." Residence Act, ch. 28, § 6, 1 Stat. 130.

Importantly, District residents continued to vote as citizens of Maryland and Virginia until that transfer took place—a full decade after ratification. *See Adams*, 90 F. Supp. 2d at 58; *id.* at 79 & n.20 (Oberdorfer, J., dissenting in part and concurring in part) (cataloguing historical evidence that District residents continued to vote during this period); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 174 (1975). Indeed, they retained representation "until Congress . . . otherwise by law

provide[d]" by way of the Organic Act, which passed on February 27, 1801, even though no federal elections occurred between the transfer and the Act. *See* Raven-Hansen, *supra*, at 174, 178 (internal quotation marks omitted).

Around the time of the federal government's relocation to the District, the questions of Congress's exclusive authority over the District, whether and how to exercise it, and the implications thereof loomed large. President John Adams reminded Congress of its authority to assert plenary, and discretionary, power over the District: "It is with you, gentlemen, to consider whether the local powers over the District of Columbia vested by the Constitution in the Congress . . . shall be immediately exercised." *Fourth Annual Address* (Nov. 22, 1800), *in A Compilation of the Messages and Papers of the Presidents, 1789–1897* (James D. Richardson ed., 2004). Numerous House and Senate bills considered the question of the extent and form of Congress's jurisdiction over the District. *See* William C. diGiacomantonio, *"To Sell Their Birthright for a Mess of Potage": The Origins of D.C. Governance and the Organic Act of 1801*, 12 Wash. Hist. 30, 41–46 (2000) (*"To Sell Their Birthright"*).

On December 17, 1800, Henry Lee presented the first of his two such bills. *See id.* at 36–37. Among other things, the bill provided that—while Maryland and Virginia would no longer enact or administer laws for the District—Congress would borrow the laws of Maryland and Virginia as they existed in December 1800 as the operating law of the District until such time as Congress could "enter on a system of legislation in detail." 10 Annals of Cong. 872 (remarks of Rep. Harper); *see also* Raven-Hansen, *supra*, at 174

(the bill was "to 'freeze' the state laws for the District as they stood in December, 1800").

The bills precipitated substantial debate over District residents' representation. Members of Congress recognized that by providing for the governance of the District, the bill would trigger the conditions of the Residence Act and the States' cessions and invest Congress with exclusive jurisdiction. The force of law over the District would thus "derive solely from Congress." William C. diGiacomantonio, *"To Make Hay while the Sun Shines": D.C. Governance as an Episode in the Revolution of 1800*, *in Establishing Congress: The Removal to Washington, D.C., and the Election of 1800* 39, 42 (Kenneth R. Bowling & Donald R. Kennon eds., 2005). Pennsylvania House member John Smilie objected to the House bill because District residents would be disenfranchised under the bill, whereas in the absence of any bill, and thus of any assumption of exclusive jurisdiction, they would not. *See "To Sell Their Birthright," supra*, at 42; Raven-Hansen, *supra*, at 175–176.

District residents, too, recognized that congressional action would trigger Congress's exclusive jurisdiction and strip them of representation in Congress. At an Alexandria town meeting, Alexandria citizens, who were now deemed District citizens, expressed their belief that it would be "unjust and inexpedient" for Congress to assume exclusive legislation "until the people are assured of a representation in [Congress]." *"To Sell Their Birthright," supra*, at 41.

The substantial debate on the District question ground to a halt in February 1801 when Congress became preoccupied by the "Revolution of 1800." *See id.* at 44, 46. The chaos of the contingent election and its

thirty-six ballots completed on February 17, 1801, with the election of Thomas Jefferson. *Id.* at 47. And with that, for the first time in the young Nation's history, executive authority would transfer into the hands of an opposition party, while the Federalist congressional majority was confronted with their own impending loss of power as Jeffersonian Republicans took the House. *See id.* at 46. Because "Jeffersonian Republican ideology was committed to restraining the power of the central government," the lame-duck Sixth Congress recognized that the incoming members would resist Federalists' efforts to "[a]ssur[e] Congress the full exercise of its authority in the ten miles square." *Id.*

On February 23, with just eight days left in that Congress, the Sixth Congress returned to considering the District question. *See id.* at 47. Congress pushed through a Senate version of the bill that looked much like Lee's first proposed bill, thus enacting the Organic Act of 1801 and assuming full control of the District. Organic Act of 1801, An Act Concerning the District of Columbia, ch. 15, 2 Stat. 103, 105. Among other things, the Act divided the District into Washington county and Alexandria county; established a circuit court to adjudicate criminal and civil cases in the District; and provided for a marshal, a United States attorney, a register of wills, and a judge of the orphans' court. *See "To Sell Their Birthright," supra*, at 46–48. Like Lee's original bill, the Act borrowed Maryland and Virginia's laws, as they then existed, and enacted them as the governing law of the District through Congress's own legislative power. The Act said nothing about District residents' voting rights. But by placing the District under its exclusive jurisdiction, Congress by implication stripped District

residents of the right to vote as citizens of Virginia and Maryland—and at that point, it was too late for the ceding States to protect their former residents' franchise. To be clear, however: it was this *Act of Congress*, not the Constitution, that took away District residents' voting representation in the House.[9]

Furthermore, just as the Framers' failure to explicitly provide for the voting rights of District residents in the Constitution itself is not probative, *see supra* at 8–11, nothing determinative can be gleaned from the fact that the Sixth Congress did not provide for voting

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[9] In the course of the debates over the Organic Act, some suggested that this result flowed from the Constitution itself. However, many of these individuals were opponents of the Organic Act who sought to defeat the bill by raising the specter of disenfranchisement. *See Adams*, 90 F. Supp. 2d at 52–53 (discussing the views of "some residents of the District," as well as remarks of Rep. Smilie, a staunch Antifederalist). The Supreme Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents," because, "[i]n their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Loc. 760*, 377 U.S. 58, 66 (1964). Other statements mentioned the possibility of a constitutional amendment to restore the vote, without stating that such an amendment was the sole solution. 10 Annals of Cong. 998–999 (remarks of Rep. Dennis); *see also* Raven-Hansen, *supra*, at 177. And although Rep. Bird suggested that the "blame" for the District's disenfranchisement lay with "the men who framed the Constitutional provision," that statement—by someone who was not a Framer, more than a decade after ratification—sheds little light on the Framers' intent. 10 Annals of Cong. 996. In contrast with these scattered statements, the Organic Act itself sent a clear message: Congress has broad authority over the District. Nothing in the Organic Act suggests that Congress lacked the power to grant District residents the vote, and the debates leading up to the passage of the Organic Act do not indicate any affirmative desire to disenfranchise District residents.

rights in the Organic Act. Whereas 60,000 residents were required to automatically qualify for statehood, *see supra* at 10, only 14,093 residents lived in the District in 1800.[10] Unsurprisingly, then, the Sixth Congress had broader and more pressing priorities as supporters rushed the bill to the President's desk with four days to spare in that congressional term. Particularly given the fraught context in which the Organic Act was passed, the Sixth Congress's further deferral of the not-yet-urgent issue demonstrates no affirmative congressional intent to deny voting rights to District residents. *See "To Sell Their Birthright," supra*, at 48 (the Organic Act was a "last-ditch, 11th-hour insurance polic[y] aimed at perpetuating Federalist influence"). And its inaction sheds even less light on the Framers' original intent with regard to those rights. *Cf. O'Gilvie* v. *United States*, 519 U.S. 79, 90 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."). What the Organic Act does confirm is Congress's vast authority to govern the District pursuant to the District Clause. And that vast power is consistent with the Framers' intent to invest Congress with broad authority. *See, e.g.*, *Federalist No. 43*, at 239 (referring to the "indispensable necessity of [Congress's] complete authority at the seat of Government"); *cf. Nat'l Mut. Ins.*, 337 U.S. at 592 ("[C]ongressional power over the District, flowing from Art. I, is plenary in every respect.").

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[10] *See* Richard L. Forstall, U.S. Bureau of the Census, Dep't of Com., *Population of States and Counties of the United States: 1790 to 1990*, at 28 (Mar. 1996), https://www2.census.gov/library/publications/decennial/1990/population-of-states-and-counties-us-1790-1990/population-of-states-and-counties-of-the-united-states-1790-1990.pdf.

2. In the ensuing years, Congress did not act to restore District residents' voting rights. But the absence of such legislative action does not establish that the early Congresses believed they lacked the *power* to provide District residents the right to vote, for three reasons.

First, the population of the District continued to remain well below the 60,000-person threshold for statehood for decades following ratification. *Population of States and Counties of the United States: 1790 to 1990*, *supra*, at 29 (showing a population of 51,687 in 1850). It is hardly surprising therefore that no one made any serious effort to secure District residents a voting representative.

Second, as a practical matter, the need for federal representation was far weaker than it later became. When Congress convened in the District for its first full session in 1801, the 137 members of the Seventh Congress alone (plus their families and staff) constituted an appreciable portion of the District's entire population. There was thus a sense that the views of District residents would naturally be taken into account due to their frequent, direct interaction with members of Congress themselves. *See "To Sell Their Birthright," supra*, at 43 (noting that some believed congressmen would represent the interests of their neighbors in the District more effectively than had delegates in Annapolis or Richmond). That sense likely further diminished the political will to provide District residents with a voting representative.

Finally, as the Supreme Court has repeatedly explained, " '[c]ongressional inaction lacks persuasive significance' in most circumstances." *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015

(2017) (alteration in original) (quoting *Pension Benefit Guar. Corporation* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)); *see also, e.g.*, *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion) ("Congress takes no governmental action except by legislation."). Congress's power over District voting rights should not be discounted merely because Congress has not previously exercised that power.

3. Congress's actions over time demonstrate that it has, and exercises, authority to grant voting representation to citizens residing outside of a State. Perhaps the most extensive of these actions, the Uniformed and Overseas Citizens Absentee Voting Act allows a citizen residing in a foreign country, regardless of any intent to return, to vote absentee for United States Senators and Representatives in "the last place in which the person was domiciled before leaving the United States." 52 U.S.C. § 20310(5)(C). And children of such citizens receive the same right, even if the child has never set foot in a State.[11] That a citizen could move from Virginia to Toronto and retain their vote debunks the idea that "*only* the People of the several States" should receive representation.

Congress's use of its authority to govern federal enclaves is similarly instructive of Congress's plenary authority to bestow voting representation upon citizens based on citizenship, not State residency. Residents of federal enclaves have voting representation in the House as a result of congressional action, not

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[11] Inspector General, U.S. Dep't of Def., *Evaluation of Department of Defense Voting Assistance Programs for Calendar Year 2020*, at 19 (Mar. 29, 2021) https://media.defense.gov/2021/Mar/31/2002611446/-1/-1/1/DODIG-2021-066_REDACTED.PDF.

constitutional design. Congress's authority to govern federal enclaves is identical to its authority over the District, and is conferred by the same clause of the Constitution. *See* U.S. Const. art. I, § 8, cl. 17. But unlike with the District, Congress has chosen not to exercise exclusive jurisdiction over federal enclaves. *See Adams*, 90 F. Supp. 2d at 64. For example, after Maryland ceded jurisdiction to the United States over the grounds of the National Institutes of Health (NIH), that area became a federal enclave. *See id.* at 63. Congress passed statutes allowing Maryland to exercise its authority in the enclave, and Maryland did so. *Id.* at 64. Individuals living within that federal enclave were not disenfranchised. *See Evans* v. *Cornman*, 398 U.S. 419, 426 (1970). It is by Act of Congress, and not the Constitution, that NIH residents are subject to the laws of Maryland, and thus have the right to vote therein.

So, too, for District residents—at least until February 27, 1801. Upon enactment of the Organic Act, Congress exercised its grant of discretionary exclusive authority over the District, but failed to provide for representation of the District's residents. By exercise of its District Clause authority Congress stripped the District residents' voting representation in the House, and by that same authority it can, and should, return that right.

4. Congress's continued failure to restore District residents' voting representation is not instructive on the predicate question whether Congress has the requisite constitutional *authority*, for Congress has long been divided on District governance. Opponents of District voting rights routinely assert that the District is unable to govern itself. But those questions about

District-governance issues appear to show racial motivation—not insightful debate over constitutional interpretation. In 1871, when black men held positions at every level of the District's local government, Congress created a new "democratic hybrid" government for the District, ultimately implementing a board of three Presidentially-appointed white male commissioners who "routinely ignored" the concerns of the District's black residents. Chris Myers Asch & George Derek Musgrove, *Chocolate City: A History of Race and Democracy in the Nation's Capital* 165, 173 (2017). As Senator John Tyler Morgan of Alabama later described the situation, Congress decided "to burn down the barn to get rid of the rats . . . the rats being the negro population and the barn being the government of the District of Columbia." 22 Cong. Rec. 165 (1890) (statement of Sen. Morgan). That supervisory commission remained in effect until President Lyndon Johnson began to push for District voting rights as a part of the broader 1960s civil rights movement. Harry S. Jaffe & Tom Sherwood, *Dream City: Race, Power, and the Decline of Washington, D.C.* 44 (1994). In short, congressional inaction, motivated by extra-constitutional ulterior motives, is not instructive on this constitutional question.

CONCLUSION

For the foregoing reasons and those in the jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
MISTY M. HOWELL
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Amici Curiae

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