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 FOR AMICUS CURIAE THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The right to vote is essential to our Nation's core democratic values and constitutional principles. Indeed, this Court has long emphasized 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." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Protecting the right to vote is particularly important to the House of Representatives, which, from the time of the Founding, has been "elected immediately by the great body of the people." *The Federalist No. 39*, at 252 (James Madison) (Jacob E. Cooke ed., 1961).

Notwithstanding the importance of this fundamental right, the more than 700,000 residents of the District of Columbia (District) have no voting representation in Congress. Amicus curiae, the U.S. House of Representatives (House),[2] therefore

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[1] The parties received the necessary advance notice about the filing of this brief required by Supreme Court Rule 37.2(a) and have consented to the filing. Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, made a monetary contribution to this brief.

[2] The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives, which "speaks for, and articulates the institutional position of, the House in all litigation matters," authorized the filing of an amicus brief in this matter. Rules of the U.S. House of Representatives (117th Cong.), Rule II.8(b), https://perma.cc/8C6V-9YUJ. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican

respectfully submits this brief in support of Appellants Angelica Castañon, Gabriela Mossi, Alan Alper, Deborah Shore, Laurie Davis, Silvia Martinez, Vanessa Francis, Abby Loeffler, Susannah Weaver, Manda Kelley, and Absalom Jordan (collectively, Ms. Castañon), residents of the District who seek Congressional voting representation.

The House has a compelling interest in defending voting representation for residents of the District—and in preserving the scope of its own authority under the U.S. Constitution. As relevant here, the Constitution's District Clause gives Congress broad, plenary authority to "exercise exclusive Legislation in all Cases whatsoever" over the District that would "become the Seat of the Government." U.S. Const. art. 1, § 8, cl. 17. As various former judges, scholars, and legal historians have recognized, this grant of power and legislative control over the District encompasses the "authority to create a seat in the House of Representatives, [a] fully voting seat."[3] Voting representation in Congress for District residents is therefore both consistent with our Nation's foundational principles of self-governance and consent of the governed, and authorized by the Constitution.

The three-judge district court erred in holding to the contrary—*i.e.*, in concluding that Congress *lacks* the constitutional authority to enact legislation

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Whip. Representative McCarthy and Representative Scalise dissented.

[3] *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. 75 (2004) (Statement of the Hon. Kenneth W. Starr).

granting District residents voting representation in Congress. The House has a unique interest in correcting that misunderstanding and advancing the proper interpretation of the District Clause, as well as the other constitutional provisions that play a critical role in guaranteeing democratic self-governance for all Americans. Indeed, such understanding of the relevant constitutional provisions is important to the House's ongoing legislative efforts to ensure that the District's residents receive the full complement of voting rights and representation consistent with the Constitution.

Given these strong institutional concerns, the House submits this brief in support of Ms. Castañon and urges the Court to recognize the fundamental constitutional interests at stake in enfranchising District residents, who should have a full and equal voice in the federal legislature.

SUMMARY OF ARGUMENT

The District Clause confers on Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17. As this Court has long recognized, that power is plenary: It gives Congress "full and unlimited jurisdiction to provide for the general welfare of District citizens by any and every act of legislation which it may deem conducive to that end." *Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 601 (1949) (plurality) (cleaned up). This Court has also long confirmed Congress's authority to enact legislation putting the District on equal footing as the States for constitutional purposes, even where the relevant constitutional text refers only to "States" and does not expressly include the District. *See, e.g.*, *id.* at 603-04. It follows, therefore, that Congress may exercise its power under the District Clause to enact legislation ensuring that District residents are afforded the same constitutional protections as citizens of the States.

Congress's exercise of its District Clause authority to provide full Congressional voting representation for District residents is especially appropriate—and necessary—given the centrality of the right to vote to our Nation's core democratic values. Indeed, since the Founding, the ability to choose one's own legislators and thus have a voice in the legislative process has been deemed essential to the functioning of a democratic republic. And as recent legislative efforts have highlighted, there is no legitimate justification for denying this fundamental right to the residents of our Nation's capital.

ARGUMENT

I. Residents Of The District Are Denied The Essential Right Of Voting Representation In Congress.

A. Voting Is A Fundamental Right "Preservative Of All Rights."

As this Court has made clear, "the political franchise of voting" is "a fundamental political right" because voting rights enable the preservation "of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). And because "[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," this Court has instructed that "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry*, 376 U.S. at 17-18. Thus, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Indeed, the Department of Justice (DOJ) agreed in its briefing below that "[v]oting has long been recognized as a vital right." Mem. in Supp. of Exec. & Senate Defs.' Mot. to Dismiss the Am. Compl. at 37, *Castañon, et al., v. United States of America, et al.*, No. 18-cv-02545 (D.D.C. Apr. 1, 2019). The district court too recognized the critical importance of the franchise—and the "gravity" of Ms. Castañon's claim that District residents had long been denied this essential right. Jur. Stmt. App. 4a, 60a-61a. The district court likewise acknowledged that the denial of Congressional voting representation is inconsistent

with "the democratic ideals that impelled and informed the creation of the Union." *Id.* at 60a-61a.

This concept—that the right to elect one's legislators is crucial to a healthy democracy—is not new. At the creation of our republic, Alexander "Hamilton emphasized: '[T]he true principle of a republic is, that the people should choose whom they please to govern them.'" *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (quoting 2 Debates on the Federal Constitution 257 (Jonathan Elliot ed., 1876)).

James Madison similarly observed that "the right of suffrage is . . . fundamental," and a "vital principle of free Government" is "that those who are to be bound by laws[] ought to have a voice in making them." James Madison, *Property and Suffrage: Second Thoughts on the Constitutional Convention* (1821), in *The Mind of the Founder: Sources of the Political Thought of James Madison* 394-95, 398 (Marvin Meyers ed., 1981).[4] And as to District residents, in particular, Madison noted that it was understood that the cession of land for the creation of the District would not abrogate "the rights and the consent of the citizens inhabiting it," who would have a "voice in the

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[4] *See also, e.g.*, 2 *The Records of the Federal Convention of 1787* 201-203 (Max Ferrand ed., 1911), https://perma.cc/VA3S-DMP3 (at the Constitutional Convention, several delegates opposed restricting the right to vote to property owners, explaining that "[t]here is no right of which the people are more jealous than that of suffrage" (Del. Pierce Butler, S.C.), and expressing concern that "[t]he people" would not support the Constitution "if it should subject them to be disfranchised" (Del. Oliver Ellsworth, Conn.)); *The Federalist No. 57*, at 384 (James Madison) (embracing universal suffrage).

election of the Government which is to exercise authority over them." *The Federalist No. 43*, at 289.

B. The Lack Of Congressional Voting Representation For District Residents Contravenes The Basic Constitutional Principle Of Self-Governance.

There are more than 700,000 residents of the District.[5] "Yet, unlike American citizens living in the fifty states[,] or even outside the United States altogether, Americans living in the District of Columbia . . . cannot exercise this most precious right with respect to their national government." Senator 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, 287 (2008).

This denial of direct voting representation in Congress contravenes our Nation's basic principle of self-governance. District residents are "Americanized for the purpose of national and local taxation and arms-bearing, but not for the purpose of voting." *Id.* (quoting Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 Geo. L.J. 207, 207 (1957-58)). Moreover, the absence of representational rights serves no legitimate governmental interest: Granting U.S. citizens in the District voting representation in Congress would significantly advance the rights of

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[5] *See H.R. 51: Making D.C. the 51st State: Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. (2021) (Statement of Fitzroy Lee, Interim Chief Financial Officer, Government of the District of Columbia) (the District's population "now stands at approximately 714,000").

District residents without rescinding others' right to voting representation. As Patricia Wald, the former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, explained, expanding the franchise to District residents also would not infringe the "structural balance between the Union and the States," otherwise "usurp[]" the States' powers, or "dilute[]" the "civil rights of any U.S. citizens"; accordingly, the "balance tilts in favor of recognizing for D.C. residents the most basic right of all democratic societies." *Ending Taxation Without Representation: The Constitutionality of S. 157*: *Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 259-60 (2007) (Prepared Statement of Patricia M. Wald).

The lack of voting representation for District residents is particularly striking given that Congress "has ultimate authority over all aspects of the city's legislative, executive, and judicial functions." H. Rep. No. 111-22, at 3 (2009); *see also Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889) (Congress "possess[es] the combined powers of a general and of a state government" over the District). As the formal head of the local government for District residents, Congress reviews legislation passed by the Council of the District of Columbia before it may become law, limits the types of laws the Council may pass, and may legislate on any District matter at any time.[6] Denying

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[6] Congress has ceded some authority to local officials, while retaining significant veto and oversight authority for itself. *See* District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified in scattered sections of the D.C. Code) (delegating certain constitutional legislative authority to an

District residents the right to vote for Congressional representatives is thus "equivalent to a State resident being denied the right to vote for State leaders as well as national leaders." Prepared Statement of Patricia M. Wald at 259 n.17.

District residents also bear all the responsibilities of our representative democracy despite their exclusion from Congressional representation. They "pay billions of dollars in Federal taxes each year" and must "register for selective service, serve on Federal juries, and assume other responsibilities of U.S. citizenship." H. Rep. No. 111-22, at 4.[7] Further, many District residents are Federal government employees and members of our Nation's armed forces. *Id.*[8] It is especially troubling that members of the District who join the military bear arms to protect the democratically elected government of the United States, yet lack voting representation in Congress.

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elected Mayor and Council but retaining authority to reject proposed legislation, and preserving the authority for Congress to enact public laws that affect the District).

[7] The District reportedly pays more in federal taxes than many States. *See H.R. 51: Making D.C. the 51st State*: *Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. (2021) (Opening Statements of Chairwoman Carolyn B. Maloney and Congresswoman Eleanor Holmes Norton) (reporting that the District pays more in federal taxes than over 20 States, and more per capita than any State).

[8] District "residents have fought in every American war." Opening Statement of Congresswoman Eleanor Holmes Norton.

II. The District Court Erred In Holding That Congress Lacks The Authority To Enact Legislation That Would Enfranchise District Residents.

The District Clause vests in Congress plenary power over the District and its affairs. It provides:

> The Congress shall have 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[.]

U.S. Const. art. I, § 8, cl. 17. The text and history of this provision, as well as relevant precedent interpreting the scope of Congress's Article I powers, confirm that Congress has the constitutional authority to pass legislation granting District residents voting representation in Congress.

A. The District Clause Grants Congress Plenary Legislative Power Over The District.

With the sweeping language of the District Clause, the Framers gave Congress "extraordinary and plenary power," *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984) (Wilkey, J., concurring), to "legislate within the District for every proper purpose of government," *Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940); *see also id.* at 250 ("Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of

Columbia by any and every act of legislation which it may deem conducive to that end.").

Indeed, this Court has long emphasized the extraordinary breadth of Congress's District Clause powers, explaining that "[o]ver this District[,] Congress possesses 'the combined powers of a general and of a state government in all cases where legislation is possible.'" *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933) (quoting *Stoutenburgh*, 129 U.S. at 147). As a result, Congress not only may "exercise all the police and regulatory powers which a state legislature or municipal government would have" over the District, but it may also apply laws of "otherwise nationwide application" to the District. *Palmore v. United States*, 411 U.S. 389, 397 (1973).

While acknowledging the broad scope of Congress's authority over the District, the district court nevertheless concluded that the Constitution does not empower Congress to enact legislation granting District residents voting representation in Congress. Jur. Stmt. App. 51a-60a. In support, the court recited the various provisions in Article I that tie Congressional representation to residency in a "State"—and concluded that the term "State" in these contexts does not include the District. *Id.* at 51a-52a.[9]

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[9] The district court cited U.S. Const. art. I, § 2, cl. 1 (Members of the House are elected "by the People of the Several States"); *id.* cl. 2 (Members must inhabit the "State" from which they are chosen); *id.* cl. 3 ("Representatives and direct Taxes" are "apportioned among the several States"; "each State shall have at Least one Representative"); *id.* amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers"); *id.* art. I, § 2, cl. 4

The district court acknowledged, however, that this Court has recognized that "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved." *Id.* at 54a (quoting *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973)). Yet the district court determined that, because the nature of Congressional representation "was the considered result of extensive debate" and compromise at the Founding, it would necessarily upset this constitutional balance to allow Congress, "acting via the District Clause," to enact legislation providing for Congressional representation for District residents. *Id.* at 60a.

That conclusion is wrong: It ignores the broad grant of authority in the District Clause and improperly subordinates the Clause to provisions that say nothing about the scope of Congress's legislative authority over the District.

In fact, after studying the text and history of the Clause, numerous legal scholars and senior government officials have rejected the approach embraced by the district court and instead have concluded that Congress has the authority to legislate voting representation for District residents. For example, Kenneth W. Starr, former Solicitor General of the United States and a former Judge on the U.S.

(addressing mechanism by which "vacancies . . . in the Representation from any State" shall be filled); *id.* art. I, § 4, cl. 1 (the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof").

Court of Appeals for the D.C. Circuit, explained that it would be "quite wrong" to read other provisions in Article I as implicitly limiting Congress's authority under the District Clause (as the district court here did). *Common Sense Justice for the Nation's Capitol: An Examination of Proposals to Give D.C. Residents Direct Representation*: *Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 75, 78-82 (2004) (Statement of the Hon. Kenneth W. Starr). As Judge Starr explained, "[l]egislation to enfranchise the District's residents presents an entirely and altogether different set of issues from those that courts have addressed when calling into question the scope of [C]ongressional power" under other provisions in Article I. *Id.* at 75.

A proper interpretation of the District Clause, Judge Starr noted, must account for its "very broad" language and "majestic" scope, as well as its location—immediately "preced[ing] the grand necessary and proper clause" in "a section of the Constitution that confers broad powers on the Congress." *Id.* at 75, 80. Looking primarily to these textual and structural cues, Judge Starr thus concluded that, pursuant to its "plenary" authority under the District Clause, "Congress does enjoy authority to create a seat in the House of Representatives, [a] fully voting seat" for the District. *Id.* at 75.

Judge Starr also noted that Congress's determination regarding the scope of its authority to enact such legislation is entitled to deference by the courts, which have historically "rightly shown considerable deference where Congress announces its considered judgment that the District should be considered as a State for specific legislative purposes."

Id. at 75. Finally, Judge Starr emphasized that "fundamental principles of representative democracy . . . support the extension of the franchise" to District residents. *Id.* at 76, 84.

Chief Judge Wald similarly concluded that, while granting voting representation to the District is "a close, and . . . somewhat novel, constitutional issue," Congress nevertheless has the power under the "plenary grant" of authority in the District Clause to grant this right to District residents. *Ending Taxation Without Representation: The Constitutionality of S. 157: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 19-20 (2007) (Statement of Patricia Wald, Former Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C.). Given "the absence of any clear impediment to Congress exercising that power," as well as "the overwhelming justice" of allowing District residents representation in Congress, she urged Congress to "tilt the constitutional balance in favor of the legislation" that would do so. *Id.* at 22.[10]

Scholars have also noted that Congress has elsewhere expanded the franchise to individuals who are *not* residents of a State: In the Uniformed and

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[10] *See also Ending Taxation Without Representation: The Constitutionality of S. 157*: *Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 84 (2007) (The Hon. Patricia Wald, Answers to Written Questions) ("[T]he Constitution contains no explicit or even implicit intent to deny D.C. residents a vote in the House. Therefore, the plenary power granted Congress to legislate 'in all Cases whatsoever' for the District can and should be interpreted to include power to accord such a vote in order to bring [Article I, Section 2 and the District Clause] into harmony.").

Overseas Absentee Voting Act of 1986, 52 U.S.C. § 20302(a)(1), Congress granted certain Americans living abroad the right to vote in federal elections. Prepared Statement of Patricia M. Wald at 256. As Chief Judge Wald explained, if Congress were held to lack the power to "address the District's disenfranchisement[,]" that would create an "anomalous situation where a Massachusetts resident can move to Zimbabwe and retain the right to vote in federal elections but the same citizen cannot retain that right if she moves to the District." *Id.* at n.10.[11]

The historical origins of the District Clause and its special role in the formation of the Nation's capital reinforce the provision's broad grant of authority and confirm Congress's expansive power over the District. As is well documented in the briefing below, the District Clause was adopted in order to ensure that the Federal Government would not be beholden to, or subject to the control of, local officials in the State within which it happened to be located.[12] And there is

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[11] *See also, e.g.*, *District of Columbia House Voting Rights Act of 2009*: *Hearing on H.R. 157 Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 196 (2009) (Statement of Viet D. Dinh, Georgetown University Law Center Professor).

[12] *See, e.g.*, Mem. of Law of *Amici Curiae* Const. Law Scholars in Supp. of Pls., *Castañon, et al., v. United States of America, et al.*, No. 18-cv-02545 (D.D.C. June 10, 2019); *Amici Curiae* Br. of D.C. Historians in Supp. of Pls., *Castañon, et al., v. United States of America, et al.*, No. 18-cv-02545 (D.D.C. June 10, 2019); *see also*, *e.g.*, Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 169-72 (1975); Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A*

no indication that, in authorizing the creation of the Nation's capital, the Framers—who viewed the right to vote as indispensable to the new republican government (*see supra* pp. 5-7)—intended that the residents of that District would forfeit their right to elect voting representatives in Congress.[13]

In 1790, Congress exercised its authority under the District Clause to accept cessions of land by Maryland and Virginia to create the seat of the Nation's capital. *See* An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). The same legislation provided that the Federal Government would assume control over the District beginning in 1800—but, until then, the laws of Maryland and Virginia would continue to govern the States' respective former citizens. *Id.*; Statement of Viet D. Dinh at 187. During the intervening decade, the District's residents thus continued to vote in Congressional elections in their

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Legislative Solution, 139 U. Pa. L. Rev. 1659, 1683-84 (1991); Hatch, *"No Right Is More Precious in A Free Country": Allowing Americans in the District of Columbia to Participate in National Self-Government*, at 289, 291.

[13] *See, e.g.,* Statement of Viet D. Dinh at 185-86 ("There are no indications, textual or otherwise, to suggest that the Framers intended that Congressional authority under the District Clause, extraordinary and plenary in all respects, would not extend also to grant District residents representation in Congress."); Jamie B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39, 77 (1999) ("Congress did not intend to disenfranchise citizens within the capital city."); Prepared Statement of Patricia M. Wald at 255 ("There certainly is no evidence in the text or history of the Constitution signifying the Framers wanted to deny the District the franchise forever for any legitimate reason.").

respective ceding states. Statement of Viet D. Dinh 187-88.[14]

As then-Professor Dinh explained, the "critical point" of this history is that early District residents' "voting rights derived from *Congressional action under the District Clause* recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation" was enacted. *Id.* That the first Congress so intentionally sought to provide for continued Congressional voting rights for District residents clearly "demonstrate[s] the Framers' belief that Congress may authorize by statute representation for the District." *Id.* at 188.

B. Legal Precedent Supports Congress's Authority to Provide Voting Rights For The District.

Consistent with the text and history of the District Clause, courts have long affirmed Congress's expansive authority to legislate under the Clause. Because Congress has "plenary" authority under the District Clause, and that power includes, "in respect of the District, the exercise by Congress of other appropriate powers conferred upon that body by the Constitution," *O'Donoghue*, 289 U.S. at 539, this Court has repeatedly recognized that Congress may treat the

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[14] *See also, e.g.*, Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, at 214; *O'Donoghue*, 289 U.S. at 540 (because the District's residents "were entitled to all the rights, guaranties, and immunities of the Constitution" granted to residents of the ceding states, "it is not reasonable to assume that the cession stripped them of these rights").

District as a State for various statutory and constitutional purposes.[15]

For example, the Commerce Clause refers to Commerce "among the several States," U.S. Const. art. 1, § 8, cl. 3, but this Court has held that Congress has the power to regulate commerce across the District's borders. *Stoutenburgh*, 129 U.S. at 149; *see also, e.g.*, *Loughran v. Loughran*, 292 U.S. 216, 227-28 (1934) (providing that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, binds courts of the District "equally with courts of the states"); *Palmore*, 411 U.S. at 395 (noting that 28 U.S.C. § 1257 "plainly provided" that the statutory phrase "highest court of a State" would "include[] the District of Columbia Court of Appeals").

Along the same lines, although "the District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment," this Court has acknowledged that—in the important context of the civil rights remedies created by Congress in 42 U.S.C. § 1983—Congress could include the District within the statute's scope via a "separate exercise of Congress'[s] power to legislate for the District under Art. I, § 8, cl. 17." *Carter*, 409 U.S. at 424 & *id.* at n.9.[16]

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[15] *See* Statement of Viet D. Dinh at 179 ("Yes, the District is not a state. Yes, 'states' mean states. But in other contexts, where we have similar [tension], the courts have resolved the issue by allowing Congress to treat District residents as if they were residents of states, or courts themselves have treated District residents as if they were residents of a state."); *id.* at 190-95 (discussing examples).

[16] Following the *Carter* decision, Congress amended the statute to include the District of Columbia in Section 1983. *See* Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (codified at 42 U.S.C. § 1983).

In *National Mutual Insurance Company v. Tidewater Transfer Company*, 337 U.S. at 604, this Court similarly upheld a federal statute that treated the District as a State for purposes of federal court diversity jurisdiction, even though Article III, § 2, cl. 1, refers to cases "between Citizens of different States." The three-justice plurality explained that "the District of Columbia is not a state within Article III of the Constitution," but emphasized that—as the House urges here—"[t]his conclusion does not . . . determine that Congress *lacks power* under other provisions of the Constitution to enact this legislation." *Id.* at 588 (emphasis added). The *Tidewater* plurality located Congress's authority in the District Clause and the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, stressing the "exclusive responsibility of Congress for the welfare of the District," 337 U.S. at 590, and the "broad terms," *id.* at 589, under which "Congress is empowered 'to exercise exclusive Legislation in all Cases whatsoever, over such District,'" *id.* (quoting U.S. Const. art. I, § 8, cl. 17). The plurality emphasized that where—as would be the case here—Congress is legislating for the District on a matter "not expressly forbidden by the Constitution," there is "no matter" in which the Court should "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 the words of Judge Starr, "[t]he *Tidewater* holding confirms what is now the law: the Constitution's use of the term 'State' in Article III cannot mean 'and not of the District of Columbia.'" Statement of the Hon. Kenneth W. Starr at 83.

As these cases illustrate, "courts have acceded to Congress's unique power to legislate for the District

when it exercises that power to put the District on a par with States in critical constitutionally-related areas." Prepared Statement of Patricia M. Wald at 256-57. There is every reason to conclude that Congress's District Clause power extends equally to the critical area of voting representation for the District.

To the extent the district court relied on *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000) (per curiam), *aff'd*, 531 U.S. 941 (2000), and *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940 (2000), that reliance was misplaced. In *Adams*, a three-judge district court determined that the District was not a State for purposes of Article I apportionment of Congressional representatives. *Id.* at 50, 55-56. But as the district court here acknowledged, the court in *Adams* did not have occasion to decide the issue the House presses: whether the District Clause authorizes Congress to enact legislation granting Congressional voting representation to District residents. Jur. Stmt. App. 38a-39a & n.8.

The court in *Adams* concluded that it "lack[ed] authority" to hold the denial of voting representation for District residents unconstitutional and to grant plaintiffs the injunctive relief they sought. 90 F. Supp. 2d at 72. The court stressed that "[i]f they are to obtain [relief], [plaintiffs] must plead their cause in other venues." *Id.* Contrary to the district court's notion that the only "other venues" available to plaintiffs are statehood or a constitutional amendment (Jur. Stmt. App. 61a), this statement in *Adams* "suggested that it is up to Congress to grant through legislation the fairness in representation that the court was unable to order." Statement of Viet D. Dinh

at 192. Congress has the power not only to provide statehood for the District through legislation, but also to provide voting representation through legislation to resolve the "contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from [C]ongressional representation." *Adams*, 90 F. Supp. 2d at 72.

C. Congress Understands Its District Clause Authority To Include The Power To Legislate Voting Rights For District Residents.

Congress's efforts to provide Congressional voting representation for District residents demonstrate its understanding that the Constitution affords it the authority to provide this crucial right through legislation.

In 2007, for example, the House passed a bill that would have granted the District a full voting seat in the House. *See* District of Columbia House Voting Rights Act of 2007, H.R. 1905, 110th Cong. (2007). The bill provided that the District "shall be considered a Congressional district for purposes of representation in the House of Representatives," *id.* § 2(a), and would have permanently increased the number of representatives to 437 Members, *id.* § 3(a). As a House Judiciary Committee report later explained, it was understood that the source of authority for this provision was the District Clause. *See* H. Rep. No. 111-22, at 5. The Committee noted that the "Framers . . . provide[d] the Congress with absolute authority over the District, broad enough to rectify" the unfortunate fact that "District residents have been

disenfranchised since the District was formally established." *Id.* (citing Statement of Viet D. Dinh).

The Senate did not pass the 2007 bill, but two years later, the Senate passed a substantially similar bill. *See* District of Columbia House Voting Rights Act of 2009, S. 160, 111th Cong. (2009). Like the 2007 House bill, the 2009 Senate bill also would have created a Congressional district for the District. Senator Joseph Lieberman, the lead sponsor of the bill, stated in the Senate floor debate that "the preponderance of constitutional opinion is that the so-called District clause occupies the field and gives us the opportunity to right this historic wrong."[17]

The House ultimately did not pass the 2009 bill, but while that bill was under consideration, DOJ issued opinions addressing its constitutionality. While recognizing the "exceptionally strong policy reasons for extending [C]ongressional voting rights to citizens of the District," DOJ's Office of Legal Counsel (OLC) determined that the proposal was inconsistent with constitutional provisions that tie House composition and federal elections to state residency. *Views on Legislation Making the District of Columbia a Congressional District*, 33 Op. O.L.C. 156, 157 (2009).

The Attorney General reached the opposite conclusion. In a separate opinion, he explained that,

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[17] 155 Cong. Rec. S2507, S2535 (daily ed. Feb. 26, 2009), https://perma.cc/3VFR-6AHF; *see also id.* at S2528 (Statement of Sen. Russell Feingold) (noting that Congress may exercise its "power of 'exclusive legislation' . . . over the District" to "ensure that this Government's just powers are derived from the consent of the governed").

while the bill "presents a close constitutional question, . . . the balance tips in favor of finding [the] proposed legislation constitutional." *Constitutionality of the D.C. House Voting Rights Act of 2009*, 33 Op. O.L.C. 38, 38 (2009). Contrary to OLC, the Attorney General found that "[n]either the text of the Constitution nor the analysis of applicable precedent clearly" forecloses Congress's ability to "confer House voting rights on D.C. residents by legislation." *Id.* at 40. Moreover, he explained, such legislation "would embody the will of the people of the United States to extend the franchise to District citizens." *Id.* Thus, the Attorney General could not "conclude that the Constitution requires us to ignore the will of the American people and to deny the most basic rights in a democracy—the right to elect representation in the legislature and therefore to self-governance—to U.S. citizens who happen to be residents of our nation's capital, the District of Columbia." *Id.*

In recent years, the House has continued its efforts to put District residents on the same constitutional footing as residents of the States, including by ensuring full voting representation for citizens living in the District. As Congresswoman Norton (who is the District's elected Representative, though she lacks House voting rights that Representatives for the States enjoy) has recently emphasized, Congress has the authority to do so because, among other reasons, the District Clause "gives Congress plenary authority over the federal district." *See H.R. 51: Making D.C. the 51st State*: *Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. (2021) (Opening Statement of Congresswoman Eleanor Holmes Norton).

CONCLUSION

For the foregoing reasons, the House urges this Court to hold that the Constitution grants Congress the power to enact legislation providing District residents with the fundamental right to voting representation in Congress.

Respectfully submitted,

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