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

OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Christopher J. Wright
Counsel of Record
Timothy J. Simeone
Deepika H. Ravi
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Floor 8
Washington, D.C. 20036
202-730-1300
cwright@hwglaw.com

Counsel for Appellants

JULY 28, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

INTRODUCTION

The three-judge court held that District of Columbia residents are not entitled to voting representation in the House of Representatives because, in the court's view, the House Composition Clause provides that *only* State residents may vote. J.S. App. 60a (citation omitted) ("the Constitution by its terms limits House representation to 'the people of the several States'"). Although the Executive Branch Defendants prevailed below on that basis, they now disagree with the court's ruling. Rather than supporting the contention that *only* State residents are entitled to vote, they now seek to preserve the official position of the Department of Justice, set forth in Constitutionality of the D.C. House Voting Rights Act of 2009, 33 Op. O.L.C. 38 (2009), that Congress has authority under the District Clause "to create a congressional district within the District." Mot. 18 n.5 (quoting 33 Op. O.L.C. at 40). The current position of the Executive Branch Defendants is thus that the Constitution does *not* limit voting representation to State residents.

Plaintiffs, of course, *agree* with the Executive Branch Defendants on that key point. So does the House of Representatives, which filed an amicus brief supporting Plaintiffs. And the Senate Defendants did not join the Motion to Dismiss or Affirm filed by the Executive Branch Defendants.

This Court should not affirm—much less summarily affirm—a decision based on a holding that neither Plaintiffs nor Defendants support. Nor should the Court affirm, summarily or otherwise, a holding that could undermine the voting rights of millions of

other Americans who are currently entitled to vote even though they do not live in a State. *See* Uniformed and Overseas Absentee Voting Act, 52 U.S.C. § 20310(5)(C) ("Overseas Voting Act") (authorizing Americans living overseas to vote, even if no State considers them to be State residents); *Evans v. Cornman*, 398 U.S. 419 (1970) (holding that equal protection principles require allowing Americans living on federal enclaves to vote, even if the State in which the enclave is located does not consider them to be State residents).

Nor is dismissal warranted. Contrary to the assertion in the Motion to Dismiss or Affirm, the three-judge court finally resolved all the issues pending before it, and its judgment is therefore subject to review by this Court. The three-judge court also denied Plaintiffs' request for an injunction requiring the Secretary of Commerce to apportion a seat to the District of Columbia, another prerequisite for review by this Court. And the argument that Plaintiffs lack standing because they are challenging congressional *inaction* is wrong because they are seeking declaratory rulings that two statutes are unconstitutional as well as an injunction requiring the Secretary to apportion a seat to the District.

Accordingly, this Court should note probable jurisdiction. Alternatively, the Court should remand the case to the three-judge court to reconsider its decision in light of Executive Branch Defendants' current position that the court erred by holding that the Constitution limits voting representation to State residents.

I. THE QUESTION PRESENTED IS SUBSTANTIAL.

1. The Motion to Dismiss or Affirm ignores most of Plaintiffs' arguments, instead claiming repeatedly and erroneously that Plaintiffs seek to challenge congressional *inaction*. But as plainly stated in their Jurisdictional Statement at page 10, to the extent that Plaintiffs challenged congressional inaction below, they are not challenging the three-judge court's dismissal of those claims. Instead, Plaintiffs challenge only those portions of the judgment below that addressed the issues the three-judge court found to be justiciable. As explained at page 8 of the Jurisdictional Statement, Plaintiffs' requests for relief in their Amended Complaint include:

(1) A declaration that 2 U.S.C. § 2a and 13 U.S.C. § 141, which govern the apportionment process, are unconstitutional insofar that they exclude residents of the District of Columbia. Am. Compl., Prayer for Relief ¶ 1.

(2) A declaration that the District Delegate must have "the full powers and privileges afforded to Members of the House of Representatives, including without limitation the power to vote on all legislation considered by the House." *Id.* ¶ 2.

(3) Various forms of injunctive relief, including an order requiring the Secretary of Commerce "to include the District of Columbia" in the Secretary's calculations determining the division of congressional

> seats resulting from the decennial census. *Id.* ¶ 5(f).

None of these requests requires congressional action.

The Executive Branch does not dispute Plaintiffs' position that voting rights are fundamental and impingements on them require strict scrutiny. Nor could they. This Court long ago declared that "the political franchise of voting is . . . a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). It is also well-established that impingement of voting rights triggers strict scrutiny. *See Dunn v. Blumstein*, 405 U.S. 330, 335–36 (1972). Yet these Defendants do not claim that there is any compelling interest supporting the disenfranchisement of District residents. And these Defendants disown the argument that only residents of a State may vote—in contrast to the court below, which held that the text of the Constitution mandates that inequitable result.

Those concessions make this an easy case under standard equal protection principles. Plaintiffs are being denied a fundamental right, and there is no compelling interest supporting the infringement of that right.

2. The Executive Branch's primary argument is that adherence to the Constitution's "default" provisions regarding the composition of the House is *per se* constitutional. Mot. 26–28. It therefore suggests that Plaintiffs are arguing that the Constitution is unconstitutional. *See* Mot. 28. This is sophistry. Plaintiffs do not argue that the House Composition

Clause is somehow unconstitutional or that 2 U.S.C. § 2a and 13 U.S.C. § 141 are unconstitutional insofar as they provide for representation in the House for State residents. Rather, Plaintiffs argue that, because voting representation is a fundamental right and there is no compelling interest justifying infringement of the exercise of that right by District residents, the apportionment statutes are unconstitutional insofar as they deny voting representation to District residents in the House of Representatives.

In any event, there is no merit to the argument that Sections 2a and 141 are constitutional because Congress provided for voting by everyone listed in the House Composition Clause, even though it denied District residents their fundamental right to voting representation. Equal protection serves primarily to *extend* benefits to groups not granted those benefits by statute. For example, in cases involving federal financial assistance benefits, this Court has repeatedly struck discriminatory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended to groups that were either not listed or specifically excluded by Congress. *See*, *e.g., Califano v. Goldfarb*, 430 U.S. 199, 202–204, 212–217 (1977) (survivors benefits); *Jimenez v. Weinberger*, 417 U.S. 628, 630–631, 631 n.2, 637–638 (1974) (disability benefits); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 529–530, 538 (1973) (food stamps); *Frontiero v. Richardson*, 411 U.S. 677, 678–679, 679 n.2, 690–91, 691 n.25 (1973) (Brennan, J., plurality opinion) (military spousal benefits).

Indeed, this Court has made clear that while it is sometimes possible to remedy equal protection

violations by *invalidating* rights conferred on one group but not another, the general rule is to *extend* the right at issue to both groups. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)) ("Ordinarily, we have reiterated, 'extension, rather than nullification, is the proper course.'"). Here, where it would be unconstitutional to invalidate Sections 2a and 141 insofar as they provide for voting by State residents, extension of the right to District residents is the only option to remedy the equal protection violation.

3. The Executive Branch Defendants raise numerous other erroneous arguments.

In response to Plaintiffs' argument that the District Delegate Act is unconstitutional because it limits the Delegate's otherwise broad powers by adding the phrase "but not of voting," the Executive Branch Defendants first contend that this is a new argument. Mot. 23–24. But that is not so. As noted above at page 3, Plaintiffs' Amended Complaint seeks a declaration that the District Delegate must have "the power to vote on all legislation considered by the House." Am. Compl., Prayer for Relief ¶ 2.

The Executive Branch Defendants also advance a defective severability argument. Mot. 24. "Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem" by severing any "problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of N. New Eng.,* 546 U.S. 320, 328–329 (2006)) (striking

provisions giving tenure to Board Members to cure a violation of the Appointments Clause). Here, invalidating the District Delegate Act would not cure the equal protection violation, and hence the appropriate solution is to strike the words "but not of voting."

The Executive Branch Defendants attempt to evade the relevance of the Overseas Voting Act, which shows that the House Composition Clause does not provide that *only* State residents may vote, by arguing that the Act does not provide a jurisdictional basis for Plaintiffs' claims (Mot. 25–26)—an argument Plaintiffs have never made. Nor have Plaintiffs argued that the District Delegate Act provides jurisdiction, a straw man the Executive Branch Defendants attack at pages 23–25.

The Executive Branch Defendants fail to provide a plausible reason why District residents may be disenfranchised if Americans living overseas and on federal enclaves may vote. Without citation, they claim that "the Constitution itself distinguishes among those classes." Mot. 31. That is flatly wrong. The Enclaves Clause is part of the same sentence in Article I, Section 8, Clause 17, that includes the District clause, and it gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever" involving the District and "like Authority" over enclaves. U.S. CONST. art. I, § 8, cl. 17. There is plainly no distinction between Congress's authority over the District and federal enclaves. With respect to overseas voters, there is *no* textual basis for concluding that Congress has authority to provide voting representation for them. However, because

voting is a fundamental right and there is no compelling reason to deny voting representation to American citizens living overseas, on federal enclaves, or, as in this case, in the District, equal protection principles support the conclusion that they are all entitled to vote.

The Executive Branch Defendants also note that overseas voters and voters in federal enclaves "vote as citizens of a State," Mot. 30, while Plaintiffs seek to vote as District residents. But that difference goes to the nature of the appropriate remedy rather than to whether there is an equal protection violation. Given the District's unique history, it is appropriate to allow District residents to vote in a congressional district within the District—as the Executive Branch Defendants concede by supporting the Attorney General's approach, which calls for the creation of a congressional district in the District. Mot. 18 n.5.

The Executive Branch Defendants ultimately argue that District residents have been denied voting representation for more than 200 years, so there must not be an equal protection problem. Mot. 31. But as the Constitutional Law Scholars explained in their amicus brief, "[t]he potential for . . . using the Equal Protection Clause . . . to challenge the discriminatory denial of the right to vote . . . began with *Baker v. Carr*, 369 U.S. 186 (1962)." Constitutional Law Scholars Br. 13. It was not until the twenty-first century that scholars focused on the relevance of the District Clause to voting rights—and both Houses of Congress then held extensive hearings and agreed that voting representation is not limited to State residents, *id.* at 12, with the approval of the Attorney General.

Moreover, as the District of Columbia Historians show, there is no evidence that the Framers intended to disenfranchise residents of the District they authorized Congress to create. The Framers assumed that District residents would continue to vote in the States from which the District was created, as they did until 1801, and would later obtain voting representation as District residents, but only after the District attained a population approximately the size of a State—which did not happen for decades. District of Columbia Historians Br. 8–9. But the Framers "did not see a need to resolve the issue" before the site of the District had even been selected. *Id.* at 3, 8. Moreover, District residents were not disenfranchised by the Constitution, but by the hasty enactment of the Organic Act of 1801, which failed to make provision for voting by District residents—"it was this *Act of Congress*, not the Constitution, that took away District residents' voting representation in the House." *Id*. at 16–18.

II. THERE IS NO BASIS FOR DISMISSAL.

The three arguments for dismissal advanced by the Executive Branch Defendants each lack merit.

1. The Motion to Dismiss or Affirm first contends that the three-judge court's decision was interlocutory rather than final for purposes of 28 U.S.C. § 2101(b). Mot. 13–15. The basis for this argument is the court's statement in its Order on September 16, 2020, that its *prior* Order, dated March 12, 2020, was not final. Mot. 14. That is irrelevant. In its second Order, the court disposed of the claims for representation in the House by denying reconsideration of its March 12 Order

dismissing the House claims. The court already had sent Plaintiffs' claims for representation in the Senate back to the single district court judge to whom the case was originally assigned, noting that any appeal from that court's determination would proceed to the D.C. Circuit. J.S. App. 18a. At that point, the three-judge court had finished its work.

The September 16 Order was therefore a final disposition of all claims that were before the three-judge court or that could come before it. *See Gelboim v. Bank of Am. Corp.,* 574 U.S. 405, 408 (2015) (citation omitted) ("A 'final decision' is one 'by which a district court disassociates itself from a case.'"). Plaintiffs were required to appeal that final order within sixty days, pursuant to 28 U.S.C. § 2101(b), and they filed their Notice of Appeal on November 13, 2020, fifty-eight days later. Therefore, it was timely filed.

2. The Executive Branch Defendants relatedly argue that the three-judge court did not deny a request for a *preliminary* injunction, as required for review by this Court of an *interlocutory* order. Mot. 15–16. But as explained above, Plaintiffs seek review of a *final* order. With respect to final orders, 28 U.S.C. § 1253 authorizes appeals involving the denial of a *permanent* injunction, and that is what Plaintiffs challenge. Among other requests, Plaintiffs sought an injunction requiring the Secretary of Commerce to apportion a seat to the District, Am. Compl., Prayer for Relief ¶ 5(f), and that request was denied, along with all of Plaintiffs' other requests for relief. This one-paragraph argument thus also fails because Plaintiffs challenge a final judgment.

3. The Executive Branch Defendants next argue that Plaintiffs lack standing because all their claims allegedly challenge congressional *inaction*. Mot. 21. This argument is wrong because, as the three-judge court concluded, many of Plaintiffs' claims simply do not require congressional action, J.S. App. 31a–36a, which is why the court addressed those claims on the merits and in detail, *Id.* 37a–60a. As explained above, pages 4–6, the court erred by rejecting those claims on the merits based on its conclusion that the House Composition Clause states that *only* State residents are entitled to voting representation in the House. But the three-judge court correctly held that Plaintiffs had standing to raise those claims.

As the court below explained, with respect to standing, Plaintiffs' arguments that the apportionment statutes are unconstitutional and their request for an injunction directing the Secretary of Commerce to apportion a House seat to the District are indistinguishable from the claims advanced in *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.), *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940 (2000) (mem.), *and aff'd*, 531 U.S. 941 (2000) (mem.). *Id.* 32a–33a. This Court's summary affirmance in *Adams*—and its decision *not* to dismiss the appeal in that case—"necessarily endorsed" the conclusion that plaintiffs had standing to raise such claims. *Id.* at 34a. It would be difficult to imagine a precedent more on point.

Redressability was the most serious standing issue in *Adams* and, as was the case in *Adams*, a declaratory judgment stating that Plaintiffs' lack of voting representation in Congress violates their constitutional rights "would amount to a significant

increase in the likelihood that the plaintiff[s] would obtain relief that directly redresses the injury suffered." *Utah v. Evans*, 536 U.S. 452, 464 (2002). That showing of redressability is all that is required.

Moreover, it is well-settled that the Secretary of Commerce is an appropriate defendant in an apportionment case, and Plaintiffs seek a declaratory ruling against the Secretary. In addition, this Court has concluded that even if a declaratory judgment does not directly bind "other executive and congressional officials," redressability is nonetheless satisfied if there is no reason to believe those officials would not adhere to a court's "authoritative interpretation" of the Constitution. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (O'Connor, J., plurality opinion).

In this case, there is little doubt that House officials will comply with a declaratory ruling that the apportionment statutes are unlawful insofar as they exclude the District, that the Secretary must apportion a seat to the District, or a declaration that the District Delegate Act is unconstitutional insofar as it denies the Delegate the right to vote on legislation. In fact, the House has filed an amicus brief *supporting* Plaintiffs.

CONCLUSION

This Court should note probable jurisdiction. Alternatively, the Court should remand the case to the three-judge court to reconsider its decision in light of the Executive Branch Defendants' current position that the court erred by holding that the Constitution limits voting representation to State residents.

Respectfully submitted,

Christopher J. Wright
Counsel of Record
Timothy J. Simeone
Deepika H. Ravi
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Floor 8
Washington, D.C. 20036
202-730-1300
cwright@hwglaw.com

Counsel for Appellants

July 28, 2021