No. 20-1279

In the Supreme Court of the United States

ANGELICA CASTAÑON, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this appeal.

2. Whether the three-judge district court had jurisdiction over appellants' claims.

3. Whether Congress is constitutionally compelled to provide for a Representative in the House of Representatives from the District of Columbia.

ADDITIONAL RELATED PROCEEDING

United States District Court (D.D.C.):

Castañon v. *United States*, No. 18-cv-2545 (Mar. 12, 2020) (order dismissing some claims and remanding others to a single-judge court)

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Pursuant to Rule 18.6 of the Rules of this Court, the Acting Solicitor General respectfully moves that the appeal be dismissed or, in the alternative, that the district court's order be affirmed.[1]

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 3a-62a) is reported at 444 F. Supp. 3d 118. The three-judge district court's opinion denying reconsideration (J.S. App. 63a-75a) is not published in the Federal Supplement but is available at 2020 WL 5569943.

[1] In their jurisdictional statement, appellants indicate that they are not challenging on appeal the district court's rulings implicating any Senate official named as a defendant in district court. Accordingly, this motion is made on behalf of only the United States and the Executive officials. See J.S. App. 5a (listing "Executive Defendants" and "Senate Defendants"); J.S. ii-iii.

JURISDICTION

The opinion of the three-judge district court was entered on March 12, 2020. A motion for reconsideration was denied on September 16, 2020. Appellants filed a notice of appeal on November 13, 2020. On January 4, 2021, Chief Justice Roberts extended the time within which to file a jurisdictional statement to and including March 12, 2021, and the jurisdictional statement was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. Art. I, § 2, Cl. 1. Section 2 further provides that Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." Art. I, § 2, Cl. 3; see also Amend. XIV, § 2. The Constitution identified the 13 original States by name and apportioned Representatives among them pending the first of the "actual Enumeration[s]" of the "respective Numbers" of the States to be made at least every ten years "in such Manner as [Congress] shall by Law direct." Art. I, § 2, Cl. 3.

The provisions of the Constitution relating to the apportionment of Representatives are effectuated by statute. Congress has provided that the Secretary of Commerce shall take the decennial census and report to the President "[t]he tabulation of total population by States

* * * as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(a) and (b). The President, within one week of the convening of the new Congress following the decennial census, is then to transmit to Congress "a statement showing the whole number of persons in each State * * * 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." 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992) (discussing and sustaining constitutionality of equal-proportions method). Each State is entitled to the number of Representatives set forth in the President's statement, and the Clerk of the House of Representatives must, within 15 days of receiving the President's statement, send the executive of each State a certificate stating that number. 2 U.S.C. 2a(b).

Article I, Section 8 of the Constitution provides that Congress shall have the power "[t]o 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 (District Clause). Since the District of Columbia became the Seat of Government over 200 years ago, District residents have not been considered residents of any State for purposes of the decennial census and representation in Congress. Accordingly, the District has never had a Representative in the House of Representatives, and no provision has been made for citizens residing in the District to vote in congressional elections. Residents of the District elect a Delegate to the House of Representatives,

who by statute has a seat in the House and may debate but not vote. 2 U.S.C. 25a(a) (District Delegate Act). By ratification of the Twenty-third Amendment, residents of the District may vote in presidential elections. U.S. Const. Amend. XXIII.

2. In 1998, a group of District residents brought several suits in the U.S. District Court for the District of Columbia to challenge the absence of voting representation in the House and Senate. See *Adams* v. *Clinton*, 90 F. Supp. 2d 35 (D.D.C.) (per curiam), aff'd, 531 U.S. 940, and 531 U.S. 941 (2000). The consolidated cases involved claims under the Equal Protection and Republican Guarantee Clauses, claims under the constitutional provisions providing for the election of Representatives and Senators, and claims asserting an abrogation of the plaintiffs' privileges of citizenship. *Id.* at 37-38. The three-judge court found that it lacked jurisdiction over the plaintiffs' claims relating to Senate representation and Congress's exercise of authority over District matters of local concern, remanding those claims to a single district judge. *Id.* at 38-40.

A majority of the three-judge district court held in *Adams* that it had jurisdiction over the plaintiffs' claims for representation in the House of Representatives and rejected those claims on the merits. *Adams*, 90 F. Supp. 2d at 40-72. The court concluded that Article I, Section 2 provides that residents of "States" can elect voting members of the House, and that the District could not be treated as a State for those purposes. *Id.* at 47-56. Although the plaintiffs had "not dispute[d] that to succeed under Article I they must be able to characterize themselves as citizens of a state," the dissenting judge "contend[ed] that the Article's repeated use of the word 'state' does not necessarily mean the Framers intended

to apportion representatives only among states." *Id.* at 56 (emphasis omitted); see also *id.* at 86-100 (Oberdorfer, J., dissenting in part). The majority rejected that contention, reasoning that "Congressional representation is tied to the structure of statehood," and that "[t]here is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise." *Id.* at 56.

The majority in *Adams* also rejected the plaintiffs' arguments based on other provisions of the Constitution. See *Adams*, 90 F. Supp. 2d at 65-72. With respect to the plaintiffs' equal protection argument, the court reasoned that "'the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution,' and the right to equal protection cannot overcome the line explicitly drawn by that Article." *Id.* at 66 (quoting *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). While acknowledging "the force of the one person, one vote principle in our constitutional jurisprudence," the court concluded that "that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress." *Id.* at 67. The court also rejected challenges that the plaintiffs' lack of House voting representation violated their privileges of national citizenship and due process rights. *Id.* at 68-72.

On two separate direct appeals brought by the plaintiffs, this Court summarily affirmed the three-judge district court's judgment. See *Adams* v. *Clinton*, 531 U.S. 941 (2000); *Alexander* v. *Mineta*, 531 U.S. 940 (2000).

3. Appellants, eleven residents of the District, filed this suit on November 5, 2018. D. Ct. Doc. 1; D. Ct. Doc.

9 (Nov. 26, 2018) (amended complaint). Appellants sought "to secure the right to full voting representation in the United States Congress for American citizens living in the District of Columbia," asserting that the denial of that right violates "constitutional guarantees of equal protection, due process, and the constitutional right to association." D. Ct. Doc. 9, ¶ 1; see also *id.* ¶¶ 135-142.[2] At appellants' request, the district court convened a three-judge panel pursuant to 28 U.S.C. 2284(a), which provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." See J.S. App. 5a.

On March 12, 2020, the three-judge district court denied appellants' motion for summary judgment, granted the government's motion to dismiss in part, and remanded the remaining claims to the single district judge. J.S. App. 3a-62a.

a. The three-judge district court first concluded that it had jurisdiction under 28 U.S.C. 2284(a) over appellants' challenge to the lack of representation in the House of Representatives, but not over the "claims aimed at senatorial representation." J.S. App. 15a. Be-

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[2] The Amended Complaint named as defendants the United States; the Speaker, the Clerk, and the Sergeant at Arms of the House of Representatives; the President *Pro Tempore*, the Secretary, and the Sergeant at Arms and Doorkeeper of the Senate; the Vice President of the United States in the capacity of President of the Senate; and the President of the United States and the Secretary of Commerce. D. Ct. Doc. 9, ¶¶ 59-67; J.S. ii. On March 27, 2019, appellants voluntarily dismissed the House defendants, D. Ct. Doc. 20 (Mar. 27, 2019), and the House later filed a brief as *amicus curiae* in support of appellants, D. Ct. Doc. 38 (June 11, 2019). See also J.S. App. 4a-5a.

cause the latter claims did not concern the apportionment of congressional districts and their disposition was not "necessary to settle the controversy between [appellants] and the Executive Defendants, against whom the apportionment claims are asserted," the court remanded those claims to the single district judge. *Ibid.*; see *id.* at 15a-18a.

b. The three-judge district court next dismissed for lack of jurisdiction appellants' claims that Congress had violated their constitutional rights by failing to "provide by legislation for the congressional enfranchisement of District residents" pursuant to its powers under the District Clause. J.S. App. 19a; see *id.* at 19a-23a. The court found that although appellants satisfied the injury-in-fact requirement of Article III standing with respect to those claims, appellants had failed to demonstrate the requisite causation and redressability. *Id.* at 23a-31a. The court explained that the "inaction of the chambers of Congress writ large," *id.* at 25a, rather than Executive Defendants or the individual legislative officers, caused appellants' asserted injury, and that the "Speech or Debate Clause would pose 'an absolute bar to suit' where [appellants] seek to assign liability for 'any act that falls within the sphere of legitimate legislative activity.'" *Ibid.* (quoting *Common Cause* v. *Biden*, 748 F.3d 1280, 1283 (D.C. Cir.) (citation and internal quotation marks omitted), cert. denied, 574 U.S. 975 (2014)). Moreover, the court explained that appellants could not establish redressability to the extent that their claims "ar[ose] from congressional inaction," which the court observed would be redressable only by "affirmative congressional action" that was "quite impossible" for the court to order. *Id.* at 26a; see also *id.*

at 29a ("It is simply not the role of this Court to legislate, any more though declaratory action than through injunction.").

c. Despite concluding that "the central thrust of [appellants'] suit is nonjusticiable," the three-judge district court concluded it had jurisdiction over appellants' challenge to their "exclusion from apportionment" and "to the apportionment statutes themselves." J.S. App. 31a-32a. The court noted that it did not "understand [appellants] to be challenging the Uniformed and Overseas Citizens Absentee Voting Act," (UOCAVA), Pub. L. No. 99-410, 100 Stat. 924, which requires States, the District, and territories to permit otherwise qualified voters residing or stationed overseas to vote in their last place of domicile prior to leaving the United States. J.S. App. 32a n.5; see 52 U.S.C. 20302, 20310. With respect to the claims appellants had raised, the court invoked this Court's affirmance in *Adams* and concluded that appellants had standing to the extent they sought a declaration that the apportionment statutes are unconstitutional and injunctive relief requiring the Secretary of Commerce to include the District in apportionment calculations. J.S. App. 33a-36a & n.6.

On the merits of those claims, the district court held that the apportionment statutes and the Executive appellees' actions in conformity with them did not violate appellants' rights to equal protection, due process, or freedom of association and representation. J.S. App. 36a-60a. The court stated that result was "foreordained, in whole or in part, by *Adams* and its summary affirmances." *Id.* at 37a. The court concluded that this Court's summary affirmances should be understood to rest on "the holding that Article I contemplates that only 'residents of actual states' have and may exercise

the House franchise." *Id.* at 38a. The court also independently "reach[ed] the same conclusion on the question of Article I's import as did the *Adams* panel twenty[]years ago," holding "that [appellants'] constitutional challenges to their exclusion from apportionment and from the House franchise fail." *Id.* at 40a.

The three-judge court rejected appellants' reliance on the District Clause, concluding that if "congressional legislation on apportionment * * * follows the dictates of other portions of the Constitution" limiting "House representation to the States," it does not run afoul of other constitutional provisions. J.S. App. 50a-60a (addressing constitutional text and history).

The three-judge court accordingly dismissed appellants' claims, except those regarding Senate representation, which it remanded to a single judge. J.S. App. 61a; see 18-cv-2545 Docket entry (Nov. 19, 2020) (single-judge court order staying consideration of the remanded claims "until the Supreme Court renders a decision on [appellants'] appeal"). The three-judge court issued an accompanying order stating that it "constitute[d] the final judgment of the Court within the meaning of Federal Rule of Civil Procedure 54(b)." D. Ct. Doc. 55 (Mar. 12, 2020).

4. Appellants filed a motion for reconsideration or to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), D. Ct. Doc. 58 (Apr. 9, 2020), which the three-judge district court denied on September 16, 2020, J.S. App. 63a-75a.

The three-judge district court first stated that Rule 59(e) did not govern the reconsideration request because "judgment was not entered as to any of [appellants'] claims." J.S. App. 68a. To enter a partial final judgment on fewer than all claims, the court observed,

it would have been necessary under Rule 54(b) to "expressly determine[] that there [wa]s no just reason for delay." *Ibid.* (quoting Fed. R. Civ. P. 54(b)). Because the court had "made no [such] express determination * * * either in [its] Memorandum Opinion or in the accompanying Order," the court concluded that its prior "'decision was interlocutory.'" *Ibid.* (quoting *Cobell* v. *Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015)). The court accordingly treated the reconsideration motion "as filed under Rule 54(b)." *Ibid.* (quoting *Cobell*, 802 F.3d at 25); see Fed. R. Civ. P. 54(b) (permitting, where the court has not entered a "final judgment," "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties," to "be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities").

The district court indicated it was "not entirely certain under what theory" appellants proceeded in their reconsideration motion, observing that they appeared to either "press * * * an equal-protection challenge to" UOCAVA or "reiterate equal-protection arguments" the court had already rejected. J.S. App. 70a. On the first possibility, the court explained that appellants' previous disclaimer of a challenge to UOCAVA could not be reconciled with their arguments and declined to consider that "new claim." *Id.* at 71a-73a (emphasis omitted). With respect to the second possibility, the court explained that it had previously found what it regarded as the "justiciable aspects" of appellants' claims "to be foreclosed by the Constitution itself." *Id.* at 73a. The court explained that UOCAVA 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," but it provides "no precedent for treating residents of the District of Columbia *qua* residents of the district as among 'the people of the several States.'" *Id.* at 74a.

Appellants filed a notice of appeal 58 days after the district court issued its order denying reconsideration and clarifying that its decision was interlocutory, on November 13, 2020. J.S. App. 1a-2a.

ARGUMENT

Appellants do not dispute that Article I, Section 2 of the Constitution, of its own force, affirmatively affords only "the People of the several States" the ability to elect Members of the House of Representatives. Nor do appellants dispute that the District of Columbia is not a "State" within the meaning of that provision. Instead, they assert that Congress has—and is constitutionally obliged to exercise—the authority to extend representation in the House of Representatives to District residents by statute.

That claim fails for multiple reasons. Even assuming that appellants properly and timely appealed the district court's decision, this Court should dismiss this appeal. Appellants' claims either are premised on congressional inaction—a type of claim that the district court properly concluded appellants lack standing to bring—or implicate challenges to non-apportionment statutes that fall outside the three-judge district court's authority under 28 U.S.C. 2284. This Court should accordingly dismiss this appeal for lack of jurisdiction.

In the alternative, if the Court concludes it has jurisdiction, it should summarily affirm the district court's order. Regardless of whether the district court was cor-

rect that the Constitution precludes Congress from extending House voting representation to District residents, its conclusion that appellants' constitutional claims must be dismissed was correct. Congress's decision to enact apportionment statutes reflecting the Constitution's default framework for the House of Representatives is not unconstitutional. Nor does Congress's decision to treat citizens living abroad as state residents for purposes of congressional representation depart from that default or violate equal protection principles. Plenary review is unwarranted.

1. As an initial matter, this Court appears to lack jurisdiction over this appeal. Parties may appeal to this Court "an order granting or denying * * * an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. 1253. A "direct appeal to [this] Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final." 28 U.S.C. 2101(b).

This Court has explained that "its jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines [this Court's] appellate docket.'" *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970) (quoting *Phillips* v. *United States*, 312 U.S. 246, 250 (1941)) (first set of brackets in original). Accordingly, the Court held in *Goldstein* that its "jurisdiction over interlocutory orders under § 1253 is confined to orders granting or denying a preliminary injunction." *Ibid.*;

see also *id.* at 474 (describing the order over which the Court declined to find appellate jurisdiction as denying summary judgment and rejecting plaintiffs' constitutional claims). Section 1253 jurisdiction does not turn on whether a district court specifically labels an order an injunction or a denial thereof, but rather whether an order "has the same practical effect as one granting or denying an injunction." *Abbott* v. *Perez*, 138 S. Ct. 2305, 2320-2321 (2018) (extending to Section 1253 the "'practical effect' inquiry" applied to 28 U.S.C. 1292(a)(1) by *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981)).

The appeal here suffers from two jurisdictional defects in light of those principles and the district court's order clarifying that its decision was "interlocutory," rather than a "final judgment." J.S. App. 68a.

First, the appeal is untimely under Section 2101(b), which requires an "interlocutory" order to be appealed within 30 days. 28 U.S.C. 2101(b); see *Riley* v. *Plump*, 555 U.S. 801 (2008) (dismissing appeal for want of jurisdiction); Appellee Mot. To Affirm Or Dismiss at 17-25, *Riley*, *supra* (No. 07-1460) (arguing that the Court lacked jurisdiction because a notice of appeal was untimely under Section 2101(b) when filed more than 30 days after entry of a judgment that left claims pending to be considered by a single-judge district court). The decision of the three-judge district court in this case did not dispose of all claims in the complaint, some of which were remanded to a single judge. A district court decision that does not resolve all claims is not "final" for purposes of an appeal to a court of appeals under 28 U.S.C. 1291, absent entry of a final judgment under Rule 54(b). See, *e.g.*, *Gelboim* v. *Bank of Am. Corp.*, 574 U.S. 405, 408-409 (2015) (explaining that 28 U.S.C. 1291

generally permits appeal only from "rulings that terminate an action," but that "Rule 54(b) relaxes 'the former general practice that, in multiple claims actions, all the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them'") (quoting *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 434 (1956)) (emphasis omitted). There is no reason for a different result under Section 1253. See *Riley* v. *Kennedy*, 553 U.S. 406, 419 n.5 (2008) (finding cases discussing "the meaning of 'final decisions' in 28 U.S.C. § 1291 * * * instructive in interpreting the parallel term 'final' judgment in § 2101(b)").

Although the district court initially labeled its decision a "final judgment * * * within the meaning of Federal Rule of Civil Procedure 54(b)," D. Ct. Doc. 55, the court later explained that its order had not satisfied Rule 54(b)'s "bright-line requirement" permitting the issuance of a partial final judgment only if the district court makes an "express[] determin[ation] that there is no just reason for delay," J.S. App. 68a (citations and internal quotation marks omitted). The court therefore concluded that its decision had actually been "interlocutory," and indicated that Rule 54(b)'s provision permitting the court to revise such nonfinal decisions at any time applied. *Ibid.* Neither the district court's decision on reconsideration, *id.* at 63a-75a, nor the order accompanying it, D. Ct. Doc. 63 (Sept. 16, 2020), made an express determination that a partial final judgment was warranted or otherwise indicated that either order should be treated as a final judgment.

The district court's decision and order that deemed its March 2020 decision interlocutory and denied appellants' motion to reconsider that decision were entered on September 16, 2020. J.S. App. 63a-75a. Appellants

did not file their notice of appeal until November 13, 2020, 58 days later. *Id.* at 1a-2a. Thus, even assuming that appellants' time to file a notice of appeal did not start to run until the district court disposed of their motion to reconsider, appellants' notice of appeal was untimely under Section 2101(b)'s 30-day time limit for appealing an "interlocutory" decision. Accordingly, this Court should dismiss this appeal for lack of jurisdiction. See, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007) (explaining that "statutory time limits for taking an appeal" are "jurisdictional"); Sup. Ct. R. 18.1 ("The time to file [a notice of appeal] may not be extended.").[3]

Second, neither the district court's March 12, 2020 order nor its September 16, 2020 order denying reconsideration constituted a denial of a request for injunctive relief within the meaning of Section 1253. This Court has held that a nonfinal district court order rejecting claims underlying a request for injunctive relief does not trigger appellate jurisdiction under Section 1253 where unaccompanied by a denial of a request for preliminary injunctive relief. See *Goldstein*, 396 U.S. at 478-479. Appellants did not seek a preliminary injunction, and although the court dismissed the claims on which appellants rested some of their requests for injunctive relief, the court retained continuing jurisdiction to modify that nonfinal decision under Rule 54(b). See J.S. App. 67a-68a. Nor does the order here satisfy

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[3] This Court's Rules do not specify the effect of a motion to reconsider or amend on the time to appeal. In some circumstances, however, this Court has concluded that a motion for reconsideration can "suspend[] the finality of the judgment" for purposes of Section 2101(b), until a "denial of the motion" later "restore[s] it." *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 445 (1974).

the "practical effect" approach applied in *Abbott* to determine whether an order should be treated as one granting an injunction for purposes of Section 1253. Assuming that such an approach could apply in a case like this, that "'practical effect' rule" requires that the order "threaten[] serious and perhaps irreparable harm if not immediately reviewed." *Abbott*, 138 S. Ct. at 2319. The district court's order here does not involve the type of exigencies that supported the request for appellate review in *Abbott*. See *id.* at 2322-2324 & n.17 (explaining that the order the Court deemed equivalent to an injunction satisfied "the irreparable harm question" described in *Carson*).

2. Even if this Court has appellate jurisdiction under Section 1253, the district court lacked jurisdiction over the claims appellants raise on appeal. Those claims either are premised on allegedly wrongful inaction by Congress that appellants lack standing to challenge—thus depriving any court of jurisdiction over them—or fall outside the three-judge district court's authority under Section 2284(a) because they challenge non-apportionment statutes.[4] In these circumstances,

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[4] The additional contentions appellants seek to raise would not appear to be appropriate subjects for the exercise of supplemental jurisdiction. Appellants' contentions regarding UOCAVA and the District Delegate Act, which provides for election of a Delegate to the House of Representatives from the District, are not so intertwined with the challenges to the apportionment statutes that their resolution is necessary to the claims that were properly before the three-judge court. See *Adams* v. *Clinton*, 90 F. Supp. 2d 35, 39 (D.D.C.) (citing *Public Serv. Comm'n* v. *Brashear Freight Lines*, 312 U.S. 621, 625 n.5 (1941); *Allee* v. *Medrano*, 416 U.S. 802, 812 n.8 (1974)), aff'd 531 U.S. 940, and 531 U.S. 941 (2000). Furthermore, because the district court properly remanded the Senate claims, and appellants have not challenged that remand, resolving challenges to

this Court should dismiss the appeal. See *Norton* v. *Mathews*, 427 U.S. 524, 529 (1976) (observing that where "three judges were not required to hear the case * * * this Court has no jurisdiction under 28 U.S.C. § 1253").

a. Article I, Section 2 provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. Const. Art. I, § 2, Cl. 1. Section 2 further provides that Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." Art. I, § 2, Cl. 3; see also Amend. XIV, § 2.

Appellants do not dispute that the District of Columbia is not a "State" for purposes of representation in the House under Article I, Section 2. Nor do appellants suggest that District residents are otherwise entitled to representation in the House under the Constitution's apportionment provisions themselves. Instead, they seek to establish that Congress's legislative power with respect to the District under Article I, Section 8, Clause 17—the District Clause—gives Congress the authority to extend representation in the House to include a Representative from the District, independent of the apportionment provisions set out in Article I. See J.S. 16-28. And appellants further argue that Congress has violated the Constitution by not exercising its power under the District Clause to provide for a Representative from the District. The crux of appellants' claim is thus one for legislative action that they assert Congress has wrongfully withheld. See J.S. App. 19a (describing "the heart of the matter" as appellants' "supposition that

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UOCAVA or the District Delegate statute would not dispose of the entire case. See *Brashear Freight Lines*, 312 U.S. at 625 n.5.

Congress is under a constitutional obligation to act affirmatively in a way it has not yet done").

Appellants and amici focus on whether Congress *may* extend representation in the House of Representatives to the District by legislation, arguing that the district court erred in concluding that Article I precludes such a legislative choice. See J.S. 16-28; *e.g.*, House Amicus Br. 22-23 (citing *Constitutionality of the D.C. House Voting Rights Act of 2009*, 33 Op. O.L.C. 38 (2009) (Holder, Att'y Gen.)).[5] The question before this Court, however, is whether Congress *must* provide for a Representative from the District, as appellants claim. This Court need not and should not address the scope of Congress's authority in this respect because appellants lack standing to challenge Congress's failure to enact legislation providing for a Representative from the District. See *Northwest Austin Mun. Util. Dist.*

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[5] In *Adams*, the government argued that reading Article I, Section 2 to permit the people of the District to have a voting Representative in the House would "lead to insurmountable textual difficulties and conflict with both historical evidence and judicial precedent." Gov't Mot. to Affirm at 10-11, *Alexander* v. *Mineta*, 531 U.S. 940 (2000) (No. 99-2062); see also Gov't Mot. to Dismiss or Affirm at 24 n.15, *Adams* v. *Clinton*, 531 U.S. 941 (2000) (No. 00-97) (agreeing with the district court that "the provisions of Article I preclude residents of the District of Columbia from voting in congressional elections"). Subsequently, however, the Attorney General concluded that the District Clause gives Congress "the authority to create a congressional district within the District," reasoning that there is an "absence of a clear constitutional prohibition" precluding such legislation and noting the importance of "the most basic rights in a democracy—the right to elect representation in the legislature and therefore to self-governance." 33 Op. O.L.C. at 40. The Attorney General did not, however, consider the different issue presented here: whether Congress violates the Constitution by failing to exercise authority to provide for a Representative from the District.

No. One v. *Holder*, 557 U.S. 193, 205 (2009) ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.") (quoting *Escambia Cnty.* v. *McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).[6]

The district court correctly concluded that appellants lack standing to pursue claims "premised on allegedly wrongful congressional inaction." J.S. App. 31a; see *id.* at 19a-31a. Article III requires that plaintiffs must demonstrate that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

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[6] The district court concluded that the summary affirmances in *Adams* indicated that this Court agreed that Article I limits "the House franchise" to "only residents of actual states," although the district court acknowledged that it was "exceedingly difficult" to discern a substantive holding from a summary affirmance, and that what it "perceive[d]" necessary to the *Adams* affirmance was a "slender reed[]" on which to rely. J.S. App. 37a-40a (internal quotation marks omitted). This Court did not specify the grounds on which it affirmed the district court's ruling in *Adams*, and it may have done so on narrower grounds than the district court attributed to it. As the district court noted, the government's filings below contained passages indicating the view that the Constitution precludes Congress from providing a Representative from the District. See *id.* at 43a-44a; see also, *e.g.*, D. Ct. Doc. 21-1, at 20-23 (Apr. 1, 2019). That argument would contravene the Attorney General's evaluation of that issue and is unnecessary to the proper disposition of this case, which instead raises the different question whether Congress is *required* by the Constitution to provide a Representative from the District.

The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997). "[S]tanding is not dispensed in gross," and appellants must establish standing "separately for each form of relief sought." *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citations and internal quotation marks omitted).

As the district court emphasized, "insofar as [appellants] are pressing the theory that Congress should have acted in a particular way," they have not brought suit against the entities that caused their injury ("the House and the Senate"), and could not do so in light of the Speech or Debate Clause's "'absolute bar to suit' where plaintiffs seek to assign liability for any 'act that falls "within the sphere of legitimate legislative activity."'" J.S. App. 25a (quoting *Common Cause* v. *Biden*, 748 F.3d 1280, 1283 (D.C. Cir.), cert. denied, 574 U.S. 975 (2014)). Nor can appellants satisfy Article III's redressability requirements, because the "Speech or Debate Clause—not to mention separation-of-powers principles more broadly—make quite impossible the injunctive relief" appellants sought in order to prompt legislative action. *Id.* at 26a-27a. And as the court explained, a declaratory judgment would not be "'likely'" to yield "ultimate redress," which would " 'depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* at 27a (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989)).

Appellants do not dispute the district court's standing analysis in their jurisdictional statement. To the contrary, they state that they do not challenge "congressional inaction" on appeal. J.S. 10 (citation omitted). But at bottom, appellants' arguments on appeal turn on Congress's ability to extend House voting representation to the District and its failure to do so to date. See J.S. 16-37. Indeed, immediately after disclaiming a challenge to congressional inaction, appellants assert that the "central thrust" of their argument on appeal "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." J.S. 10. That argument is only relevant insofar as it advances appellants' contention that Congress has unlawfully failed to extend representation in the House of Representatives to the District by legislation.

Although the issue is not free from doubt, in our view, and contrary to the district court's conclusion, appellants cannot evade the limits of Article III's standing requirements by characterizing their dissatisfaction with the absence of action by Congress to establish a Representative from the District as a challenge to the existing apportionment statutes. See J.S. 9-10 (recounting district court's conclusion that appellants raised a justiciable apportionment claim).[7] To be sure,

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[7] The district court concluded that appellants had standing to assert challenges to apportionment statutes to the extent they were not "premised on allegedly wrongful congressional inaction." J.S. App. 31a-36a. This Court need not decide whether the district court correctly viewed appellants' district court challenges as encompassing such claims, given that appellants' jurisdictional statement

this Court has held that an apportionment challenge was justiciable where the Secretary of Commerce's method of calculating the populations of the States for purposes of apportioning Representatives among them was alleged to violate the apportionment provisions in Article I, Section 2. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992) (plurality opinion) (identifying the possibility of an injunction directing the Secretary to recalculate the census numbers to accord with the asserted constitutional apportionment requirements as sufficient for redressability purposes); see also *Utah* v. *Evans*, 536 U.S. 452, 460-461 (2002).

In contrast, however, appellants in this case do not contend that the apportionment statutes or the Executive appellees' actions in conformity with them violate Article I, Section 2. Rather, appellants assert that other provisions of the Constitution effectively compel Congress to exercise its District Clause powers to provide for a Representative from the District, which then in turn would provide a basis for apportioning Representatives among the States *and* the District. Thus, appellants' disagreement with the apportionment statutes is that they do not reflect an antecedent legislative choice that appellants want Congress to make. Unlike the potential relief identified in *Franklin* and *Evans*—recalculation of census numbers to accord with existing statutory or constitutional requirements—the apportionment-related remedy appellants contemplate is an injunction directing the Secretary to calculate and transmit census numbers in accordance with legislation appellants assert Congress has wrongfully withheld,

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makes clear that their only claims on appeal turn on Congress's ability and asserted obligation to provide for a Representative in the House from the District. See J.S. 16-37.

i.e., numbers reflecting "representatives to be apportioned to the District of Columbia." D. Ct. Doc. 9, at 47; see J.S. App. 33a. Such a request makes clear that appellants' challenge to the apportionment statutes, like their other claims, are premised on congressional inaction.

Similarly, the jurisdictional analysis in *Adams* does not aid appellants. There, the district court addressed the contention that the Constitution itself afforded plaintiffs voting representation in the House—not a request for a judicial ruling that Congress should exercise its legislative authority over the District in a particular manner, or that the court should proceed as if Congress already had done so. Compare *Adams* v. *Clinton*, 90 F. Supp. 2d 35, 45 (D.D.C.) (describing "plaintiffs' contention that their right to vote in congressional elections is guaranteed by Article I"), aff'd 531 U.S. 940, and 531 U.S. 941 (2000), and *id.* at 65-72 (addressing claims that other constitutional provisions afforded plaintiffs the right to vote), with J.S. 24 (noting that appellants' proposed "interpretation of Congress's District Clause power was not considered by the *Adams* court" and that they "advance a different argument").

b. Appellants invoke several non-apportionment statutes in their effort to secure a Representative for the District in the absence of an Act of Congress, passed pursuant to the District Clause. Those challenges would not have been within the three-judge district court's authority under Section 2284(a), even if appellants had timely raised them below.

First, appellants assert (J.S. 11, 36) that congressional action is unnecessary to redress their lack of voting rights, newly suggesting on appeal that the Court could simply strike language in the District Delegate

Act. That statute provides the Delegate to the House of Representatives from the District with "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). Appellants contend (J.S. 11, 36) that the Court could "invalidate" the phrase "but not of voting" to redress their asserted injuries. But that remedial contention is not a challenge to "the apportionment of congressional districts," 28 U.S.C. 2284(a), and because Congress has not provided for any congressional district in the District to begin with, such a claim would have fallen outside the authority of the three-judge district court had appellants raised it below.

Moreover, that proposed remedy defies ordinary severability principles. This Court has repeatedly cautioned against severing an invalid portion of a statute where "it is evident that the Legislature would not have enacted [the remaining] provisions which are within its power, independently of that which is not." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (citation omitted); see also *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (explaining that the "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress"). The District Delegate Act's explicit provision precluding voting is central to the Act, which creates the position of "Delegate," not "Representative." Moreover, appellants' reference (J.S. 19-20) to two unsuccessful bills that would have extended representation to the District underscores that Congress thus far has not affirmatively chosen to provide for a seat in the House of Representatives from the District. The courts may not transform a limited exercise of Congress's District Clause power—the provision for a non-voting Delegate

to the House of Representatives from the District—into the position of a voting Representative that Congress has declined to establish. See *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) (courts are "not at liberty to rewrite [a] statute passed by Congress and signed by the President").

Second, appellants suggest (J.S. 28-33) that Congress's decision in UOCAVA to permit United States citizens living overseas to vote in congressional elections in the State of their last domicile, while not providing for a Representative from the District, constitutes an equal protection violation. Despite their assertion in district court that they were not "challeng[ing] the constitutionality of [UOCAVA]," J.S. App. 71a, appellants invoke UOCAVA in this Court to argue that this Court should "cure [the] equal protection problem" by extending the right to vote to District residents to align with the "comparable part[ies] who already enjoy[] the right," *i.e.*, "citizens living overseas." J.S. 32-33 (citing *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1699 (2017)). The district court correctly understood that argument as belatedly presenting an equal protection challenge to UOCAVA.[8]

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[8] In their motion for reconsideration, appellants argued "that UOCAVA's 'differential treatment of similarly situated overseas citizens and District residents violates the Equal Protection Clause,'" and that it "'violates the Equal Protection Clause for Congress to allow the "people of the several States" who move abroad to continue to vote for senators and representatives, but *not* to allow citizens who move from the States to the District to do the same.'" J.S. App. 67a (quoting D. Ct. Doc. 58-1, at 1-2). Appellants do not renew the latter claim—that citizens who move from a State to the District should be entitled to vote in the State from which they moved—in this Court. See J.S. i, 32-33.

As with the District Delegate Act, the three-judge district court lacked jurisdiction under Section 2284 to entertain a challenge to UOCAVA, even had appellants timely raised one. See J.S. App. 71a-73a (declining to address that "new claim" on reconsideration). In providing that certain U.S. citizens living overseas should be regarded as among the people of their last State (or other location) of domicile for voting purposes, UOCAVA addresses residency and absentee-voting requirements. See 52 U.S.C. 20301-20311. UOCAVA neither apportions Representatives nor creates a distinct entitlement to a seat in the House of Representatives for such individuals, outside the apportionment of Representatives among the several States. And because such a claim would not fall within the bounds of Section 2284, this Court lacks jurisdiction over it under Section 1253.[9]

3. If the Court does not dismiss this appeal, it should affirm the district court's order. Appellants' constitutional claims lack merit. Congress's decision to adhere

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[9] When faced with an appeal from an improperly convened three-judge district court, this Court has the authority "to make such corrective order as may be appropriate to the enforcement of the [jurisdictional] limitations which 28 U.S.C. § 1253 imposes." *Norton*, 427 U.S. at 531 (noting this Court's power to "vacate the district court judgment and remand the case for the entry of a fresh decree from which an appeal may be taken to the appropriate court of appeals") (citation and internal quotation marks omitted). Given the district court's conclusion that challenges to UOCAVA were not properly preserved, no such remand would be appropriate here. See J.S. App. 71a-73a (district court's refusal to address appellants' "attempt to assert a new claim" or otherwise "reconsider [its] prior rulings to account for the challenge to UOCAVA that [appellants] now seek to assert") (emphasis omitted); see also *id.* at 32a n.5 (stating that the district court did not originally "understand [appellants] to be challenging [UOCAVA]").

to the default composition of the House of Representatives established by the Constitution itself is not an unconstitutional choice. And even assuming that appellants' challenge to UOCAVA is properly before this Court, appellants cannot establish an equal protection violation by reference to legislation regarding U.S. citizens living overseas. They likewise cannot establish such a violation by reference to the status of the residents of federal enclaves.

a. Appellants cannot succeed on their claims that Congress is constitutionally compelled to provide for a Representative in the House from the District. As discussed, appellants do not dispute that Article I, Section 2 does not itself provide for a Representative from the District in the House of Representatives. See J.S. 24 (asserting that appellants rely on a "different argument" than the *Adams* plaintiffs' contention that they were citizens of a "state"); *Adams*, 90 F. Supp. 2d at 45 (explaining that Article I, Section 2's phrase "'people of the several States'" does not refer to "all the people of the 'United States'" but rather to "those who are citizens of individual states") (citation omitted); see also *id.* at 46-56 (rejecting the plaintiffs' theory "that the District of Columbia itself may be treated as a state through which its citizens may vote"). Rather, appellants' only contention is that the District Clause gives Congress the authority to expand representation in the House by legislation to include a Representative from the District, and that other constitutional provisions oblige Congress to exercise that authority. J.S. 16-36.

But Congress's adherence to the Constitution's default provisions for the composition of the House does not violate the Constitution. The current apportionment statutes mirror the apportionment provisions of

Article I and the Fourteenth Amendment, which provide for the apportionment of Representatives among States. See 2 U.S.C. 2a; 13 U.S.C. 141. In asking this Court to declare those statutes unconstitutional, appellants "*do* seek to establish that the Constitution is unconstitutional"—or at minimum, unconstitutionally incomplete. J.S. App. 50a-51a; see also *ibid.* ("[Appellants] argue that the statutes by which Congress has put Article I's provisions for apportionment into action (2 U.S.C. § 2a and 13 U.S.C. § 141) violate the First, Fifth, and Fourteenth Amendments."). Indeed, below, appellants did "not seriously contest the point that the Constitution cannot be unconstitutional," "'agree[ing]'" with the government that "'the constitutional provisions . . . allocating representatives and Senators to the [S]tates are constitutional.'" *Id.* at 45a n.15 (quoting D. Ct. Doc. 50, at 3 (Aug. 22, 2019)) (second set of brackets in original).

Nonetheless, appellants contend (J.S. 32) that "equal protection and due process principles * * * compel the conclusion that District residents may not be denied voting rights." But Congress's adherence to Article I's default provisions for representation in the House is not cast into doubt by the more general terms of those Amendments. And the very nature of the plenary power that appellants assert Congress has under the District Clause to establish a Representative from the District must encompass the authority to make the necessary judgments concerning the appropriateness of such a step, taking into account such considerations as the special status and history of the District and its distinct relationship to the federal government.

Moreover, while appellants focus on what the Constitution *permits*, it has never been understood to *require* that citizens who are not among the people of the several States be permitted to vote in elections for a Representative in the House. Appellants' contention that the First, Fifth, or Fourteenth Amendment required Congress to provide for a Representative from the District cannot be squared with constitutional history. If appellants were correct about the Fifth Amendment, for example, the Framers' understanding that District residents would not have representation in the House absent legislative or constitutional change would have been unconstitutional virtually from the outset, see *Adams*, 90 F. Supp. 2d at 51-53; J.S. App. 59a-60a; the long history of permitting only citizens of the States to vote for Representatives would have entrenched that constitutional violation for two centuries, see *Adams*, 90 F. Supp. 2d at 54-55; J.S. App. 54a-59a; and the Twenty-third Amendment would have been needless, see U.S. Const. Amend. XXIII, § 1. Indeed, the Fourteenth Amendment again provides that Representatives shall be apportioned among the several States and does not itself provide for a Representative from the District. See U.S. Const. Amend XIV, § 2.

b. In addition to asserting that the Constitution itself renders unconstitutional Congress's failure to provide for a Representative from the District, appellants also suggest that Congress has legislated in a way that violates equal protection principles. See J.S. 6, 35-36; see also, *e.g.*, D. Ct. Doc. 23-1, at 23 (June 3, 2019) (arguing that "[t]here is no reason why Americans living overseas" have representation "while Americans living within walking distance of this Court should be denied that right"); see also Const. Law Scholars Amicus Br.

20-21. Appellants point to UOCAVA, which permits certain citizens living abroad to vote in federal elections, and also note that residents of federal enclaves within States may vote as State residents. J.S. 28-29. Appellants assert, for example, that the arguments articulated in favor of UOCAVA "apply with equal, if not greater, force to District residents," J.S. 29, and suggest that, as a remedy, this Court should "cure" that asserted "equal protection problem by extending" voting rights to District residents, rather than "'nullif[ying]'" the statutory provisions permitting citizens living abroad to vote for Representatives, J.S. 32-33 (quoting *Sessions*, 137 S. Ct. at 1699). See also J.S. 6, 13-14.

Appellants, however, do not seek the same rights as those of overseas voters or residents of federal enclaves. Critically, both of those classes of persons may vote as citizens of a State for a Representative from that State. See 52 U.S.C. 20302, 20310 (permitting otherwise qualified voters residing or stationed overseas to vote in the last place they were domiciled before leaving the United States); *Evans* v. *Cornman*, 398 U.S. 419, 421 (1970) (holding that Maryland could not prevent residents of a federal enclave from voting in congressional elections because those individuals retained their status as citizens of Maryland). Appellants, by contrast, seek to vote as *non-state* citizens for a *non-state* Representative. See J.S. 31 (urging that they can be afforded voting rights "*as District residents*"); J.S. 36-37 (seeking full voting rights for the District Delegate and an injunction requiring the Secretary of Commerce to "apportion a seat in the House of Representatives to the District of Columbia"). Neither UOCAVA nor the ability of residents of federal enclaves to vote in elections in

their States supports an equal protection claim to establish a seat in the House of Representatives in the District.[10]

Moreover, appellants are not similarly situated to either overseas or federal-enclave residents, given that the Constitution itself distinguishes among those classes. The logical conclusion of appellants' argument is that Congress must treat the District and federal enclaves in an identical manner with respect to representation in Congress, even though federal enclaves remain within a State but the District as it presently exists was ceded to the federal government by the State of Maryland. More broadly, the Constitution separately gives Congress plenary authority over those areas without requiring that Congress exercise that plenary authority in the same manner across them. See U.S. Const. Art. I, § 8, Cl. 17. Rather, consistent with the Constitution's text and structure, Congress has, for two hundred years, treated the District, federal enclaves, and States differently from one another. It is unlikely that a constitutional requirement foreclosing such differential treatment would have gone unremarked to date.

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[10] Given that Congress addressed the definition of "state" residents in UOCAVA rather than expanding representation in the House beyond such residents, appellants are incorrect in contending that "[t]he logic of the decision below"—that Article I, Section 2 requires that only state residents be permitted to elect Representatives—calls into question the constitutionality of UOCAVA. J.S. 32.

CONCLUSION

The appeal should be dismissed for want of appellate jurisdiction or for lack of jurisdiction under Article III and 28 U.S.C. 2284. In the alternative, the district court's order should be affirmed.

Respectfully submitted.

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