No.

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

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTION PRESENTED

Whether the three-judge district court erred by holding that residents of the District of Columbia are not entitled to voting representation in the House of Representatives because they do not live in a "State," even though (1) Americans living overseas and residents of "federal enclaves" have voting representation in Congress despite not being State residents, (2) Congress has concluded that it may extend voting rights to District residents under the "District Clause" of the Constitution, Article I, Section 17, Clause 8, and (3) this Court has held that the right to vote is the most fundamental of all rights because it is preservative of all other rights.

CORPORATE DISCLOSURE STATEMENT

The Appellants are all individuals and were Plaintiffs in the proceedings below. None of the Appellants is a corporation.

PARTIES TO THE PROCEEDING

The following were parties and *amici* in the court below:

Plaintiffs:

- Angelica Castañon
- Gabriela Mossi
- Alan Alper
- Deborah Shore
- Laurie Davis
- Silvia Martinez
- Vanessa Francis
- Abby Loeffler
- Susannah Weaver
- Manda Kelley
- Absalom Jordan

Defendants:[1]

- The United States of America
- Paul Ryan, in his official capacity as Speaker of the United States House of Representatives
- Karen L. Haas, in her official capacity as Clerk of the United States House of Representatives

[1] Each of the individual Defendants below was named in his or her official capacity. Appellants have named here the individual holding each office at the time Appellants filed their November 26, 2018 Amended Complaint.

- Paul D. Irving, in his official capacity as Sergeant at Arms of the United States House of Representatives
- Orrin G. Hatch, in his official capacity as President Pro Tempore of the United States Senate
- Julie Adams, in her official capacity as Secretary of the United States Senate
- Michael Stenger, in his official capacity as Sergeant at Arms and Doorkeeper of the United States Senate
- Michael R. Pence, in his official capacity as Vice President of the United States
- Wilbur Ross, in his official capacity as Secretary of Commerce
- Donald J. Trump, in his official capacity as President of the United States

Amici:

- The United States House of Representatives
- The District of Columbia
- Peter B. Edelman, Lawrence Lessig, Alan B. Morrison, Peter M. Shane, Peter J. Smith, and Kathleen M. Sullivan
- Kenneth R. Bowling, William C. diGiacomantonio, and George Derek Musgrove
- The Washington Lawyers' Committee for Civil Rights and Urban Affairs, Neighbors United for DC Statehood, the League of Women Voters of the United States, the League of Women Voters of the District of Columbia, DC Vote, and the American Civil Liberties Union of the District of Columbia

- Concerned District of Columbia Legal Organizations and Concerned District of Columbia Legal Professionals
- David C. Krucoff
- John H. Page

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The three-judge district court's initial opinion is published at 444 F. Supp. 3d 118 and reproduced at App. 3a–62a. The three-judge district court's opinion on reconsideration is available at 2020 WL 5569943 and reproduced at App. 63a–75a.

JURISDICTION

The three-judge district court issued opinions on March 12, 2020 and September 16, 2020. This Court granted an extension of time to file this jurisdictional statement to March 12, 2021. The Court has jurisdiction under 28 U.S.C. § 1253(b) and 28 U.S.C. § 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 1 of the Constitution states: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."

Article I, Section 2, Clause 3 of the Constitution states: "Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers . . . ."

Article I, Section 8, Clause 17 of the Constitution grants Congress the power "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of

Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

2 U.S.C. § 2a(a) provides, in pertinent part, that "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member."

2 U.S.C. § 25a(a) provides: "The people of the District of Columbia shall be represented in the House of Representatives by a Delegate, to be known as the 'Delegate to the House of Representatives from the District of Columbia', who shall be elected by the voters of the District of Columbia in accordance with the District of Columbia Election Act. The Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting, shall have all the privileges granted a Representative by section 6 of Article I of the Constitution, and shall be subject to the same restrictions and regulations as are imposed by law or rules on Representatives. The Delegate shall be elected to serve during each Congress."

13 U.S.C. § 141 provides, in pertinent part:

"(a) The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date' . . . .

"(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States . . . ."

52 U.S.C. § 20302(a)(1), part of the Uniformed and Overseas Absentee Voting Act ("Overseas Voting Act"), requires States to "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office . . . ."

INTRODUCTION

Residents of the District of Columbia are the only adult American citizens subject to federal income taxes who lack voting representation in Congress, except for felons in some States. It is well-established that voting representation is a fundamental right. Indeed, more than 130 years ago, the Supreme Court 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). The Court has repeatedly made similar

declarations. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 561–562 (1964) (quoting *Yick Wo*, 118 U.S. at 370); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo*, 118 U.S. at 370); *Burson v. Freeman*, 504 U.S. 191, 191 (1992). It is also well-established that impingement of voting rights—like impingement of any fundamental right—triggers strict scrutiny. *See Dunn v. Blumstein*, 405 U.S. 330, 335–36 (1972).

No one contends that there is any practical consideration, let alone one amounting to a compelling interest, that justifies denying voting representation to District residents. The court below instead relied on Article I, Section 2, Clause 1 ("Article I"), which states that Members of the House of Representatives are "chosen . . . by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. According to the court, this means that *only* State residents may vote.

But the constitutional text does not say that *only* State residents are entitled to voting representation in the House, and in practice that is simply not the case. Thus, under the Overseas Voting Act, Americans living overseas—who generally are *not* State residents—are entitled to vote for a representative (and senators) in the State where they previously resided. And, in light of Congress's decision to relax its exclusive jurisdiction over "federal enclaves," this Court has held that equal protection principles require that Americans living on those enclaves, such as military bases, generally must be permitted to vote in the State where the enclave is located, even if that

State does not consider them to be State residents. *Evans v. Cornman*, 398 U.S. 419 (1970).

Furthermore, by large majorities both Houses of Congress have concluded—contrary to the decision below—that the Constitution's "District Clause," Article I, Section 8, Clause 17, gives Congress the power to extend voting representation in Congress to District residents even though they are not residents of a State. Starting in 2004, Congress held a series of extensive hearings at which many experts, including former Judges Patricia Wald and Kenneth Starr, explained that the Framers did not intend to bar District residents from voting, but instead gave Congress authority under the District Clause to extend voting representation to District residents at an appropriate time. *See*, *e.g.*, *Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 255–60 (2007) (statement of Patricia M. Wald, former Chief Judge, U.S. Court of Appeals for the D.C. Circuit) ("Wald Statement"); *Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing on H.R. 5388 Before the H. Comm. on Gov't Reform*, 108th Cong. 83–84 (2004) (statement of the Hon. Kenneth W. Starr, former Solicitor General of the United States; former Judge, U.S. Court of Appeals for the D.C. Circuit) ("Starr Statement").

Each House of Congress passed legislation providing for a voting representative for the District premised on its understanding of Congress's power to do so under the District Clause, albeit in different

sessions of Congress. District of Columbia House Voting Rights Act of 2007, H.R. 1905, 110th Cong. (2007); District of Columbia House Voting Rights Act of 2009, S. 160, 111th Cong. (2009).

Plenary review by this Court is warranted because the three-judge district court did not adequately explain why Americans living on federal enclaves or overseas have voting representation in Congress if such representation is limited to State residents. There is no sound basis for distinguishing those individuals—who, again, are not all State residents—from District residents. Therefore, the three-judge court's decision is contrary to this Court's decision in *Evans*, which *required* that enclave residents be allowed to vote without regard to whether they are State residents. In addition, under the three-judge court's reasoning, the Overseas Voting Act is unconstitutional because it extends voting representation to people who are not State residents. Furthermore, the three-judge court clearly held that Congress erred in concluding that it has the power to extend voting representation to District residents, and paid no deference, as is required, to Congress's view of its broad authority under the District Clause.

At the oral argument, the three-judge district court plainly grasped the unfairness of the current situation, in which a person who moves from New York to Toronto continues to have voting representation in Congress, while a person who moves from New York to the District loses representation. Transcript of Motion Hearing Held Before the Following Three-Judge Panel: the Honorable Randolph D. Moss, the Honorable Robert L. Wilkins,

the Honorable Trevor N. McFadden at 43:13–17, *Castañon v. United States*, 444 F. Supp. 3d 118 (2020) (No. 1:18-cv-2545). In its initial opinion, the court began by acknowledging that most people view the current situation facing District residents as "deeply unjust" and ended by noting that "'[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws.'" App. 4a, 61a (alteration in original) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The court below should have concluded that voting representation in the House is not limited to State residents and that equal protection and due process principles compel the conclusion that District residents are entitled to voting representation in Congress.

This Court should note probable jurisdiction to consider the substantial question presented by this case.

STATEMENT OF THE CASE

I. The Amended Complaint

The Plaintiffs are eleven American citizens who live in the District and seek voting representation in Congress for all adult American citizens living in the District. Am. Compl. ¶ 1, ECF No. 9. The Amended Complaint alleges, *inter alia*, that their lack of voting representation infringes their equal protection and due process rights. The Defendants include federal officials sued in their official capacity, including the Secretary of Commerce, who has substantial authority with respect to apportioning seats in the House of Representatives. *Id.* ¶ 66.

The District of Columbia is currently represented by a Delegate to the House of Representatives, who has many of the powers of a representative, but cannot vote. Among other relief, the Plaintiffs sought a declaration that the 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." Am. Compl., Prayer for Relief ¶ 2. Plaintiffs also sought 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. *Id.* ¶ 1. And Plaintiffs sought 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). Finally, the Amended Complaint also sought "such further or different relief as the Court deems just and proper." *Id.* ¶ 7.

II. The Three-Judge Court's First Opinion

The Defendants other than the House officials filed a motion to dismiss. (The House Defendants were voluntarily dismissed by the Plaintiffs and the House of Representatives filed an *amicus* brief in the three-judge court that argued that Congress has the power to provide for voting representation in Congress for District residents under the District Clause.) The Plaintiffs moved for summary judgment. The three-judge court granted Defendants' motion in relevant part and denied Plaintiffs' motion. The court's key holding was that "only 'the People of the several

States' [are] permitted to elect voting representatives to the House." App. 51a (citing U.S. CONST. art. I, § 2, cl. 1). Thus, the court read the word "only" into Article I.

A. Procedural Issues

The court began its analysis by rejecting the Defendants' argument that the three-judge court lacked jurisdiction under 28 U.S.C. § 2284(a) because, Defendants claimed, the Plaintiffs had not raised an *apportionment* claim. The court concluded that this argument was foreclosed by this Court's summary affirmance in an earlier case, *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940 (2000) (mem.), *and aff'd*, 531 U.S. 941 (2000) (mem.). That case was similar in that the plaintiffs sought voting representation in the House for District residents. The case differed, however, in the critical respect that the plaintiffs there conceded that they had to show that District residents are *State* residents within the meaning of Article I to prevail, while the Plaintiffs here contend that District residents are entitled to voting representation even if they are not considered to be State residents.

With respect to the jurisdictional issue, the three-judge court concluded that the summary affirmance in *Adams* was controlling. In *Adams*, jurisdiction had been contested in this Court and the Court summarily affirmed even though Justice Stevens would have dismissed the appeal on the ground that the Court lacked jurisdiction. *See Iguartúa v. Obama*, 842 F.3d 149, 155 (1st Cir. 2016) (finding *Adams* binding on jurisdiction). Accordingly, the court below reasoned

that the conclusion that the plaintiffs in *Adams* had presented an apportionment claim by seeking to have a seat in the House apportioned to the District "was essential to the Supreme Court's direct review under 28 U.S.C. § 1253." App. 14a.

The three-judge court next concluded that it lacked jurisdiction over Plaintiffs' claims seeking voting representation in the Senate and remanded the issue to a single district court judge. App. 17a–18a. The court further noted that a decision on the Senate claims by that single judge would be subject to initial review in the court of appeals rather than this Court. *Id.* Accordingly, no issue involving Senate representation is presented by this Jurisdictional Statement. Instead, following this Court's decision, the parties will litigate about the effect of that decision on the Senate claims before the single district court judge, and the resulting decision will not be directly reviewable in this Court.

The three-judge court also held that Plaintiffs lack standing "insofar as Plaintiffs' House-related claims are premised on allegedly wrongful congressional inaction." App. 31a. Plaintiffs disagree with the court's statement that challenges to congressional inaction are "the central thrust of Plaintiffs' suit," App. 31a, and Plaintiffs do not challenge congressional *inaction* in this Jurisdictional Statement. Rather, the central thrust of Plaintiffs' argument is that, while Article I makes clear that State residents *must* have voting representation in Congress, that provision does not say that *only* State residents are entitled to such representation. Moreover, Congress's own actions regarding overseas

residents, residents of enclaves, and its asserted authority under the District Clause, all strongly support the view that citizens other than State residents may be afforded voting representation.

In light of the three-judge court's statements, it bears emphasis that the relief Plaintiffs seek requires no action by Congress. Rather, the relief Plaintiffs seek includes a declaration that the 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." Am. Compl., Prayer for Relief ¶ 2. Such a declaration would invalidate the four words in the District Delegate Act, 2 U.S.C. § 25a(a), providing that the District Delegate has "all the privileges granted a Representative by section 6 of Article I of the Constitution . . . but not of voting." 2 U.S.C. § 25a(a). In addition, Plaintiffs seek a declaration that the Secretary of Commerce must take appropriate action in apportioning a seat in the House to the District; this too would require no action by Congress.

B. Merits Issues

Plaintiffs explained that their argument is supported by the District Clause, this Court's decision in *Evans*, and the Overseas Voting Act. With respect to the District Clause, Plaintiffs argued that if Congress can provide for District residents' voting representation in the House under that Clause, as both Houses of Congress have concluded, then the claim that voting representation can be extended *only* to State residents is wrong. The three-judge court appeared to disagree with Congress's interpretation of

the District Clause, but did not directly address the points that Judges Starr and Wald had advanced. However, given the fundamental nature of the right to vote, if the Constitution does not restrict voting to State residents, District residents must be allowed to vote because there is no compelling State interest in denying them that right.

Similarly, Plaintiffs argued that this Court's decision in *Evans* is highly relevant because it held that residents of federal enclaves—even if not considered to be State residents by the State in which the enclave is located—are entitled to vote. That contradicts the three-judge court's holding that voting representation in the House is limited to State residents, and the three-judge court did not even attempt to reconcile its decision with *Evans*.

The three-judge court addressed the Overseas Voting Act only in a footnote. Plaintiffs argued that the key point of the Overseas Voting Act, as relevant to this case, is that it shows that voting is not limited to State residents. Congress enacted that law because, although some States allowed people who moved overseas to continue to vote, many States did not. Congress overrode the judgment of those States and required them to allow people who did not live in the State to vote in the State even though they had moved overseas. Instead of addressing Plaintiffs' argument, however, the court obliquely commented that "[w]e do not understand Plaintiffs to be challenging" the constitutionality of the Overseas Act. App. 32a n.5. But the court went on to note that Plaintiffs' "focus is evidently on securing congressional representation for District residents *qua* District residents." *Id.* The

court did not address Plaintiffs' argument that the Overseas Voting Act shows that voting is not limited to State residents, and that granting that right to overseas residents but not to District residents violates principles of due process and equal protection.

III. The Three-Judge Court's Opinion on Reconsideration

Plaintiffs sought limited reconsideration. Specifically, Plaintiffs explained that, although they sought, and continued to seek, congressional representation for "District residents *qua* District residents," they would prefer some relief rather than no relief. Noting that the Amended Complaint asked for "such further or different relief as the Court deems just and proper," Am. Compl., Prayer for Relief ¶ 7, Plaintiffs stated that such relief could include a declaratory ruling that District residents who moved to the District from a State should be allowed to vote in the State from which they had moved.

The court denied Plaintiffs' request for reconsideration. It stated that the Overseas Voting Act "merely supports the premise that Congress *might* treat residents of the District of Columbia as residents of the State in which they resided before moving to the District." App. 74a. The court did not dispute that Congress had that power or consider what that meant with respect to the court's determination that District residents are barred from voting representation because they are not State residents. Nor did the court explain how equal protection principles would allow the denial of voting representation to District residents if they *might* be treated as State residents,

given that other citizens who are *not* State residents are accorded such treatment.

Instead, the court said it was declining to consider Plaintiffs' request because it had determined in its first opinion "that residents of the District *qua* residents of the District are not among 'the people of the several States.'" *Id.* (citation omitted). The court thus again avoided Plaintiffs' claim that it violates equal protection and due process to prohibit American citizens living in the District from voting when American citizens living overseas may vote.

Plaintiffs' argument is that District residents can and should be represented as District residents. The three-judge court's opinion on reconsideration acknowledged that Congress "might" allow District residents to vote for Members of the House (and, like citizens living overseas, for Senators). That opinion suggests that, as with citizens living overseas, Congress can at a minimum allow them to vote in the State from which they moved to the District—which, by extension, suggests that voting representation is not limited to State residents and therefore can and should be extended to all District residents.

THE QUESTION PRESENTED IS SUBSTANTIAL

No one seriously disputes the unfairness of the status quo in which District residents are subject to taxation without representation and are governed by Congress without their consent. It nevertheless bears note that, as the Plaintiffs stated in ¶ 72 of their Amended Complaint, in FY 2017 District residents paid approximately $26 billion in federal income

taxes. *See Internal Revenue Service Data Book, 2017* 11 (2017), *https://www.irs.gov/pub/irs-soi/17databk.pdf*. This amount is greater than the total federal income taxes paid by individuals in twenty-three States. *Id.* On a per capita basis, Americans living in the District pay more federal income taxes than those living in all fifty States. *See id.* at 11–13; U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019* (2019), *available to download at https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html*. In addition, it bears note that District residents have served in every major armed conflict in the 20th and 21st centuries, including World War I, World War II, the Korean War, the Vietnam War, the Persian Gulf War, and the wars in Afghanistan and Iraq. In 2015, more than 28,000 veterans lived in the District. U.S. Dep't of Veterans Affairs, *District of Columbia* 3 (2018), *https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_District_of_Columbia.pdf*; Am. Compl. ¶ 73.

Yet, uniquely among American citizens subject to federal income taxes, District residents have no voting representation in Congress. This injustice is not required by the Constitution. To the contrary, Congress correctly determined that it has authority under the District Clause to provide voting representation to all District residents, even though they are not State residents. That is further shown by Congress's decision to grant voting representation to Americans living overseas, even though they are not State residents. It is also shown by this Court's decision in *Evans*, which held that residents of federal

enclaves may be entitled to vote even if the State in which the enclave is located does not consider them to be State residents. Because voting is the most fundamental of all rights, there is no serious dispute that all District residents should have voting representation absent any constitutional bar.

These arguments warrant plenary review by this Court, especially in light of the serious nature of the injustice at issue.

I. THE DISTRICT CLAUSE PERMITS VOTING REPRESENTATION FOR DISTRICT RESIDENTS.

A. Congress Correctly Concluded that the District Clause Permits Voting by District Residents.

Congress's own determinations confirm Plaintiffs' view that Congress has authority to extend voting rights to District residents under the District Clause. That Clause authorizes the creation of a District "not exceeding ten Miles square" and gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever" involving the District. U.S. CONST. art. I, § 8, cl. 17. Of course, if Congress may extend voting rights to District residents, the three-judge court

erred by concluding that *only* State residents may have voting representation.

1. Historical Background

As an initial matter, there is no evidence in either the text or history of the Constitution suggesting any intent to deny voting representation to District residents. In fact, the District was created for reasons having nothing to do with voting representation. On June 20, 1783, while the Continental Congress was meeting at Independence Hall in Philadelphia, several hundred disgruntled Pennsylvania State militiamen demanded back pay for their Revolutionary War service. As explained in an *amicus* brief filed by District Historians in the three-judge court, "Pennsylvania refused to provide assistance to repel the mob . . . [and] the event convinced the Framers that the federal government's security should not be left in the hands of any one State. As Madison warned in 'Federalist 43,' without a federal district, 'the public authority might be insulted, and its proceedings be interrupted with impunity . . . .'" Historians' Br. at 4, ECF No. 39 (quoting The Federalist No. 43, at 29 (E.H. Scott ed., 1898)). Nothing about protecting Congress from mobs requires the disenfranchisement of District residents.

When the Constitution was ratified, the location of the District had not been selected. Many States sought to house the District in cities large and small. As the District Historians stated, "it seems implausible that States would have been fiercely competing to house the new federal district if the price of winning was expected to be their residents' disenfranchisement." Historians' Br. at 9. When the

sparsely populated District of Columbia was selected in 1790, the Historians further explained, its population was far below the "30,000 population-to-Representative ratio the Framers established for the House." *Id*. at 8 (citing U.S. CONST. art. 1, § 2, cl. 3). "It is hardly surprising therefore that no one made any serious effort to secure District residents a voting representative" at that time. *Id.* at 14.

As the Historians also explained, the process that resulted in the disenfranchisement of District residents in no way suggests that the Framers of the Constitution intended such a result. In fact, District residents continued to vote in Maryland or Virginia—which had ceded the land that became the District—for ten years after the first Congress accepted the cessions in the Residence Act of 1790. *Id.* at 10. That Act identified December of 1800 as the date on which "the seat of the government" would "be transferred to the [D]istrict," which might theoretically have been an appropriate time to address District voting rights. *See id.* (quoting Residence Act, § 6, 1 Stat. 130 (1790)). But as the Historians explained, in December of 1800, the Sixth Congress was "preoccupied with the aftermath of the election of 1800," which resulted in the transfer of executive authority from Federalists to Jeffersonian Republicans. *Id.* at 11–12 (citing 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. HISTORY 30, 46 (2000)). The outgoing Federalists hastily enacted the Organic Act of 1801, An Act Concerning the District of Columbia, 2 Stat. 103, *reprinted in* 1 D.C. Code 46 (1991), which had the effect of disenfranchising District residents. *See* Historians' Br. at 12. However,

as the Historians also explained, given the District's small size and the Sixth Congress's "broader and more pressing priorities, . . . the Sixth Congress's further deferral of the not-yet-urgent issue demonstrates no affirmative congressional intent to deny voting rights to District residents." *Id.* at 13. And, of course, the failure of Congress to address District voting rights in 1801 says nothing about the Framers' intentions when drafting the District Clause and adding it to Article I in 1787.

In addition, as the Historians explained, the Framers' choice of the phrase "People of the several States" was not used to bar voting by residents of the future District. Rather, "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." *Id.* at 5 (citation omitted).

2. Recent Congressional Action

More recently, Congress examined this history and concluded both that the District Clause gives it authority to provide voting representation to District residents, and that it should exercise that authority. In April 2007, following extensive hearings, the House of Representatives passed the District of Columbia House Voting Rights Act of 2007 (H.R. 1905). The Act would have considered the District as "a Congressional district for purposes of representation in the House of Representatives" and given an additional Representative to Utah, and thus would have increased the number of Members in the House of Representatives from 435 to 437. H.R. 1905, 110th Cong. §§ 2–3 (2007); *see also Common Sense Justice*

for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing Before the H. Comm. on Gov't Reform, 108th Cong. 53–54 (2004) (statement of Rep. Chris Cannon) (At the 2004 House hearing, Rep. Chris Cannon from Utah said that he is "supportive of any plan that would allocate Utah an additional seat," and added that he was "an original cosponsor" of the House bill for that reason.). H.R. 1905 passed the House with bipartisan support by a vote of 241 to 177. *See* H.R. 1905, District of Columbia House Voting Rights Act of 2007, Roll Call Vote No. 231 (Apr. 19, 2007). The Senate, however, did not pass the bill in that Congress.

In February 2009, the Senate passed the District of Columbia House Voting Rights Act of 2009 (S. 160), on a bipartisan basis by a margin of 61 to 37. *See* S. 160, District of Columbia House Voting Rights Act of 2009, Roll Call Vote No. 73 (Feb. 26, 2009). Like the 2007 House Bill, S. 160 would have considered the District "a congressional district for purposes of representation in the House of Representatives," given an additional Representative to Utah, and increased the number of Members in the House of Representatives from 435 to 437. S. 160, 111th Cong. §§ 2–4 (2009). The House did not pass S. 160 in that Congress.

During hearings on the House and Senate bills, bipartisan panels of lawmakers and constitutional experts testified that Congress has the power under the District Clause to grant District residents voting representation in Congress. The legal experts who testified included former D.C. Circuit Judge and Solicitor General Kenneth Starr, former Chief Judge

of the D.C. Circuit Patricia Wald, and Senator Orrin Hatch.

Senator Hatch supported the proposed legislation because "[the] principle of popular sovereignty is so fundamental to our Constitution, the existence of the franchise so central, that it ought to govern absent actual evidence that America's founders intended that it be withheld from one group of citizens." Orrin G. Hatch, *"No Right is More Precious in a Free Country": Allowing Americans in the District of Columbia to Participate in National Self-Government*, 45 HARV. J. ON LEGIS. 287, 298–99 (Summer 2008).

Judge Wald agreed:

> There certainly is no evidence in the text or history of the Constitution signifying the Framers wanted to deny the District the franchise forever . . . . [And] the courts have acceded to Congress' unique power to legislate for the District when it exercises that power to put the District on a par with States . . . . Congress is justified in concluding the balance tilts in favor of recognizing for D.C. residents the most basic right of all democratic societies, the right to vote for one's leaders.

Wald Statement at 255–60.

Judge Starr also testified that the broad language of the District Clause gives Congress the power to extend voting rights to District residents. *See* Starr

Statement at 83–84. Judge Starr explained that the Constitution's explicit grant of voting representation to "State" residents in Article I did not preclude Congress from extending the right to other citizens, and offered this commonsense analysis:

> Absent any persuasive evidence that the Framers' intent . . . was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of [the] term ["State" in Article I, Section 2 of the Constitution] does not necessitate that result.

Id.

Congress's authority under the District Clause to grant voting rights to District residents is further reinforced by the House and Senate Committee Reports. The March 20, 2007 House Judiciary Committee Report states that "[w]hile there [was] no evidence that the Framers intended to deny voting representation for District residents, the Framers did provide the Congress with absolute authority over the District to rectify such a problem." H.R. Rep. No. 110-52, pt. 2, at 2 (2007). The 2007 House Oversight and Government Reform Committee Report noted that "[s]cholars spanning the political and legal spectrum have concluded that Congress has authority through this legislation to provide voting representation in

Congress for local residents." H.R. Rep. No. 110-52, pt. 1, at 29 (2007).

The 2007 Senate Homeland Security and Governmental Affairs Committee Report affirmed that "[t]wo centuries of political and judicial precedent support Congress's authority to legislatively extend House representation to the District under the District Clause" and that "[t]he Committee believe[d] this authority, which the Supreme Court described as 'plenary in every respect,' allows Congress to live up to the principles this nation was founded upon, and provide representation in the U.S. House of Representatives to the District of Columbia." S. Rep. No. 110-123, at 4 (2007) (quoting *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 592 (1949) (plurality opinion of Jackson, J.)).

The Senate thus endorsed Justice Jackson's conclusion in *National Mutual Insurance Co.* that the District Clause grants Congress power that is "plenary in every respect," including the power to treat residents of the District like residents of the States for purposes of invoking diversity jurisdiction. *Nat'l Mut. Ins. Co.*, 337 U.S. at 592. Justice Jackson also stated that "[i]n no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power." *Id.* at 603.

In short, the Framers mandated immediate representation for *State* residents. But not knowing even where the District would be located, the Framers effectively authorized Congress to provide voting representation to District residents when appropriate by using its District Clause authority. That time has

long since passed. The District is no longer a small town that has less than half the appropriate population for a congressional district. By 1870, the District's population (131,700) exceeded the population of the average congressional district (130,532). *See Table I. Population of the United States by States and Territories* 3, *https://www2.census.gov/library/publications/decennial/1870/population/1870a-04.pdf*; Office of the Historian of the U.S. House of Representatives, *Representatives Apportioned to Each State*, *available to download at https://history.house.gov/Institution/Apportionment/Apportionment/*. And today, the District's population exceeds the population of Vermont and Wyoming. District of Columbia Br. at 2, ECF No. 42 (citing U.S. Census Bureau, *Quick Facts*, *https://www.census.gov/quickfacts/fact/table/dc,vt,wy/PST045218*). In any event, the key point for this case is that, by providing for immediate congressional representation for *State* residents, the Framers did not *bar* Congress from providing *District* residents congressional representation by invoking the District Clause.

This interpretation of Congress's District Clause power was not considered by the *Adams* court. That court specifically noted that the *Adams* plaintiffs did "not dispute that to succeed [under Article I] they must be able to characterize themselves as citizens of a 'state.'" 90 F. Supp. 2d at 56 (citations omitted). Plaintiffs here advance a different argument—that the Framers deferred the issue of congressional representation for District residents and gave Congress the power to provide voting representation to District residents at an appropriate time.

B. The Three-Judge Court Erred in Rejecting Congress's Interpretation of its District Clause Authority.

The three-judge court in this case recognized that:

> Plaintiffs' argument is, essentially: that the District Clause empowers Congress to treat the District for apportionment purposes as if it were a State; that voting is a fundamental right that Congress must allocate to all citizens on an equal basis absent a compelling reason to do otherwise; and that such compelling reason is absent here.

App. 44a. After reviewing the precedent, the court concluded that "Supreme Court pronouncements on the subject are a lightly mixed bag." App. 57a. It nevertheless concluded that "the weight of what precedent there is on the issue supports our reading of Article I as limiting House representation to the people of the States." App. 58a–59a.

In reaching that conclusion, the three-judge court gave the relevant precedent an unreasonably cramped reading and gave no deference at all to Congress's contrary reading of its authority. With respect to *National Mutual Insurance Co.*, the court recognized that Justice Jackson's plurality opinion for three Justices gave a broad reading to Congress's District Clause power and concluded that it authorized Congress to treat District residents as if they were State residents for purposes of diversity jurisdiction. App. 46a–47a. The three-judge court emphasized that the two concurring Justices took a different approach

and construed "State" in Article III, Section 2, Clause 1 to include the District. App. 47a–48a. However, the concurring opinion of Justice Rutledge adopted that approach because of a concern not presented here—that basing the holding on the District Clause "would entangle every district court of the United States for the first time in all of the contradictions, complexities and subtleties which have surrounded the courts of the District of Columbia in the maze woven by the 'legislative court–constitutional court' controversy . . . ." *Nat'l Ins. Mut. Co.*, 337 U.S. at 604–05 (Rutledge, J., concurring). And Justice Rutledge's rationale for treating District residents as State residents is very similar to the rationale used by Judges Wald and Starr: in the absence of clear intent to treat District residents differently, Justice Rutledge stated that "I cannot accept the proposition that absence of affirmative inclusion is, here, tantamount to deliberate exclusion." *Id.* at 622. So too here, where the fundamental nature of the right to vote far outweighs the importance of the diversity jurisdiction issue addressed in *National Mutual Insurance Co.*

The three-judge court also gave short shrift to this Court's decision in *Loughborough v. Blake*, 18 U.S. 317 (1820). In that case, the Court considered whether Congress may impose direct taxes on the District, even though Article I, Section 2, Clause 3 states that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ." The Court held that Congress may tax District residents even though the provision refers only to *States*. It reasoned in the

alternative, holding that the District may be considered to be a State for purposes of the provision *or* Congress may use its District Clause power to treat District residents as State residents. The Court stated:

> If, then, the language of the [C]onstitution be construed to comprehend the territories and district of Columbia, as well as the States, that language confers on Congress the power of taxing the District and territories as well as the States. If the general language of the Constitution shall be confined to the States, still the [District Clause] gives to Congress the power of exercising 'exclusive jurisdiction in in all cases whatsoever within this district.'

Loughborough, 18 U.S. at 323–24. The three-judge court found it significant that the *Loughborough* Court cited several other constitutional provisions relating to taxes. App. 48a–49a. But in doing so, it overlooked the fact that in *Loughborough* this Court held that "States" in Article I, Section 2, Clause 3 could be interpreted either to include the District or, under the District Clause, to give Congress the power to treat the District as if it were a State.

In addition, the key provision before the Court in *Loughborough*—Article I, Section 2, Clause 3—addresses the apportionment of "representatives" as well as "taxes," and provides that both are to be "apportioned among the several States." The court below did not address this argument. But it would make no sense to conclude that the word "States" in

Article I, Section 2, Clause 3 includes the District for one purpose but not the other.

II. THE OVERSEAS VOTING ACT MAKES CLEAR THAT VOTING REPRESENTATION IS NOT LIMITED TO STATE RESIDENTS.

The Overseas Voting Act allows American citizens residing in foreign countries to vote by absentee ballot 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). The Americans covered by the Act do not actually reside in the State in which they vote, and they need not intend to return to that State. Moreover, a majority of States allow the children of American citizens, including those who never set foot in the State (or even have spent their entire life outside the United States), to vote in the State where their parents last resided. Federal Voting Assistance Program, *Never Resided Voters* 6 (Spring 2017), *https://www.fvap.gov/uploads/FVAP/EO/FVAPNeverResidedPolicyBrief_20170222_FINAL.pdf*. All of these features of the Overseas Voting Act demonstrate that Article I does not bar voting by people who do not live in a State or have never lived in a State. Indeed, it is bizarre that Americans who have never been in the United States nonetheless have voting representation in Congress, but Americans who live in the Nation's capital do not.

Prior to the enactment of the Overseas Voting Act, overseas Americans' right to vote depended on the governing laws of their prior State of residence. Unhappy with this uneven extension of the franchise,

congressional representatives noted the importance of voting, even for those Americans who do not live in any one of our States. As Sargent Shriver stated:

> The need for federal legislation is overwhelming. How can one justify a system which allows a former resident of Michigan now living in Paris to vote in the 1972 Presidential election but denies his fellow citizen and neighbor that fundamental privilege of citizenship merely because Rhode Island or West Virginia was his last state of residence before moving to France?

Voting by U.S. Citizens Residing Abroad: Hearings on S. 2101 and S. 2384 Before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin., 93rd Cong. 70 (1973) (statement of Sargent Shriver, Chairman, Ambassadors Committee for Voting by Americans Overseas).

Senator Pell similarly opined that "citizens, wherever situated have an inherent constitutional right to vote, and that such a right should not be denied simply because those citizens cannot claim a residence in any State." *Voting by U.S. Citizens Residing Abroad: Hearings on S. 2101 and S. 2384 Before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin.*, 93rd Cong. 2 (1973) (statement of Sen. Claiborne Pell, Chairman, Subcommittee on Privileges and Elections).

These arguments apply with equal, if not greater, force to District residents. They too have an inherent right to vote that should not be abridged merely

because they are not residents of any State. They too share common national interests with residents of the fifty States. And they too regard themselves as citizens of the United States—not merely as citizens of the District of Columbia. As this Court long ago stated:

> The District is not an 'ephemeral' subdivision of the 'outlying dominion of the United States,' but the capital—the very heart—of the Union itself . . . . The power conferred by [the District Clause] is plenary; but it does not . . . authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable.

O'Donoghue v. United States, 289 U.S. 516, 539 (1933). And while "[t]he constitution of the United States declares that [C]ongress shall have exclusive legislation [over the District]; . . . it does not require that the power shall be despotic or unlimited." *Van Ness v. City of Washington*, 29 U.S. 232, 265 (1830).

The Overseas Voting Act is directly relevant here because it shows that voting representation is not limited to State residents. As explained above, the Act was necessary because some States had concluded that American citizens who had *previously* lived in the State could not vote because they were no longer State residents. Congress overrode the decisions of those States, mandating that those American citizens be granted voting representation in the House and the Senate. Congress's action shows, contrary to the decision of the three-judge court, that voting is not limited to State residents.

The three-judge court had no satisfactory answer to this point. It attempted to avoid the issue in its first decision by addressing the Overseas Voting Act in a footnote. On reconsideration, the court stated that the Overseas Voting Act "merely supports the premise that Congress *might* treat residents of the District of Columbia as residents of the State in which they resided before moving to the District." App. 74a. But if Congress "might" grant voting rights to District residents, that means Article I does not bar District residents from voting for a representative *as District residents* and that Congress "could" grant them that right.

The court below is not the only court that has failed to address this issue in a satisfactory manner. So has the Fourth Circuit. In *Howard v. State Administrative Board of Election Laws*, 976 F. Supp. 350 (D. Md. 1996), *aff'd*, No. 96-2840, 1997 WL 561200 (4th Cir. Sept. 9, 1997), the court considered a claim by a District resident who had moved to the District from Maryland that he should be permitted to continue to vote in Maryland. The district court rejected that equal protection claim on the theory that "[c]ompliance with [the Overseas Voting] Act provides a reasonable basis" for Maryland officials to treat District residents differently than Americans living overseas. *Id.* at 351. And the Fourth Circuit affirmed "on the reasoning of the district court." *Howard*, 1997 WL 561200, at *1. But that reasoning is obviously flawed. Congress cannot violate the Constitution, so it is no answer to say that District residents must be denied voting representation because they are not State residents, while Americans living overseas may

vote, even though they are not State residents, because Congress authorized them to vote.

Because voting is a fundamental right, it follows that it may not be denied to District residents absent a compelling State interest. *Dunn*, *supra.* No one has suggested that there is such an interest. The *Adams* court explicitly acknowledged that the defendants there "failed to offer a compelling justification for denying District residents the right to vote in Congress," 90 F. Supp. 2d at 66, and the Defendants in this case have not even tried to do so. Rather, the Defendants and the court below contend that this injustice is required by the language of Article I—but without explaining the inconsistency with the Overseas Voting Act.

The logic of the decision below compels the conclusion that the Overseas Voting Act is unconstitutional. Of course, Plaintiffs dispute that conclusion and do not seek that result, and contend that citizens living overseas and District residents are not barred from voting by Article I. Further, absent a compelling interest to deny voting representation to American citizens living overseas, equal protection and due process principles compel the conclusion that they may not be denied their voting rights, just as they compel the conclusion that District residents may not be denied voting rights. Moreover, even in cases where strict scrutiny is not triggered, "extension, rather than nullification, is the proper course." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (citation omitted). That is, this Court generally should cure an equal protection problem by extending a right to a benefit to both the party seeking

the benefit, such as District residents, and a comparable party who already enjoys the right, such as citizens living overseas. Such an approach is compelled when a fundamental right is at issue and there is no compelling interest justifying the denial of the right to either party.

In any event, if the only way to make sense of the decision below is to conclude that American citizens living overseas, including members of the military, may not vote in federal elections, that is a good reason for this Court to grant plenary review. If the Court holds that District residents are entitled to voting representation in Congress, the Court will simultaneously shield the Overseas Voting Act from invalidation.

III. THIS COURT HAS HELD THAT RESIDENTS OF FEDERAL ENCLAVES MAY VOTE.

The same constitutional provision that contains the District Clause also contains the "Enclaves Clause." In fact, both clauses are part of the same sentence. After stating that Congress shall "exercise exclusive Legislation in all Cases whatsoever" involving the District, the provision goes on to state that Congress possesses "like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be." U.S. CONST. art. I, § 8, cl. 17. Based on essentially the same constitutional authority as provided in the District Clause, Congress has created numerous federal enclaves. Indeed, the District is in substance a federal enclave, differing from others—like many military bases, national parks, and other properties purchased

by the federal government—only in that its existence was specifically mandated when the Constitution was adopted.

In 1970, this Court held in *Evans* that the Equal Protection Clause requires that residents of the National Institutes of Health ("NIH"), a federal enclave in Maryland, be permitted to vote in federal and State elections, including for United States Senators and Representatives, in Maryland. 398 U.S. 419. The Court so held even though Maryland did not consider NIH residents to be Maryland residents. *Id.* at 421. This result was required, the Court explained, because Congress had acted affirmatively under its Article I enclave authority to authorize Maryland "to extend important aspects of state powers over federal areas." *Id*. at 423. For example, NIH residents are subject to Maryland criminal laws, income tax, State sales tax, unemployment laws, and motor vehicle laws. *Id*. at 424. Under those circumstances, the Court held, NIH residents could not be deprived of the right to vote absent a "compelling" reason, and Maryland's justification—that "NIH residents are substantially less interested in Maryland affairs" than other citizens subject to Maryland laws—was not sufficiently compelling. *Id*. at 422–23.

As an initial matter, this Court's holding in *Evans* is highly relevant because the Court held that a denial of voting representation is subject to strict scrutiny. In addition, the Court required Maryland to treat enclave residents as State residents even though Maryland did not consider them to be State residents. District residents differ from NIH residents because they are not subject to any State's law. But this does

not mean that District residents may be denied their fundamental right to voting representation with no compelling government interest justifying that denial. Because the Enclaves Clause authorizes Congress to treat enclave residents in a manner that requires them to be permitted to vote even if the State in which the enclave is located does not consider them to be State residents, the District Clause ought to also be interpreted to permit Congress to provide voting representation to District residents.

It is undisputed that the interest that led to the creation of the District—permitting Congress to defend itself from mobs without relying on State authorities—is not furthered in any way by denying a voting representative to District residents. On the other side of the scale, in contrast, District residents have even more need for representation in Congress than State residents, since Congress acts as a super-legislature with respect to the District on account of its District Clause power. Accordingly, the appropriate remedy is to hold that District residents, like enclave residents—and like overseas residents—are entitled to voting representation in Congress.

* * * * *

The three-judge court appropriately acknowledged that "'[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws.'" App. 61a (quoting *Wesberry*, 376 U.S. at 17). The three-judge court in *Adams* similarly noted the "contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation" and recognized "the inequity of the situation plaintiffs

seek to change." 90 F. Supp. 2d at 72. It is clear that denying voting representation to District residents is therefore manifestly unjust. And as we have shown, a careful historical examination supports the conclusion that the Framers did not intend to disenfranchise District residents, and likely would be shocked to learn that the 700,000 residents of our Nation's capital lack voting representation.

American citizens living in the District, on federal enclaves, and overseas do not live in a State. Yet of those three groups, only District residents do not have a voting representative in Congress. It is no answer to say, as the three-judge court below said, App. 74a, that Congress *might* grant voting rights to District residents. That statement undermines the three-judge court's holding that *only* State residents may vote. And given the fundamental nature of the right to vote, voting representation in Congress must be provided to District residents if, as Plaintiffs and Congress agree, Article I does not restrict voting representation of residents of States.

Accordingly, the Court should grant plenary review. After that review, the Court should (a) declare the apportionment statutes unconstitutional insofar as they have been interpreted to deny voting representation to District residents, as requested in Paragraph 1 of the Plaintiffs' prayer for relief; (b) declare that the District Delegate must have all the powers and privileges afforded to Members of the House of Representatives, including the power to vote on all legislation, as requested in Paragraph 2 of the Plaintiffs' prayer for relief; (c) enjoin the Secretary of Commerce to apportion a seat in the House of

Representatives to the District of Columbia, as requested in Paragraph 5(f) of the Plaintiffs' prayer for relief; and (d) grant whatever further or different relief it determines to be warranted, as requested in Paragraph 7 of the Plaintiffs' prayer for relief.

CONCLUSION

The Court should note probable jurisdiction.

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