UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGELICA CASTAÑON, *et al.*,

Plaintiffs,

v.

The UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 1:18-cv-2545
(RDM, RLW, TNM)

MEMORANDUM IN SUPPORT OF EXECUTIVE AND SENATE DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

I. The Constitution Compels the District's *Sui Generis* Status. 3

II. Past Litigation Has Affirmed the Constitutional Provenance of the District's Status. 6

III. This Litigation 8

ARGUMENT 10

I. Threshold Issues Warrant the Dismissal of All Claims. 10

A. The Speech or Debate Clause and Separation of Powers Principles Preclude This Action Against Senate Defendants. 10

B. Plaintiffs Lack Standing to Sue the Senate Defendants Because the Senate Defendants Do Not Cause Plaintiffs' Alleged Harms and Relief Against the Senate Defendants Will Not Redress Those Harms 13

C. The President Should Be Dismissed as a Party to this Lawsuit Because There Is No Cause of Action Against the President and Plaintiffs Cannot Obtain Equitable Relief Against the President. 17

D. This Case Presents a Nonjusticiable Political Question. 19

II. Even if the Court Exercised Jurisdiction, Plaintiffs' Claims Fail on the Merits 20

A. As Recognized in *Adams*, District Residents Do Not Reside in a State, and Therefore the Constitution Precludes Their Representation in the House or Senate. 20

B. The Electoral System that the Constitution Requires Cannot Itself Be Unconstitutional. 25

1. In Any Event, Plaintiffs' Equal Protection Claim Would Fail Because District Residents Are Not Similarly Situated to Residents of Federal Enclaves or Overseas Voters, and Any Differential Treatment Is Rational. 28

2. Plaintiffs' Due Process Claim Would Also Fail Because District Residents Do Not Meet the Constitutionally-Mandated Qualifications for Voting Representation in the House or Senate. 35

3. Plaintiffs Do Not State a Claim Under the First Amendment. 37

CONCLUSION 39

TABLE OF AUTHORITIES

CASES

Adams v. Bush,
No. 00-5239, 2001 WL 1488944 (D.C. Cir. Oct. 18, 2001), *pet. cert denied*,
No. 01-1519, 537 U.S. 812 (Oct. 7, 2002) 7

Adams v. Clinton,
90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000) ..... *passim*

Adams v. Clinton,
90 F. Supp. 2d 27 (D.D.C. 2000) 8, 17

Adams v. Clinton,
531 U.S. 941 (2000), *pet. reh't denied*, 531 U.S. 1045 (2000) 1, 7

Agostini v. Felton,
521 U.S. 203 (1997) 36

Alexander v. Daley,
No. 99-2062, 531 U.S. 940 (2000) 7

Armstrong v. Exceptional Child Ctr., Inc.,
135 S. Ct. 1378 (2015) 18

Attorney Gen. of Territory of Guam v. United States,
738 F.2d 1017 (9th Cir. 1984), *cert denied*, 469 U.S. 1209 (1985) 24, 28, 31

Baker v. Carr,
369 U.S. 186 (1962) 19

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,
512 U.S. 687 (1994) 13

Calloway v. District of Columbia,
216 F.3d 1 (D.C. Cir. 2000) 32

Carliner v. Commissioner,
412 F.2d 1090 (D.C. Cir. 1969) 35

City of Phila. v. Klutznick,
503 F. Supp. 657 (E.D. Pa. 1980) 9

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 16

Cohens v. Virginia,
19 U.S. 264 (1821) 27

Dalton v. Specter,
511 U.S. 462 (1994) 17

De Jonge v. Oregon,
299 U.S. 353 (1937) 38

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014) 36

District of Columbia v. Carter,
409 U.S. 418 (1973) 5, 34

District of Columbia v. John R. Thompson Co.,
346 U.S. 100 (1953) 33, 34

District of Columbia v. Murphy,
314 U.S. 441 (1941) 5

Doe v. McMillan,
412 U.S. 306 (1973) 11

Downes v. Bidwell,
182 U.S. 244 (1901) 20

Eastland v. U.S. Servicemen's Fund,
421 U.S. 491 (1975) 10, 11

Evans v. Cornman,
398 U.S. 419 (1970) 30, 31, 33

FCC v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993) 32

Fort Leavenworth R.R. Co. v. Lowe,
114 U.S. 525 (1885) 33

Franklin v. Massachusetts,
505 U.S. 788 (1992) 18

Gill v. Whitford,
138 S. Ct. 1916 (2018) 39

Gravel v. United States,
408 U.S. 606 (1972) 11

Grupo Mexicano De Desarrollo v. All. Bond Fund,
527 U.S. 308 (1999) 18

Hague v. CIO,
307 U.S. 496 (1939) 38

Hand v. Scott,
888 F.3d 1206 (11th Cir. 2018) 37

Harper v. Va. State Bd. of Elections,
383 U.S. 663 (1966) 36

Harris v. Rosario,
446 U.S. 651 (1980) 32

Hassan v. Fed. Election Comm'n,
893 F. Supp. 2d 248 (D.D.C. 2012), *aff'd*,
No. 12-5335, 2013 WL 1164506 (D.C. Cir. Mar. 11, 2013) 26

Hearst v. Black,
87 F.2d 68 (D.C. Cir. 1936) 13

Hicks v. Miranda,
422 U.S. 332 (1975), *rev'd on other grounds sub nom*,
Obergefell v. Hodges, 135 S. Ct. 2584 (2015) 36

Hitson v. Baggett,
446 F. Supp. 674 (M.D. Ala. 1978), *aff'd*, 580 F.2d 1051 (5th Cir. 1978) 26

Igartúa v. United States,
626 F.3d 592 (1st Cir. 2010) 23

Igartúa de la Rosa v. United States,
842 F. Supp. 607 (D.P.R. 1994), *aff'd*, 32 F.3d 8, (1st Cir. 1994);
cert denied, 514 U.S. 1049 (1995) 20

Igartúa de la Rosa v. United States,
32 F.3d 8 (1st Cir. 1994) 20, 28, 31

Igartúa-De La Rosa v. United States,
417 F.3d 145 (1st Cir. 2005) 23, 26

Keener v. Congress,
467 F.2d 952 (5th Cir. 1972) 10

Kendall v. U.S. ex rel. Stokes,
37 U.S. (12 Pet.) 524 (1838) 34

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 15

McLean v. United States,
566 F.3d 391 (4th Cir. 2009) 10

Minn. State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984) 39

Mississippi v. Johnson,
71 U.S. (4 Wall.) 475 (1866) 18

N. Pipeline Const. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 34

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007) 27, 28

New v. Pelosi,
No. 08-Civ-9055, 2008 WL 4755414 (S.D.N.Y. Oct. 29, 2008), *aff'd*,
374 Fed. App'x 158 (2d Cir. 2010) 26

Newdow v. U.S. Congress,
328 F.3d 466 (9th Cir. 2003), *rev'd on other grounds*,
Elk Grove Unified Sch. Dist. v. Newdow,542 U.S. 1 (2004) 13

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 18

O'Donoghue v. United States,
289 U.S. 516 (1933) 5, 33

Pauling v. Eastland,
288 F.2d 126 (D.C. Cir. 1960), *cert denied*, 364 U.S. 900 (1960) 12

Phillips v. Payne,
92 U.S. 130 (1875) 20

Porter v. Bowen,
518 F.3d 1181 (9th Cir. 2008) 26

Powers v. Ohio,
499 U.S. 400 (1991) 15

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1978) 28

Raines v. Byrd,
521 U.S. 811 (1997) 15

Richardson v. Ramirez,
418 U.S. 24 (1974) 33

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 38

Rockefeller v. Bingaman,
234 F. App'x 852 (10th Cir. 2007) 10

Rodriguez de Quijas v. Shearson/Am. Express, Co.,
490 U.S. 477 (1989) 36

S.R.A., Inc. v. Minnesota,
327 U.S. 558 (1946) 33

Shapiro v. McManus,
136 S. Ct. 450 (2015) 9

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 16

Swan v. Clinton,
100 F.3d 973 (D.C. Cir. 1996) 18, 19

Trinsey v. United States,
No. CIV.A. 00-5700, 2000 WL 1871697 (E.D. Pa. Dec. 21, 2000) 27

U.S. Dep't of Commerce v. Montana,
503 U.S. 442 (1992) 33

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 26

Ullmann v. United States,
350 U.S. 422 (1956) 26

United States v. Cohen,
733 F.2d 128 (D.C. Cir. 1984) 33

United States v. Johnson,
383 U.S. 169 (1966) 10, 11

Vieth v. Jubelirer,
541 U.S. 267 (2004) 39

Vill. of Willowbrook v. Olech,
528 U.S. 562 (2000) 30

Washington v. Glucksberg,
521 U.S. 702 (1997) 36

Watt v. Alaska,
451 U.S. 259 (1981) 27

We the People Found., Inc. v. United States,
485 F.3d 140 (D.C. Cir. 2007) 39

Wesberry v. Sanders,
376 U.S. 1 (1964) 36

Williams v. Rhodes,
393 U.S. 23 (1968) 39

Wisconsin v. City of New York,
517 U.S. 1 (1996) 33

STATUTES

2 U.S.C. § 2a 4

2 U.S.C. § 4591 16

13 U.S.C. § 141 4

28 U.S.C. § 2284 9

An Act for Establishing the Temporary and Permanent Seat of the Government of the United States,
1 Stat. 130 (1790) 4, 33

An Act Concerning the District of Columbia,
2 Stat. 103 (1801) 4

An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government,
13 Va. Stat. at Large (Hening 1823) 4

An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States,
2 Kilty Laws of Md. (1788) 4

An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia,
9 Stat. 35 (1846) 6

The Uniformed and Overseas Citizens Absentee Voting Act of 1986,
Pub. L. No. 99-410, 100 Stat. 924 31

RULES

Fed. R. Civ. P. 25 8

UNITED STATES CONSTITUTION

U.S. Const. art. I, § 2 ..... *passim*

U.S. Const. art. I, § 3 ..... 4, 21, 26, 35

U.S. Const. art. I, § 4 21

U.S. Const. art. I, § 5 ..... 11, 14

U.S. Const. art. I, § 6 ..... 2, 10

U.S. Const. art. I, § 8 ..... 3, 21, 33, 34

U.S. Const. art. II, § 1 ..... 22, 26

U.S. Const. art. IV, § 3 ..... 26, 34

U.S. Const. art. V 26

U.S. Const. amend. XVII 4, 22

OTHER AUTHORITIES

2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987) 5

5 The Papers of Alexander Hamilton (Harold C. Syrett & Jacob E. Cooke eds., 1962) 5

12 Annals of Cong. 487 (1803) 6

10 Annals of Cong. 992 (1801) 6

124 Cong. Rec. 5272 (Mar. 2, 1978) 37

124 Cong. Rec. 27,260 (Aug. 22, 1978) 37

Enquiries into the Necessity or Expediency of Assuming Exclusive Legislation over the District of Columbia (1800) (available in Rare Book/Special Collections Reading Room, Library of Congress) 6

H. Rep. No. 86-1698 (May 31, 1960), *reprinted in* 1960 U.S.C.C.A.N. 1459 22

Standing Rules of the Senate, *reprinted in Senate Manual*, S. Doc. No. 113-1, https://www.govinfo.gov/content/pkg/SMAN-113/pdf/SMAN-113.pdf 14

The Federalist No. 43 ..... 25, 34

INTRODUCTION

In the two-hundred-odd years since the District of Columbia was established, the District has never been recognized as a state under Article I, § 2 of the Constitution. For that reason, residents of the District have never elected Senators or Representatives. Plaintiffs are individual residents of the District who seek voting representation in the House of Representatives and Senate. They concede that the District is not a state, but nonetheless argue that other constitutional provisions—the First, Fifth, and Fourteenth Amendments—require this Court to re-write Article I. Plaintiffs' claims fail for a variety of reasons, none more fundamental than that the Constitution cannot be unconstitutional.

Although the text of the Constitution would suffice to compel this result, this Court does not write on a blank slate. Whether District residents are entitled to congressional representation was exhaustively considered by a three-judge panel of this Court nearly twenty years ago in *Adams v. Clinton*. While that panel noted that it was "not blind to the inequity of the situation plaintiffs seek to change," the Court ultimately joined "[a]ll" of its predecessor courts in concluding that "longstanding judicial precedent, as well as the Constitution's text and history" precluded the Court from granting the plaintiffs the relief they sought. *Adams v. Clinton* (*Adams I*), 90 F. Supp. 2d 35, 72 (D.D.C. 2000). That decision was summarily affirmed by the Supreme Court. *Adams v. Clinton*, 531 U.S. 941 (2000).

What was true two hundred years ago—and twenty years ago—remains true now. The Constitution itself reserves congressional representation to residents of the states, and federal courts are not empowered to rewrite the Constitution. Plaintiffs attempt to escape *Adams* by arguing that, unlike the *Adams* plaintiffs, they "do not rely on Article I, Section 2 for their claims," and "contend that they are constitutionally entitled to voting representation

notwithstanding that they are not residents of a State." Am. Compl. ¶ 124, ECF No. 9. But Plaintiffs cannot opt out of Article I, § 2 of the Constitution. *Adams* definitively resolved that Article I, § 2 reserves congressional representation to the states, and the Court's holding, affirmed by the Supreme Court, resolves this case, regardless of how Plaintiffs try to recast their claims.

Even if Plaintiffs' claims were not foreclosed by binding precedent, dismissal would be warranted for a variety of reasons. First, Plaintiffs' claims against the Senate Defendants are barred by the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, and the constitutional separation of powers because Plaintiffs seek to control Senate Defendants' performance of legislative functions. In addition, Plaintiffs lack standing to sue the Senate Defendants, cannot state a cause of action against the President or receive equitable relief against the President, and Plaintiffs raise non-justiciable political questions.

Plaintiffs appear to concede that congressional action would be required to grant the relief that they seek, whether through the enactment of legislation or the proposal of a constitutional amendment. In a tacit acknowledgement that separation of powers principles prevent the judiciary from compelling Congress to act, Plaintiffs do not expressly request that this Court order Congress to make the District a state. Instead, Plaintiffs request a bevy of declaratory relief and note that "[t]o comply with the declaratory judgment, Congress need not . . . make the District a State. However, making the District a State would satisfy the judgment." Am. Compl. at 46 (Prayer for Relief). Congress, of course, is not a party here, and Plaintiffs have voluntarily dismissed the House defendants—not because the House has recognized a Representative from the District, but with the understanding that the House will file an amicus brief supporting Plaintiffs. Notice of Voluntary Dismissal of Certain Defendants (Notice of

Voluntary Dismissal), ECF No. 20. In the event that Congress does not act, Plaintiffs instead request extensive injunctive relief. Am. Compl. at 46-47 (Prayer for Relief). Rather than explain how the Defendants here—now absent the former House defendants—could skirt the Constitution and grant voting representation to the District without congressional involvement, Plaintiffs invite this Court to conscript Defendants into an extra-constitutional political process and then micro-manage that process. *See* Am. Compl. at 51 (Prayer for Relief) (requesting injunctive relief ordering the defendants to "present plans setting forth their recommended best means for assuring the right of District of Columbia citizens to participate in the election of voting members of Congress," and then ordering Defendants to "pursue the steps that will most appropriately assure the rights of District of Columbia citizens to participate in the election of voting members of Congress"). As these procedural contortions illustrate, even if Plaintiffs' theory of the case were correct (that Congress has chosen to disenfranchise District residents and could choose to enfranchise them instead), this Court can offer no remedy because separation of powers principles prevent the judicial branch from dictating legislation to be passed by Congress.

BACKGROUND

I. The Constitution Compels the District's *Sui Generis* Status.

When the United States Constitution was ratified 231 years ago, it provided for the establishment of a permanent federal capital—separate and apart from any state. *See* U.S. Const., art. I, § 8, cl. 17 (granting Congress 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"). In 1788 and 1789, Maryland and Virginia enacted legislation to cede territory

for the creation of such a federal capital.[1] Congress accepted the cessions from Maryland and Virginia, and provided that the cessions would become effective in 1800. An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). Finally, in 1801, Congress enacted the "Organic Act" which provided for the government and the administration of justice in the District. 2 Stat. 103 (1801). Residents of the District were therefore no longer eligible to vote in Maryland or Virginia as of at least 1801. *Adams I*, 90 F. Supp. 2d at 58.

The Constitution also set forth the structure of the United States House of Representatives (House) and United States Senate (Senate). Representatives in the House are elected "by the People of the several States," U.S. Const. art. I, § 2, cl. 1,[2] and Senators likewise.[3] The District is not a state, but "is an exceptional community . . . established under the Constitution as the seat of the National Government." *District of Columbia v. Murphy*, 314 U.S. 441, 452 (1941); *see also District of Columbia v. Carter*, 409 U.S. 418, 432 (1973) ("[The

---

[1] An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States, 2 Kilty Laws of Md., ch. 46 (1788); An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, at 43 (Hening 1823) (enacted 1789).

[2] The involvement of the President and the Secretary of Commerce in this lawsuit apparently stems from their role in apportioning representatives in the House among the various states. After the decennial census, the Secretary of Commerce reports the population by state to the President, 13 U.S.C. § 141 (a), (b), and the President transmits 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).

[3] The Constitution initially provided for the election of Senators by the legislature of each state, U.S. Const. art. I, § 3, cl. 1, but the Seventeenth Amendment provided for direct election of Senators "by the people [of each state]," U.S. Const. amend. XVII.

District] is 'the very heart—of the Union itself, to be maintained as the "permanent" abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised' . . . . Unlike either the States or Territories, the District is truly sui generis i[n] our governmental structure." (quoting *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933)); *id.* at 420 ("Whether 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.").

Accordingly, the District has never been understood to be a state for purposes of representation in the House or Senate. This oddity was understood and anticipated by the Founders when the Constitution was ratified, as plentiful historical evidence shows. At the New York ratifying convention, for example, some opposed the creation of a federal capital on the grounds that its residents would lack representation in Congress, and Alexander Hamilton unsuccessfully proposed a constitutional amendment providing for representation in Congress for the District once its population reached a certain size. *Adams I*, 90 F. Supp. 2d at 51.[4] Subsequently, in the lead-up to the passage of the Organic Act, some objected to the federal assumption of jurisdiction over the District on the grounds that its residents would be subject to laws but without representation in Congress. *Id.* at 52.[5] And, after the passage of the Organic

---

[4] The *Adams I* court cited 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987) and 5 The Papers of Alexander Hamilton 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[5] The *Adams I* court cited Enquiries into the Necessity or Expediency of Assuming Exclusive Legislation over the District of Columbia 15 (1800) (available in Rare Book/Special

Act, some lobbied for retrocession of the District to Maryland or Virginia in order to correct the lack of representation in Congress for residents of the District. *Id.* at 53 (citing 12 Annals of Cong. 487 (1803) (remarks of Rep. Smilie).[6] Examining Founding-era historical records at length, the Court in *Adams* concluded that although there was ample "positive evidence of a contemporary understanding that District residents would not (and did not) have the right to vote in Congress, perhaps more important is the absence of evidence to the contrary." *Id.*

II. Past Litigation Has Affirmed the Constitutional Provenance of the District's Status.

The absence of voting representation in the House and Senate for District residents has been challenged before, most notably in *Adams v. Clinton* and *Alexander v. Daley*. Both cases were filed in D.D.C. in 1998. Compl., *Adams v. Clinton*, No. 98-cv-1665 (June 30, 1998), ECF No. 1, Ex. A; 1st Am. Compl., *Alexander v. Daley*, No. 98-2187 (Oct. 20, 1998), ECF No. 13, Ex. B. The *Adams* plaintiffs raised claims under the Equal Protection Clause and the Republican Guarantee Clause. Compl., *Adams v. Clinton*. The *Alexander* plaintiffs raised similar claims, as well as claims directly under the constitutional provisions providing for election of Representatives and Senators, and claims asserting that their privileges of citizenship had been abrogated. 1st Am. Compl., *Alexander v. Daley*. The two cases were consolidated and heard before a three-judge panel of this Court, with *Adams* as the lead case. Mem. & Order Consolidating Proceedings, *Adams v. Clinton*, No. 98-cv-1665 (Nov. 3, 1998), ECF No. 42, Ex.

Collections Reading Room, Library of Congress) and 10 Annals of Cong. 992 (1801) (remarks of Rep. Smilie).

[6] In the mid-nineteenth century, portions of the District south of the Potomac River were retroceded to Virginia, leaving the District in its current configuration. An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846).

C; Order Designating Three-Judge Court, *Adams v. Clinton*, No. 98-cv-1665 (Nov. 16, 1998), ECF No. 50, Ex. D.

The three-judge court adjudicated plaintiffs' claims concerning the non-apportionment of Representatives—dismissing them entirely—but found that it lacked jurisdiction over the remaining claims relating to representation in the Senate and Congress's authority over the District, and so remanded those claims to the initial judge—Judge Oberdorfer—alone. *Adams I*, 90 F. Supp. 2d at 38-40. The three-judge court dismissed all of the claims it considered because Article I limits representation in the House to residents of a state, and the District is not a state. Having determined that Article I compels the status quo, the three-judge court concluded that neither the requirements of equal protection, the privileges of national citizenship, due process, or the Republican Guarantee Clause altered the outcome. *See, e.g.*, *id.* at 70-71 ("Nor can the Due Process Clause, any more than the Equal Protection Clause, be used to change elements of the composition of Congress that are dictated by the Constitution itself."), *aff'd* 531 U.S. 941 (2000).[7]

Separately, Judge Oberdorfer dismissed the claims that the three-judge court had remanded, concerning representation in the Senate and Congress's authority over the District.

---

[7] Plaintiffs repeatedly and unsuccessfully attempted to dislodge this result. The *Adams* plaintiffs appealed to the Supreme Court, which affirmed the judgment of the three-judge court. *See Adams v. Clinton*, No. 00-97, 531 U.S. 941 (2000), *pet. reh'g denied*, 531 U.S. 1045 (2000). The *Alexander* plaintiffs also unsuccessfully appealed the three-judge court's decision to the Supreme Court. *See Alexander v. Daley*, No. 99-2062, 531 U.S. 940 (2000) (affirming the judgment of the three-judge court). After the failure of their appeal to the Supreme Court, the *Adams* plaintiffs sought reconsideration before the three-judge panel, which was denied. Mem. Op. & Order, *Adams v. Bush*, No. 98-1665 (Apr. 4, 2001), ECF No. 202, Ex. E. They appealed this denial to the D.C. Circuit, which dismissed the appeal for lack of jurisdiction. *Adams v. Bush*, No. 00-5239, 2001 WL 1488944, at *1 (D.C. Cir. Oct. 18, 2001), *pet. cert. denied* No. 01-1519, 537 U.S. 812 (Oct. 7, 2002).

Adams v. Clinton (*Adams II*), 90 F. Supp. 2d 27 (D.D.C. 2000). Judge Oberdorfer concluded that plaintiffs lacked standing for their claims concerning the Senate Defendants, because they could not show that the Senate officers sued were the cause of their alleged injuries. *Id.* at 31-33. Although he did not reach the merits, Judge Oberdorfer did strongly suggest that the logic of *Adams I*'s holding that representation in the House was constitutionally foreclosed would also doom plaintiffs' claims concerning the Senate. *Id.* at 30-31. Judge Oberdorfer also rejected plaintiffs' arguments concerning Congress's authority over the District. *Id.* at 33-35. The *Adams* plaintiffs appealed this decision to the D.C. Circuit, but then voluntarily dismissed their appeal. Order, *Adams v. Clinton*, No. 00-5239 (D.C. Nov. 13, 2002).

III. This Litigation

Plaintiffs, eleven residents of the District, filed this lawsuit on November 5, 2018, ECF No. 1, and amended their complaint on November 26, 2018, ECF No. 9. They claim that the lack of voting representatives for the District in the House and Senate is a violation of the Equal Protection and Due Process Clauses, and the First Amendment. Defendants are the United States of America and a bevy of official-capacity individual defendants: President Trump, Vice President Pence, Secretary of Commerce Ross, President Pro Tempore of the Senate Grassley,[8] Secretary of the Senate Adams, and Senate Sergeant at Arms Stenger. Although Plaintiffs' initial and amended complaints also named a number of defendants affiliated with the House—namely, the Speaker of the House, the Clerk of the House, and the Sergeant at Arms of the House—Plaintiffs voluntarily dismissed the House defendants. Notice of Voluntary Dismissal.

[8] The current President Pro Tempore of the Senate, Senator Grassley, has been substituted for the prior incumbent of that office per Federal Rule of Civil Procedure 25(d).

Plaintiffs stated that the House defendants "are no longer adverse to Plaintiffs" because the House defendants intend to "file an amicus brief in support of Plaintiffs." Notice of Voluntary Dismissal.

Contemporaneously with their filing of an Amended Complaint, Plaintiffs filed a motion to convene a three-judge court. Application for Three-Judge Court, ECF No. 10. Following a telephonic hearing during which Senate and Executive Defendants objected to the appointment of a three-judge court, Judge Moss concluded that "even if Plaintiffs might 'ultimately fail on the merits of their suit, . . . [28 U.S.C.] § 2284 entitles them to make their case before a three-judge district court.'"[9] Request for Designation of a Three-Judge Court, ECF No. 14 at 2-3 (quoting *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015)). On December 18, 2018, pursuant to Judge Moss's request, the Chief Judge of the Court of Appeals for the District of Columbia Circuit designated Judge McFadden of the United States District Court for the District of Columbia and Judge Wilkins of United States Court of Appeals for the District of Columbia Circuit to serve on a three-judge panel along with Judge Moss to hear the case, with Judge Wilkins presiding. Designation of Judges to Serve on Three-Judge District Court, ECF No. 16.

[9] Senate and Executive Defendants respectfully disagree with the referral of this case to a three-judge court, for the reasons stated during the telephonic hearing, and because Plaintiffs' complaint challenges the District's lack of representation in the House, not any particular apportionment of congressional districts. *See City of Phila. v. Klutznick*, 503 F. Supp. 657, 658 (E.D. Pa. 1980) (declining to convene three-judge court to resolve challenge to conduct of census in absence of request for change in existing apportionment).

ARGUMENT

I. Threshold Issues Warrant the Dismissal of All Claims.

A. The Speech or Debate Clause and Separation of Powers Principles Preclude This Action Against Senate Defendants.

Plaintiffs do not seek relief against the Congress, the entire House, or the entire Senate, likely because they know that such a suit would be barred.[10] Plaintiffs' claims against the individual Senate Defendants[11] for their performance of legislative duties, however, are equally barred by the Speech or Debate Clause.

The Constitution's Speech or Debate Clause precludes suing Members of Congress for their performance of legislative duties. *See* U.S. Const. art. I, § 6, cl. 1. ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."). The Speech or Debate Clause is an "absolute bar to interference," and "'reinforc[es] the separation of powers'" and "'insure[s] that the legislative function the Constitution allocates to Congress may be performed independently.'" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502-03 (1975) (quoting *United States v. Johnson*, 383 U.S. 169, 178 (1966)). The Clause is

---

[10] *See, e.g.*, *McLean v. United States*, 566 F.3d 391, 401 (4th Cir. 2009) (holding that the court lacked jurisdiction to hear a suit against Congress because "sovereign immunity extends to the United States Congress when it is sued as a branch of the government"); *Rockefeller v. Bingaman*, 234 F. App'x 852, 855-56 (10th Cir. 2007) (unpublished) (holding that "[s]overeign immunity forecloses [the plaintiff's] claims against the House of Representatives and Senate as institutions, and Representative Pearce and Senator Bingaman as individuals acting in their official capacities"); *Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972) (affirming the dismissal of a suit against Congress due to "sovereign immunity, and [the fact] that no cause of action lies to compel Congress to exercise its discretion to legislate on a purely political question").

[11] The Senate Defendants are Vice President Pence, in his capacity as President of the Senate, President Pro Tempore of the Senate Chuck Grassley, Secretary of the Senate Julie Adams, and Sergeant at Arms of the Senate Michael Stenger.

therefore read "broadly to effectuate its purposes," *Gravel v. United States*, 408 U.S. 606, 625 (1972) (quoting *Johnson*, 383 U.S. at 180). Although the heart of the Clause is speech or debate on the floor of the House or Senate, it also extends to "the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House" as "necessary to prevent indirect impairment of such deliberations." *Gravel* at 625.

Senate officers or employees, just as much as sitting Members of the Senate, are protected by the Clause for their assistance in the performance of the Senate's legislative functions. *See Doe v. McMillan*, 412 U.S. 306, 320 (1973) ("[T]o the extent that [congressional officers] serve legislative functions, the performance of which would be immune . . . if done by Congressmen, these officials enjoy the protection[s] of the Speech or Debate Clause."); *see also Eastland*, 421 U.S. at 507; *Gravel*, 408 U.S. at 616-18. In *Doe*, the Supreme Court held that the Superintendent of Documents and the Public Printer, as "institutional or individual legislative functionaries," were immune under the Speech or Debate Clause for their roles in the publication and distribution for legislative purposes of a House report. *See Doe*, 412 U.S. at 312.

Here, Plaintiffs challenge precisely such legislative activities—namely, the Senate's constitutionally-mandated duty to judge the election and qualification of its members, U.S. Const. art. I, § 5, cl. 1, and the Senate's ability to control procedures for voting on legislation and speaking and debating in the chamber. *See, e.g.*, Am. Compl. ¶ 62 (alleging that former defendant President Pro Tempore Hatch "would not favor permitting individuals elected by the citizens of the District of Columbia to be seated in the United States Senate"); Am. Compl. ¶ 63 (alleging that Secretary Adams "would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to be sworn in as a Senator"); Am. Compl. ¶ 64

(alleging that Sergeant at Arms Stenger "would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to enter the floor of the Senate"); Am. Compl. ¶ 65 (alleging that Vice President Pence "would not favor permitting individuals elected by the citizens of the District of Columbia to be seated in the United States Senate"). These functions are clearly vital to the ability of the Senate to consider and pass legislation, and Plaintiffs thus have threatened a significant intrusion on the Senate's legislative responsibilities. Nor can Plaintiffs circumvent the Speech or Debate Clause by pursuing declaratory relief when the purpose of that relief is still to compel Congress to act. *See Pauling v. Eastland*, 288 F.2d 126, 130 (D.C. Cir. 1960) (Prettyman, C.J.) ("[A] declaratory judgment would be as effective an impingement upon and interference with legislative proceedings as a flat injunction would be."), *cert. denied*, 364 U.S. 900 (1960).

In addition, Plaintiffs' claims raise serious separation-of-powers concerns because Plaintiffs seek to compel Congress to legislate or propose constitutional amendments. *See* Am. Compl. ¶ 4 ("Members of Congress have correctly concluded that Congress has the constitutional authority to provide voting rights representation in Congress to District residents . . . . Notwithstanding that recognition, Congress continues to deny [representation to District residents]."); Am. Compl. at 46 (requesting a declaratory judgment and stating that "[t]o comply with the declaratory judgment, Congress need not exercise its authority under Article IV, Section 3, Clause 1 to make the District a State. However, making the District a State would satisfy the judgment"). Plaintiffs cannot force Congress to enact legislation by suing a handful of Senate officers, both because, as a practical matter, action by the entirety of both the House and Senate would be necessary, and because such relief would be prohibited by the Speech or Debate Clause and separation of powers principles. The separation of powers prohibits the entry of any order,

whether for declaratory or injunctive relief, directing Congress to take, or refrain from taking, any legislative action. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("a legislature's failure to enact a special law is itself unreviewable"); *Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003) ("[T]he federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation."), *rev'd on other grounds*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) ("[T]he universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.").

B. Plaintiffs Lack Standing to Sue the Senate Defendants Because the Senate Defendants Do Not Cause Plaintiffs' Alleged Harms and Relief Against the Senate Defendants Will Not Redress Those Harms.

Perhaps in an unsuccessful attempt to avoid the Speech or Debate Clause issues addressed above, Plaintiffs have named as defendants several individual Senate officers. Plaintiffs' claims against the Senate Defendants must also be dismissed for lack of standing, because the Senate Defendants have not caused any injury to Plaintiffs (the Constitution, not the Senate Defendants, prevents District residents from participating in congressional elections), and relief against them will not redress Plaintiffs' purported injury, as the court held with respect to virtually identical claims in *Adams II*.

Plaintiffs here allege the following concerning the Senate Defendants.

First, as to Secretary Adams, the Secretary of the Senate, Plaintiffs allege that she "would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to be sworn in as a Senator" and "also has not sent a Recommended Form for Certificate of Election to an official of the District of Columbia certifying an upcoming election in the

Senate, as she does to the secretary of state and the governor of each of the fifty States where there is an upcoming election for the Senate." Am. Compl. ¶ 63. However, the Secretary has no authority to "give effect" to votes cast in senatorial elections, or otherwise to determine whether to recognize a Senator. This responsibility lies solely with the Senate itself as the "Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I,§ 5, cl. 1. Whether or not Secretary Adams sends a Recommended Form for Certification of Election has no substantive effect, because the form is provided only as one option for states to consider, and is not required for a state to certify an election. Rule II.3 of the Standing Rules of the Senate, *reprinted in Senate Manual*, S. Doc. No. 113-1, at 2-3, https://www.govinfo.gov/content/pkg/SMAN-113/pdf/SMAN-113.pdf.

Second, as to Michael Stenger, Sergeant at Arms and Doorkeeper of the Senate, Plaintiffs allege that he "would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to enter the floor of the Senate as a Senator from the District of Columbia." Am. Compl. ¶¶ 64. However, like the Secretary, the Sergeant at Arms has no authority to "give effect" to votes cast in senatorial elections, or to determine whether to recognize as a Senator an individual who presents credentials of election or appointment to the Senate. Moreover, mere access to the Senate floor does not confer any power to vote on legislation or participate in Senate debate. Indeed, the Sergeant at Arms may permit individuals other than sitting Senators—including the Mayor of the District—on the floor. Rule XXIII of the Standing Rules of the Senate, *reprinted in Senate Manual*, S. Doc. No. 113-1, at 23-24. Thus, allowing access to the Senate floor would not remedy Plaintiffs' alleged injury. In addition, Plaintiffs could not predicate their standing on a claim that some third party was wrongfully

excluded from the Senate floor, unless some obstacle blocks "the third party's ability to protect his or her own interests" *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

Finally, as to Senator Grassley, the President Pro Tempore of the Senate, Plaintiffs assert that "[o]n information and belief, Defendant Hatch[12] would not favor permitting individuals elected by the citizens of the District of Columbia to be seated in the United States Senate." Am. Compl. ¶ 62. Plaintiffs likewise assert that Vice President Pence, in his capacity as President of the Senate, "would not favor permitting individuals elected by the citizens of the District of Columbia to be seated in the United States Senate." Am. Compl. ¶ 65. Plaintiffs make no attempt to explain how Senator Grassley's or Vice President Pence's "favor" or lack thereof injures Plaintiffs. As discussed above, the Constitution commits judgments about membership in the Senate to the Senate itself, and therefore Senator Grassley's and Vice President Pence's individual opinions are not the cause of any injury suffered by Plaintiffs.

Moreover, Plaintiffs' own filings make clear that their alleged injuries purportedly caused by the Senate Defendants are hypothetical—Plaintiffs do not allege that any of the Senate Defendants has actually excluded any particular person from being recognized as a Senator for the District. But of course, an Article III injury cannot be "conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). And, because standing reflects separation-of-powers concerns, the inquiry is "especially rigorous" where, as here, a plaintiff asks a federal 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, 819-20 (1997).

---

[12] *See supra* note 8 regarding the substitution of parties.

For essentially the same reasons that the Plaintiffs cannot establish the requisite causal link between their alleged injury and any actions of the Senate Defendants, they also cannot show that their injuries would be redressed through the relief that they seek from the Senate Defendants. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (requiring "a likelihood that the requested relief will redress the alleged injury"). Because Plaintiffs' amended complaint fails to demonstrate any injury-in-fact caused by these Senate Defendants or redressable by a judgment against these officials, Plaintiffs lack standing and their claims against the Senate Defendants should be dismissed for lack of jurisdiction. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (citation omitted)).[13] Plaintiffs' dismissal of the House defendants underscores the lack of redressability. The former House defendants have certainly not redressed Plaintiffs' alleged lack of voting rights by offering to submit an amicus brief to this Court, yet it is not clear why the Senate Defendants would be necessary in this litigation if the House defendants are not, given that District residents lack representation in both the House and Senate.

Indeed, after the three-judge court in *Adams* remanded the claims against the Senate Defendants to the District Court, the District Court held—substantially for the causation and

---

[13] To the extent that Plaintiffs seek to identify an injury in any defendant's role in paying Senators, that injury is also overly speculative, given that no District Senator exists to go without pay. *Cf.* Am. Compl. at 47 (Prayer for Relief) (requesting injunctive relief ordering "Defendants Irving and Stenger . . . to give effect to votes cast by citizens of the District of Columbia in determining the prevailing candidates . . . to receive the salary of a voting member of the House of Representatives or of the Senate"). Defendants also note that the *Secretary of the Senate*, not the Sergeant at Arms, is responsible for ensuring that Senators are paid. 2 U.S.C. § 4591.

redressability reasons set forth above—that the *Adams* plaintiffs lacked standing to proceed against the Senate Defendants.[14] As the court noted:

> Nothing that the Secretary of the Senate or the Sergeant of Arms and Doorkeeper of the Senate has done, or intends to do, would have substantially contributed to [Plaintiffs'] injury. Before either of the Senate defendants would be called upon to take any of the actions the plaintiffs seek to enjoin, a law would have to be passed authorizing the Board of Elections to conduct an election for Senator, the Board of Elections would have to hold such an election, and the Senate would have to refuse to recognize the individual identified by the District as a Senator. It is by no means certain that all, if any, of these events would ever take place.

Adams II, 90 F. Supp. 2d at 33 (footnotes omitted).[15] This Court should reach the same conclusion and dismiss the Senate Defendants for lack of standing.

C. The President Should Be Dismissed as a Party to this Lawsuit Because There Is No Cause of Action Against the President and Plaintiffs Cannot Obtain Equitable Relief Against the President.

Plaintiffs' claims against President Trump suffer from a separate and independent problem: there is no cause of action against the President and Plaintiffs may not obtain—and the Court may not order—equitable relief directly against the President for his official conduct.

Plaintiffs lack a cause of action to sue the President. The actions of the President are not reviewable under the APA, *see Dalton v. Specter*, 511 U.S. 462, 479 (1994), and likewise there is no implied equitable cause of action to do so. Although courts of equity may in some circumstances permit suits to "enjoin unconstitutional actions by . . . federal officers," *Armstrong*

---

[14] Although the President Pro Tempore of the Senate and the Vice President were not defendants in *Adams*, the standing analysis in *Adams* is equally applicable to them.

[15] The District Court also noted that, if it were to reach the merits, the three-judge court's decision in *Adams* would also compel dismissal of Plaintiffs' claims. *See Adams II*, 90 F. Supp. 2d at 30 ("[A]lthough the majority opinion did not directly address the merits of the plaintiffs' claim with respect to the Senate, its reasoning applied to the Senate claim would lead to the same conclusion.").

v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015), the availability of such relief depends on whether it "was traditionally accorded by courts of equity," *Grupo Mexicano De Desarrollo v. All. Bond Fund*, 527 U.S. 308, 319 (1999). Here, there is no tradition of equitable relief against the President. To the contrary, the Supreme Court recognized over 150 years ago in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866), that federal courts lack jurisdiction to "enjoin the President in the performance of his official duties," a principle the Court reaffirmed more recently in *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *id.* at 827 (Scalia, J., concurring in part and concurring in the judgment) ("apparently unbroken historical tradition supports the view" that courts may not order the President to "perform particular executive . . . acts").

Moreover, the Supreme Court has twice held that causes of action that are available against other government officials should not be extended to the President absent a clear statement by Congress. *See Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (declining to assume that *Bivens* and other implied statutory damages "cause[s] of action run[] against the President of the United States"); *Franklin*, 505 U.S. at 801 (declining to find cause of action against the President under the APA "[o]ut of respect for the separation of powers and the unique constitutional position of the President"). Accordingly, in the absence of an express statutory cause of action against the President or a tradition of recognizing such suits as a matter of equity, there is no basis for the Court to infer equitable relief against the President. "The reasons why courts should be hesitant to grant such relief are painfully obvious" given the President's unique constitutional role and the potential tension with the separation of powers. *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). This Court should therefore reject Plaintiffs' request for an injunction "enjoining Defendants [Secretary] Ross and [President] Trump, and their successors

in office, to include the District of Columbia in calculations for purposes of transmitting to Congress, on the basis of the decennial census, any number of representatives to be apportioned to the District of Columbia," Am. Compl. at 47 (Prayer for Relief), and their request that President Trump be required "to present plans setting forth [his] recommended best means for assuring the right of District of Columbia citizens to participate in the election of voting members of Congress," and then to implement those plans. Am. Compl. at 47 (Prayer for Relief). Instead, Plaintiffs' claims against President Trump should be dismissed.

Dismissing the claims against the President would be compatible with the result in *Adams I*, where the Court declined to decide "whether the President . . . is subject to suit" because it determined that the Secretary of Commerce played the same role as in *Franklin* and was subject to suit. *See* 90 F. Supp. 2d at 43-44 (finding that the Secretary of Commerce was "amenable to suit"). The Secretary of Commerce is also a defendant here, and Plaintiffs could therefore potentially obtain relief without President Trump's presence in this lawsuit. *See Swan*, 100 F.3d at 978 ("In most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials.").

D. <u>This Case Presents a Nonjusticiable Political Question.</u>

It addition to the previously-discussed threshold issues, the Court should dismiss Plaintiffs' claims because they present a nonjusticiable political question. Recognizing that the court in *Adams* concluded otherwise, *Adams I*, 90 F. Supp. 2d at 40, Executive and Senate Defendants address this topic only briefly. A controversy is a nonjusticiable political question where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Here, the relief Plaintiffs seek

would indisputably require action by the political branches, as Plaintiffs acknowledge. *See, e.g.*, Am. Compl. ¶ 114 ("And even though, as was the case regarding residents of enclaves and those living overseas, Congress could have taken action to afford voting representation to District residents, it has not done so."). For example, congressional action would be necessary for Congress to propose a constitutional amendment to grant District residents voting rights, legislate statehood for the District, or retrocede the District to a state. *See Igartúa de la Rosa v. United States*, 842 F. Supp. 607, 609-10 (D.P.R. 1994) (deferring plaintiffs' arguments that Puerto Rico should be a state to Congress), *aff'd*, 32 F.3d 8 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995); *see also Downes v. Bidwell*, 182 U.S. 244, 312 (1901) (White, J., concurring) (holding that admission into statehood is a political question); *Phillips v. Payne*, 92 U.S. 130, 133-134 (1875) (declining to question Congress's decision to retrocede part of the District to Virginia). Accordingly, the Court should decline to wade into this political dispute.

II. Even if the Court Exercised Jurisdiction, Plaintiffs' Claims Fail on the Merits.

A. As Recognized in *Adams*, District Residents Do Not Reside in a State, and Therefore the Constitution Precludes Their Representation in the House or Senate.

The Constitution reserves representation in the House and Senate to residents of a state—a group that does not include residents of the District. This conclusion is clear from the text of Article I, and was recognized by the *Adams* court nearly twenty years ago. *Adams I*, 90 F. Supp. 2d at 55-56 ("In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I."); *id.* at 56 (rejecting the argument that District residents could gain representation in the House and Senate without being residents of a

state). *Adams* remains good law and the Supreme Court's decision in that case mandates that this court reach the same result.

This conclusion flows first from the text of the Constitution itself. Article I, section 2, clause 1 provides that "The 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 (emphasis added); *see also* U.S. Const. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several *States* which may be included within this Union, according to their respective numbers." (emphasis added)). These provisions do not include the District, which is defined under the Constitution, Article I, § 8, cl. 17, as a federal "District." Clause 3 in § 2 makes inescapably clear that the District is not a state for these purposes, by listing the initial number of Representatives for each of the thirteen original states—but not the District.

Likewise, the Constitution requires at Article I, § 2, cl. 1, that the electors for Representatives in the House "shall have the Qualifications requisite for Electors of the most numerous Branch of the *State* Legislature," (emphasis added), and at Article I, § 4, cl. 1 that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each *State* by the Legislature thereof." (emphasis added). The District, of course, lacks any such state legislative apparatus, and thus it would be an impossibility for these two provisions to apply to the District.[16] *See* U.S. Const. art. I, § 8, cl. 17 (granting Congress the

[16] When the Constitution was ratified, it contained an analogous provision for Senators, requiring that the Senate should be "composed of two Senators from each State, chosen by the Legislature thereof." U.S. Const. art. I, § 3, cl. 1. Like the requirements for the House, this language eliminates the possibility of Senators for the District, because the District lacked a legislature. The Seventeenth Amendment provided for direct election of Senators, but still does

power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District"); *see also* U.S. Const. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any *State*, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies" (emphasis added)).

The description of the election of the President in Article II of the Constitution and the Twenty-Third Amendment also demonstrate that District residents are not entitled to representation in the Senate or House. Article II provides: "[e]ach state shall appoint, in such a Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2. This language, of course, provides no voice for District residents in electing the President because the District is entitled to no Representatives and no Senators (and has no legislature) because it is not a state. Those who disagreed with this result were ultimately successful in implementing a reform through the political process—the Twenty-Third Amendment grants residents of the District electors in the electoral college. If, as Plaintiffs here maintain, the District was entitled to Representatives and Senators, no such amendment would have been necessary. *See* H. Rep. No. 86-1698 at 2 (May 31, 1960), *reprinted in* 1960 U.S.C.C.A.N. 1459 ("[T]he Constitution provides machinery only through the States for the selection of the President and [the] Vice President (art. II, sec. 1). In fact, all national elections including those for Senators and Representatives are stated in terms of the States. Since the

---

not encompass the District: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . . The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. Const., amend. XVII.

District is not a State or a part of a State, there is no machinery through which its citizens may participate in such matters." (footnote omitted)). It is thus inescapably clear that the Constitution precludes representation in the House or Senate for District residents. *Contra* Am. Compl. ¶ 100 ("The reference to the 'people of the several States' [in Article I, Section 2, Clause 1] was not intended to strip otherwise qualified voters who reside in the District of their right to vote.").

In addition to the decision in *Adams*, affirmed by the Supreme Court, this conclusion is supported by numerous other decisions. For example, the District of Puerto Rico and the First Circuit have considered over decades whether residents of Puerto Rico are entitled to vote for President and Vice President. The First Circuit, sitting *en banc*, concluded that "[l]ike each state's entitlement to two Senators regardless of population, the make-up of the electoral college is a direct consequence of how the framers of the Constitution chose to structure our government—a choice itself based on political compromise rather than conceptual perfection." *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005). In light of the clear constitutional provisions for election of the President and Vice President, the First Circuit rejected plaintiffs' claims:

> Voting for President and Vice President of the United States is governed neither by rhetoric nor intuitive values but by a provision of the Constitution. This provision does not confer the franchise on "U.S. citizens" but on "Electors" who are to be "appoint[ed]" by each "State," . . . . Puerto Rico—like the District of Columbia, the Virgin Islands, and Guam—is not a "state" within the meaning of the Constitution.

Id. Plaintiffs' claims were therefore "not only [] unsupported by the Constitution but [] contrary to its provisions." *Id.* at 148; *see also, e.g.*, *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010) (dismissing plaintiffs' claims for representation in the House because "[s]ince Puerto Rico is not a state, and cannot be treated as a state under the Constitution for these purposes, its citizens do not have a constitutional right to vote for

members of the House of Representatives"); *Attorney Gen. of Territory of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections), *cert. denied*, 469 U.S. 1209 (1985).

Plaintiffs argue that "[t]he Framers . . . did not intend [through the District Clause][17] to deprive District residents of their fundamental voting rights." Am. Compl. ¶ 93. But, the text of the Constitution is clear, and plentiful historical evidence indicates that the Founders did understand at the inception that residents of the District would not elect Representatives, Senators, or the President, and that this result was to them part of a considered calculation. *Adams* discusses the historical evidence at length, including concerns stated at the New York ratifying convention, Alexander Hamilton's unsuccessful proposal to grant representation to District residents, and significant public lobbying prior to the passage of the Organic Act. *Adams I*, 90 F. Supp. 2d at 51-54.

And the Founders had reason to create the District as they did. By establishing a seat of federal government that was independent from any state, they sought to ensure that the federal government would not have to depend on another sovereign for its protection. In the words of James Madison, if the seat of federal government were placed within a state:

> not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.

---

[17] As discussed above, although the District Clause states Congress's near-total jurisdiction and power over the District, it is primarily Article I which limits representation in the Senate and House to residents of states.

Adams I at 50 n.25 (quoting The Federalist No. 43). And this fear was not hypothetical—in 1783, an angry crowd of protesters disrupted a meeting of the Continental Congress in Philadelphia. *Id.* at 50 n.25. Pennsylvania ignored Congress's pleas to summon its militia, forcing Congress to decamp to New Jersey. *Id.*

B. The Electoral System that the Constitution Requires Cannot Itself Be Unconstitutional.

Once it has been determined, as in *Adams*, that the Constitution dictates the lack of representation for residents of the District, then all of Plaintiffs' claims must fail, regardless of which sections of the Constitution Plaintiffs cite. Although Plaintiffs, instead of couching their challenge in terms of Article I, attempt to concoct their argument based on the more general provisions of the First, Fifth, and Fourteenth Amendments, they cannot successfully establish that the Constitution itself is unconstitutional.

Indeed, the *Adams* court rejected the precise argument that other portions of the Constitution, including the Equal Protection and Due Process Clauses, could be read to override the commands of Article I:

> Plaintiffs argue that, even if we cannot find that Article I guarantees their right to vote in congressional elections, we should harmonize that Article with the other provisions discussed in this Part, which, they contend, do protect such a right. We do not disagree that we should strive to read the Constitution in a way that harmonizes its various provisions. We believe, however, that we have done so in the only way the words and historical interpretation of that document permit. Although the provisions considered in this Part protect rights guaranteed by the Constitution, our reading of Article I precludes the conclusion that the right plaintiffs seek to vindicate is one of those. Because the provisions of the Constitution that set forth the composition of Congress do not contemplate representation for District residents, we conclude that the denial of representation does not deny them equal protection, abridge their privileges or immunities, deprive them of liberty without due process, or violate the guarantee of a republican form of government.

Adams I at 71-72. This conclusion is in harmony with that of other courts.[18]

At risk of tautology, the Constitution must be constitutional. This instinctive understanding is likely why a number of express features of the Constitution have long escaped what might seem to be colorable challenges under the Equal Protection Clause or other grounds. For example, undersigned counsel is unaware of any cases challenging the allotment of two senators to each state, U.S. Const., art. I, § 3, cl. 1, or the requirement that the President "have attained the Age of thirty five Years," U.S. Const., art. II, § 1, cl. 5. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (holding that the Constitution's requirements for office are

---

[18] *See, e.g.*, *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956) ("Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process. . . . As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion."); *Porter v. Bowen*, 518 F.3d 1181, 1183-84 (9th Cir. 2008) (Kleinfeld, J., dissenting from denial of reh'g) ("Whether the electoral college and winner-take-all casting of electoral votes is a good idea or not has no bearing on the law. Article II, [S]ection 1 and the Twelfth Amendment are the Constitution we have."); *Igartúa-De La Rosa*, 417 F.3d at 148 (en banc) ("That the franchise for choosing electors is confined to 'states' cannot be 'unconstitutional' because it is what the Constitution itself provides. Hence it does no good to stress how important is 'the right to vote' for President. Although we recognize the loyalty, contributions, and sacrifices of those who are in common citizens of Puerto Rico and the United States, much the same could have been said about the citizens of the District of Columbia, who were voteless over a much longer period. The path to changing the Constitution lies not through the courts but through the constitutional amending process, U.S. Const. art. V; and the road to statehood—if that is what Puerto Rico's citizens want—runs through Congress. U.S. Const. art. IV, § 3, cl. 1."); *Hassan v. Fed. Election Comm'n*, 893 F. Supp. 2d 248, 257 (D.D.C. 2012) ("Plaintiff essentially asks this Court to declare that a provision of the Constitution is itself unconstitutional. It is beyond this Court's authority to do so. '[T]his Court . . . as interpreter and enforcer of the words of the Constitution, is not empowered to strike the document's text on the basis that it is offensive to itself or is in some way internally inconsistent.'" (quoting *New v. Pelosi*, No. 08-Civ-9055, 2008 WL 4755414 at *2 (S.D.N.Y. Oct. 29, 2008), *aff'd*, 374 Fed. App'x. 158 (2d Cir. 2010))), *aff'd*, No. 12-5335, 2013 WL 1164506 (D.C. Cir. Mar. 11, 2013); *Hitson v. Baggett*, 446 F. Supp. 674, 676 (M.D. Ala. 1978) ("The discrimination of which plaintiffs complain (if it is discrimination) . . . . is a type of 'discrimination' specifically sanctioned by the Constitution. . . . Thus, while this 'discrimination' may be considered by some to be unfair, it is hardly 'unconstitutional.'"), *aff'd*, 580 F.2d 1051 (5th Cir. 1978).

fixed, and that "[i]f the qualifications set forth in the text of the Constitution are to be changed, that text must be amended"). To conclude otherwise would be to invite any number of thorny problems—which constitutional provisions should take precedence over others? The Constitution is intended to be a lasting charter of our nation, and it is a feature—not a bug—that it does not easily bend to the winds of changing opinion. *See Cohens v. Virginia*, 19 U.S. 264, 387 (1821) ("[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."); *Trinsey v. United States*, No. CIV.A. 00-5700, 2000 WL 1871697, at *3 (E.D. Pa. Dec. 21, 2000) ("Our Founding Fathers adopted and the states ratified a Constitution that has endured for more than two centuries. The genius of it is that though not immutable, our Constitution is not subject to change by judicial fiat or presidential decree. . . . It is not the province of this Court to engage in constitutional amendment where it is asserted that part of the document is unconstitutional."). And, while not easy, changes to the Constitution are certainly possible, as the Twenty-Third Amendment's allotment of presidential electors to the District demonstrates.

For the reasons previously stated, the Constitution is necessarily constitutional, and all of its provisions must be interpreted in harmony. Plaintiffs appear to suggest that, here, the First, Fifth or Fourteenth Amendments have implicitly repealed the scheme of representation set forth in Article I. Even assuming, *arguendo*, that such an implicit repeal were possible, none has occurred here. Repeal of a *statute*, much less a constitutional provision, by implication is "not favored" and results only when the "intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

Furthermore, Article I provides highly specific instructions for representation in the House and the Senate, which cannot be cast into doubt by the more general instructions of the First, Fifth, or Fourteenth amendments. *See id*. at 663 ("[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1978))); *see also Att'y General of the Territory of Guam*, 738 F.2d at 1018-19 (holding that, despite plaintiffs' constitutional claims, "[a] constitutional amendment would be required" to permit citizens residing in Guam to vote for President); *Igartúa de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (affirming the dismissal of plaintiffs' claims that their due process and equal protection rights were violated because citizens residing in Puerto Rico cannot vote in presidential elections).

For the previously stated reasons, Plaintiffs' claims fail regardless of the specific portions of the Constitution that they identify. However, we briefly address each of Plaintiffs' specific theories in turn.

1. In Any Event, Plaintiffs' Equal Protection Claim Would Fail Because District Residents Are Not Similarly Situated to Residents of Federal Enclaves or Overseas Voters, and Any Differential Treatment Is Rational.

Plaintiffs argue that the Equal Protection Clause of the Fifth Amendment is violated because District residents, unlike some other U.S. citizens, do not have voting representation. Am. Compl. ¶¶ 135-36. This claim must fail because the equal protection framework scrutinizes classifications drawn by *statute*, whereas the classification to which Plaintiffs object inheres in the Constitution. The court in *Adams* rejected equal protection claims for precisely this reason, concluding that "the voting qualification of which plaintiffs complain is one drawn by the

Constitution itself" and therefore, "[t]his court is without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between." *Adams I*, 90 F. Supp. 2d at 65, 66-68. *Adams* has thus disposed of the precise claim that Plaintiffs attempt to raise here.

Plaintiffs attempt to distinguish *Adams*, arguing that "the Court did not address[] whether Congress has authority under the District Clause to grant voting representation to District residents. It was not until 2007 and 2009 that Congress demonstrated that it does have such authority. Because Congress has that authority and has exercised its authority to afford voting representation to those living overseas, and in a manner which results in voting representation for those who live in enclaves, its refusal to do so for District residents violates equal protection principles." Am. Compl. ¶ 125. This mis-states the analysis. The *Adams* court was certainly aware that political remedies existed to grant District residents representation in Congress. *See Adams I*, 90 F. Supp. at 72 ("But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues."). For example, the Constitution could be amended to provide for Representatives and Senators for the District, Congress could make the District a state (which might also require harmonizing Constitutional amendments), or Congress could retrocede the District to Maryland. It is irrelevant whether or not the precise bills that Plaintiffs now cite had been contemplated at the time. Political remedies exist, now and when *Adams* was decided, but it is beyond this Court's power to compel Congress into action, much less to re-write the Constitution.

Even if the equal protection framework were applicable here, Plaintiffs' claim would fail. Plaintiffs cannot show that they "ha[ve] been intentionally treated differently from others

similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). U.S. citizens with representation in Congress are not similarly situated to Plaintiffs because represented citizens are residents of states. And, in any event, there is a rational basis for treating residents of the District differently, including longstanding concerns about maintaining the independence of the federal capital from the states.

Plaintiffs attempt to compare themselves to residents of federal enclaves and overseas voters, both of whom may elect Senators and Representatives. *See* Am. Compl. ¶ 13 ("[Plaintiffs'] claim is that notwithstanding they are not residents of a State, they are nonetheless entitled to voting representation, just as Congress has provided that representation to those living overseas and in federal enclaves."). But both groups may vote in congressional elections precisely *because* they are citizens of a state, as required by Article I of the Constitution. The Supreme Court held, in *Evans v. Cornman*, that Maryland could not prevent residents of a federal enclave located in Maryland from voting in federal elections because those individuals retained their status as citizens of Maryland. 398 U.S. 419, 421 (1970). (Contrary to Plaintiffs' suggestion, *see, e.g.*, Am. Compl. ¶¶ 4, 12, 108, it was the Supreme Court and not Congress that specifically afforded the residents of federal enclaves the right to participate in congressional elections.). The Supreme Court first concluded that the residents of the federal enclave were, in fact, Maryland residents, and concluded that Maryland could not prevent them from voting in Maryland, in part because Congress had permitted Maryland to extend many important state powers, including state criminal laws, state income tax, state sales tax, state unemployment laws, state laws related to driving, state family law, and state schools, over the enclave. *Evans*, 398 U.S. at 423-24. The Supreme Court left open the possibility that the individuals might lose their ability to participate in congressional elections if Congress had more thoroughly exercised its

authority over the federal enclave. *Id.* ("While it is true that federal enclaves are still subject to exclusive federal jurisdiction and Congress could restrict as well as extend the powers of the States within their bounds . . . whether appellees are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today, not on what it may be sometime in the future." (citation omitted)).

U.S. citizens who can vote in congressional elections while living overseas can likewise do so because of their status as citizens of a state. The Uniformed and Overseas Citizens Absentee Voting Act of 1986 (the Act), Pub. L. No. 99-410, 100 Stat. 924, requires states, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, and American Samoa to permit individuals who formerly resided in those locations to continue voting as a resident of that location in federal elections while residing abroad. In other words, a person who resided in Maryland before living abroad is eligible to vote in federal elections as a Maryland resident, while a person who resided in the District before living abroad is eligible to vote in federal elections as a District resident. Nothing about the Act changes the distinctions drawn by the Constitution between the District and the States. *See Attorney Gen. of Territory of Guam*, 738 F.2d at 1019-20 (analyzing the legislative history of the predecessor statute to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, which likewise permitted overseas citizens to continue to vote as residents of their previous state, and concluding that it was "premised upon the rights of citizens of states" and therefore did not establish "that Congress has authorized all American citizens, even though not residents of a state, to vote in the presidential election"); *see also Igartúa De La Rosa*, 32 F.3d at 10 (rejecting Puerto Rico residents' equal protection and due process arguments because Congress had a rational basis for permitting individuals who had left the United States and thus would risk "losing their right to

vote in all federal elections" to vote for president, but not individuals residing in Puerto Rico). Here, of course, Plaintiffs concede that they are not residents of a state and they are therefore not similarly situated to either residents of federal enclaves located in states or overseas voters who previously resided in a state. *See* Am. Compl. ¶ 13 ("[Plaintiffs'] claim is that notwithstanding they are not residents of a State, they are nonetheless entitled to voting representation . . .").

Indeed, it is difficult to imagine how the District residents could be treated the same as overseas voters or residents of federal enclaves. Citizens of the District who live abroad are *already* permitted to vote as District residents—just as citizens of states who live abroad may vote as state residents. On the other hand, it is impossible for the federal government to reduce its control over the District the way it did over the federal enclave at issue in *Evans*, because there is no other obvious source of law in the District to collect taxes, regulate driving, or mediate family dispute (nor is it clear which state District residents would then be entitled to vote in, if the federal government did reduce its control).

Finally, even if an equal protection analysis were appropriate, there is a rational basis to distinguish residents of states from residents of the District, which is all that is required. A classification that does not target a suspect class or impinge on a fundamental right will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *cf. Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam) (holding that Congress may treat Puerto Rico, a territory over which it has plenary authority, differently from States provided there is a rational basis for the distinction). Residents of the District are not a suspect class. *See Calloway v. District of Columbia*, 216 F.3d 1, 7 (D.C. Cir. 2000) ("D.C. residents do not comprise a suspect class for equal protection purposes."); *United States v. Cohen*, 733 F.2d 128, 135-36 &

n.12 (D.C. Cir. 1984) (en banc) (Scalia, J.) (stating same in dictum). Nor does Plaintiffs' invocation of voting rights require a higher standard of review. *Cf. Wisconsin v. City of New York*, 517 U.S. 1, 18 (1996) (declining to apply strict scrutiny to decision not to undertake statistical adjustment to the census); *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 464 (1992) (declining to apply strict scrutiny and affording "deference" to Congress's choice of apportionment methods); *Richardson v. Ramirez*, 418 U.S. 24, 41-56 (1974) (declining to apply strict scrutiny to state denial of voting rights to felons because Section 2 of Fourteenth Amendment authorizes such state action).

The Founders certainly had at least a rational basis for treating residents of the District different than residents of states. The District is the lone capital of the nation and the "permanent" seat of government, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 104 (1953), "as lasting as the states from which it was carved or the union whose permanent capital it became." *O'Donoghue*, 289 U.S. at 538; *see also* An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, § 1, 1 Stat. 130 (1790) (accepting the District "for the permanent seat of the government of the United States"). In contrast, federal enclaves are located within the boundaries of existing States. *See* U.S. Const. art. I, § 8, cl. 17 (referring to the "State in which [an enclave] shall be" but providing that the District is to be created by "Cession of particular States"); *Evans*, 398 U.S. at 421. Federal enclaves are "necessarily temporary" and generally are returned to the jurisdiction of the States within which they are located when they are no longer needed for federal purposes, *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564 n.11 (1946); *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 542 (1885). Overseas voters who are eligible to vote in a state were residents of that state before

leaving the country, and thus have ties to the state or may reasonably be expected to return to the state when they return to the U.S.

In structuring the District pursuant to Article I, § 8, cl. 17, Congress's purpose was to prevent interference by any of the states in the operation of the federal government. As the Supreme Court succinctly stated in *John R. Thompson Co.*, 346 U.S. at 109, "it is clear from the history of the provision that the word 'exclusive' was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states." Madison explained the need for this authority by asking: "How could the general government be guarded from the undue influence of particular states, or from insults, without such power?" *Id.* at 109-110 (quoting The Federalist, No. 43). These rationales, of course, are no obstacle to congressional representation for residents of states, including those living abroad or in federal enclaves.

Finally, the absurdity of the logical conclusion of Plaintiffs' argument demonstrates why their equal protection claim must fail. By Plaintiffs' logic, Congress would be required to treat the District, federal enclaves, and the territories in an identical manner with respect to representation in the Senate and House. This conclusion is fundamentally inconsistent with the text and structure of the Constitution, two hundred years of historical experience, and the purpose of the District Clause. The Constitution gives Congress plenary authority over all three types of areas. *See* U.S. Const. art. I, § 8, cl. 17 (authority over the District and enclaves is "exclusive . . . in all Cases whatsoever"); U.S. Const. art. IV, § 3, cl. 2 (Congress may "dispose of and make all needful Rules and Regulations respecting" the territories); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982); *District of Columbia v. Carter*, 409 U.S. 418, 430 (1973); *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619 (1838). There is no

textual suggestion that Congress must exercise that plenary authority in the same manner with respect to all of the areas. As to the federal enclaves, Plaintiffs' position would apparently require Congress to treat the District and every military installation, research institute, or wetland the same—whether by exercising complete federal control or not. And, Plaintiffs' logic would equally call into question the status of all U.S. territories, whose residents, like District residents, do not elect congressional representatives because they are not residents of states. It is unlikely that such sweeping and categorical requirements, if they existed, would have gone unremarked for so extended a period of time.

2. Plaintiffs' Due Process Claim Would Also Fail Because District Residents Do Not Meet the Constitutionally-Mandated Qualifications for Voting Representation in the House or Senate.

Plaintiffs also claim that District residents have been deprived of their "fundamental right" to voting representation, arguing that all United States citizens are entitled to such voting representation. Am. Compl. ¶¶ 137-39. Like Plaintiffs' equal protection claim, this claim was already rejected in *Adams*:

> Like the privileges or immunities argument, this contention founders upon its underlying assumption: that District residents have a right to vote in congressional elections. As we have repeatedly stated above, the Constitution does not grant that right except to individuals who qualify under Article I—which District residents do not. Nor can the Due Process Clause, any more than the Equal Protection Clause, be used to change elements of the composition of Congress that are dictated by the Constitution itself.

Adams I, 90 F. Supp. at 70 (citing *Carliner v. Commissioner*, 412 F.2d 1090, 1090 (D.C. Cir. 1969)).

That conclusion is still correct today. Plaintiffs are not denied any "fundamental right" to participate in congressional elections, because Article I, § 2 (as amended by the Fourteenth Amendment), and Article I, § 3 (as amended by the Seventeenth Amendment)—not the Fifth

Amendment—govern which individuals are qualified to vote for representatives in the House and Senate. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[Article I, § 2] gives persons *qualified to vote* a constitutional right to vote and to have their votes counted." (emphasis added)); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution . . ."). Plaintiffs are not qualified to elect Representatives and Senators because they do not reside in a state.

Plaintiffs argue that *Obergefell* compels this Court to reach a different conclusion than the *Adams* court did. Am. Compl. ¶¶ 14-15, 126. *Adams* and the other cases upholding the Constitution's scheme of representation are, of course, still good law. *Cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (quoting *Rodriguez de Quijas v. Shearson/Am. Express Co.*, 490 U.S. 477, 484 (1989))); *DeBoer v. Snyder*, 772 F.3d 388, 400 (6th Cir. 2014) ("Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions 'until such time as the Court informs [us] that [we] are not.'" (quoting *Hicks v. Miranda*, 422 U.S. 332, 345 (1975))), *rev'd on other grounds sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Nor is it clear that the analysis of *Obergefell* applies beyond the area of marriage and intimacy. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("[*Washington v.*] *Glucksberg*[, 521 U.S. 702 (1997)] did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted

suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.").

Finally, Plaintiffs are incorrect in suggesting that a new and recent recognition of the importance of congressional representation for District residents changes the constitutional analysis. Voting has long been recognized as a vital right. To cite just a few examples, as discussed previously, when the District was ceded from Maryland and Virginia more than two hundred years ago, it was controversial because of the recognition that District residents would not have representation in Congress. In the 1960s, recognition of the importance of the right to District residents reached such a height that the Twenty-Third Amendment was ratified, granting presidential electors to District residents. A further constitutional amendment was later submitted to the states by Congress to give District residents representation in Congress (and in amending the Constitution), 124 Cong. Rec. 5,272-73 (March 2, 1978) (House passage), 124 Cong. Rec. 27,260 (Aug. 22, 1978) (Senate passage), but it did not become effective because it was not ratified by a sufficient number of states.

3. Plaintiffs Do Not State a Claim Under the First Amendment.

Finally, Plaintiffs claim that their First Amendment rights have been violated—their only claim that does not duplicate a claim rejected in *Adams*. Nonetheless, the logic of *Adams* still bars this claim; the Constitution's scheme of representation cannot be unconstitutional, and the general provisions of the First Amendment cannot alter the specific instructions of Article I concerning representation in the House and Senate. *Cf. Hand v. Scott*, 888 F.3d 1206, 1211 (11th Cir. 2018) (concluding that the First Amendment offers no greater protection of voting rights than the Fourteenth Amendment).

Even considering them anew, Plaintiffs' First Amendment claims do not withstand scrutiny. Plaintiffs contend that their inability to elect voting representatives in Congress "denies them the right to associate for the advancement of their political beliefs," Am. Compl. ¶ 141, but they do not actually plead any allegations of interference with their association. As far as can be gleaned from the amended complaint, Plaintiffs are completely free to meet with, communicate with, and join together with whomever they please. The Supreme Court has recognized two types of protected association—first, a freedom of "intimate association," relating to close personal relationships, and second, "expressive association," which relates to associations for the purpose of engaging First Amendment-protected activities. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617, 618 (1984). This right includes activities such as political meetings and public gatherings, *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937); *Hague v. CIO*, 307 U.S. 496, 512-13 (1939), and may be infringed when the government "seek[s] to impose penalties or withhold benefits from individuals because of their membership in a disfavored group," *Roberts*, 468 U.S. at 622. But, fatally, Plaintiffs do not claim any impingement on their right to freely assemble, band together to advance their agenda, or petition existing lawmakers (or the courts, as this lawsuit demonstrates) to advance their agenda, much less one that has been imposed upon them due to their membership in a disfavored group.

Plaintiffs also contend that they are "without voting representatives in Congress to whom they may effectively bring their grievances," Am. Compl. ¶ 141, but the First Amendment does not mandate the restructuring of government in order to facilitate the resolution of Plaintiffs' grievances in the manner they prefer. Plaintiffs do not assert any interference into their right to organize, petition existing government officials, file lawsuits, or take similar actions. It is well established that the petition clause does not obligate the government to respond to a petition in a

certain way. *See We the People Found., Inc. v. United States*, 485 F.3d 140, 143 (D.C. Cir. 2007) (holding that "individuals 'have no constitutional right as members of the public to a government audience for their policy views'" (quoting *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286 (1984)).

Although Plaintiffs purport to rely on "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," Am. Compl. ¶ 117 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)), Plaintiffs do not allege any burden on their ability to associate, and as discussed at length above, they are not *qualified* voters by operation of the Constitution's explicit instructions. The concurring opinions that Plaintiffs cite, Am. Compl. ¶ 16, are inapposite. Plaintiffs do not allege that the government has "subject[ed] a group of voters or their party to disfavored treatment," Am. Compl. ¶ 16 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., joined by Ginsburg, Breyer, & Sotomayor, JJ., concurring)), or that they have been penalized "because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views," *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). Instead they allege that all residents of the District are unable to participate in congressional elections due to constitutional restrictions that the *Adams* court concluded are "reflections of the Great Compromise forged to ensure the Constitution's ratification." 90 F. Supp. 2d at 56.

CONCLUSION

For the above-stated reasons, Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction and failure to state a claim.

Dated: April 1, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

LESLEY FARBY
Assistant Branch Director

/s/ Rebecca M. Kopplin
REBECCA M. KOPPLIN
Trial Attorney (California Bar No. 313970)
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20005
Telephone: (202) 514-3953
Facsimile: (202) 616-8470
Email: Rebecca.M.Kopplin@usdoj.gov

Counsel for Executive Defendants the United States of America, Secretary of Commerce Wilbur Ross, and President Donald J. Trump; and Senate Defendants President Pro Tempore Chuck Grassley, Secretary of the Senate Julie Adams, Sergeant at Arms and Doorkeeper Michael Stenger, and Vice President Michael R. Pence