

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASTAÑON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 18-2545 (RDM, RLW, TNM)
)	
UNITED STATES, et al.,)	
)	
Defendants.)	

**BRIEF FOR THE DISTRICT OF COLUMBIA AS
AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS**

TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE*..... 1

ARGUMENT..... 1

 I. District Residents Deserve Full Representation In Congress 1

 II. District Residents Are Harmed By Their Lack Of Full Representation
 In Congress 6

 A. District residents have been unfairly denied representation in
 Congress for more than two centuries 6

 B. Congress can and does override the will of District residents..... 9

 C. Lack of full representation exacerbates numerous practical issues
 for the District..... 12

CONCLUSION..... 15

TABLE OF AUTHORITIES

Cases

In re Roland Pool & Michael Geller v. Boy Scouts of Am. & Nat’l Capital Area Council,
Nos. 93-030-(PA) & 93-031-(PA) (D.C. Comm’n on Human Rights June 18, 2001) 11

Statehood Solidarity Comm. v. United States, Case 11.204, Inter. Am. Comm’n H.R.,
Report No. 98/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003) 9

Statutes

28 U.S.C. § 541(a) 13

Assisted Suicide Funding Restriction Act,
Pub. L. No. 105-12, 111 Stat. 23 (1997) 10

Consolidated and Further Continuing Appropriations Act,
Pub. L. No. 113-235, 128 Stat. 2130 (2014) 12

Consolidated Appropriations Act,
Pub. L. No. 110-161, 121 Stat. 1844 (2007) 10, 11

Department of Defense and Full-Year Continuing Appropriations Act,
Pub. L. No. 112-10, 125 Stat. 38 (2011) 11

District of Columbia Appropriations Act,
Pub. L. No. 107-96, 115 Stat. 923 (2001) 11

District of Columbia Appropriations Act,
Pub. L. No. 108-335, 118 Stat. 1322 (2004) 11

District of Columbia Self-Government and Governmental Reorganization Act,
Pub. L. No. 93-198, 87 Stat. 774 (1973) 7

Omnibus Consolidated and Emergency Supplemental Appropriations Act,
Pub. L. No. 105-277, 112 Stat. 2681 (1998) 10

Omnibus Consolidated Rescissions and Appropriations Act of 1996,
Pub. L. No. 104-134, 110 Stat. 1321 10

D.C. Act 9-188 (Apr. 15, 1992) 10

D.C. Act 12-340 (Apr. 22, 1998) 10

D.C. Act 19-632 (Jan. 18, 2013) 14

D.C. Code § 1-201.02(a)..... 9

D.C. Code § 1-204.33(a)..... 12

D.C. Code § 1-206.01 9

D.C. Code § 1-206.02(c)(1) 9

D.C. Code § 11-101(2)..... 12

D.C. Code § 16-2301(3)(A)..... 13

D.C. Code § 23-101(c)..... 13

Legislative Materials

12 Annals of Cong. (1803)..... 6

139 Cong. Rec. (1993)..... 8

22 Cong. Rec. (1890)..... 7

Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 113th Cong. (2014).....2, 8-9, 14-15

H.R. 1905, 110th Cong. (2007)..... 8

S. 160, 111th Cong. (2009)..... 8

Other Authorities

Chris Myers Asch & George Derek Musgrove, *Chocolate City: A History of Race and Democracy in the Nation’s Capital* (2017) 6-7

At a Glance, Catholic Univ. of Am..... 4

Awards and Accreditations, George Washington Univ. Hosp. 4

Awards and Recognitions, MedStar Georgetown Univ. Hosp. 4

Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the Fourteenth Annual Session (July 1-5, 2005) 9

Federal Employees by State, Governing..... 2

Gloria G. Guzman, U.S. Census Bureau, ACSBR/17-01, Household Income: 2017
 (issued Sept. 2018) 3

Health Care and Life Sciences, D.C. Econ. Strategy..... 4

Higher Education, D.C. Econ. Strategy..... 4

Hospitality and Tourism, D.C. Econ. Strategy 5

Howard at-a-Glance, Howard Univ. 4

Harry S. Jaffe & Tom Sherwood, *Dream City: Race, Power, and the Decline of Washington, D.C.*
 (1994) 7

Andy Kiersz, *Every US State Economy Ranked from Worst to Best*, Bus. Insider
 (Mar. 15, 2018, 6:11 AM)..... 3

Ed Lazere, *How Does the DC Budget Get Put Together Every Year?*, Greater Wash.
 (Feb. 11, 2019) 14

Letter from Eleanor Holmes Norton to Mitch McConnell et al. (Mar. 28, 2019) 13

Letter from Irvin B. Nathan, Chairman, Council for Court Excellence, to Ron Johnson et al.
 (July 30, 2018)..... 13

Letter from Jeffrey S. DeWitt, Chief Fin. Officer, to Muriel Bowser & Phil Mendelson
 (Jan. 22, 2019)..... 15

Maya Rhodan, *These Are the Best and Worst States for Women’s Job Equality*, Time
 (Sept. 4, 2014) 3

Press Release, Eleanor Holmes Norton, Norton Introduces Bill to Give D.C. a Local Prosecutor,
 Same Right Already Enjoyed by U.S. Territories (Jan. 31, 2019)..... 13-14

Press Release, Eleanor Holmes Norton, Norton Welcomes New Members of Congress to D.C.,
 Encourages Them to Support D.C. Statehood and Respect Home Rule (Nov. 15, 2018) 12

Press Release, Muriel Bowser, Statement on the Federal Government Shutdown’s Impact of the
 District of Columbia Government’s Revenue Estimates (Jan. 22, 2019) 15

Professional Services, D.C. Econ. Strategy 5

Quick Facts, U.S. Census Bureau 2

Retail, D.C. Econ. Strategy 5

Yesim Sayin Taylor, *Twenty Years After the Revitalization Act, the District of Columbia Is a Different City*, D.C. Policy Ctr. (Dec. 19, 2017)..... 4

Jon O. Shimabukuro, Cong. Res. Serv., RL33467, *Abortion: Judicial History and Legislative Response* (2012)..... 11-12

Veteran Statistics: District of Columbia, U.S. Census Bureau..... 2

What You Need to Know About Reauthorization, Chronicle of Higher Educ. (Sept. 19, 2013)..... 5

Garry Young, *The District of Columbia and Its Lack of Representation in Congress: What Difference Does It Make?* (2009) 10

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The District of Columbia has a strong interest in ensuring that its residents have full representation in Congress. The District is currently home to over 700,000 residents. These individuals pay taxes, serve on juries, fight in wars, and fulfill all the obligations of citizenship, but they cannot elect a single voting member of Congress. As a consequence, District residents lack a meaningful voice in formulating the far-reaching national legislation that is debated in Congress. Due to the District's unique status in our constitutional structure, Congress also has authority over District affairs that are distinctly local in nature. Yet District residents have no say in these matters either.

More than two centuries after the Framers rejected taxation without representation, the District remains a glaring exception to the prevailing rule of self-government. The United States is the only democracy in the world that denies residents of its capital city full representation in its legislature, and several international organizations have found the United States' failure to provide District residents with full representation in Congress to be a human rights violation.

Congress's failure to grant District residents representation is a historical wrong, and District residents are feeling its effects to this day. As long as District residents are denied full representation, members of Congress from other states can overturn District laws and impose their own policy preferences on District residents without their consent. Additionally, Congress's failure to provide District residents with full representation exacerbates numerous practical issues for the District in areas ranging from judicial process to local government operations.

ARGUMENT

I. District Residents Deserve Full Representation In Congress.

The District's current lack of representation in Congress is particularly egregious given its large population and significant contributions to the nation. Two centuries ago, only a few

thousand people lived in the District, and most of them would not have been able to vote because the franchise was limited to property-owning white men. *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 53 (2014) (statement of Alice Rivlin, Senior Fellow, Brookings Inst.). Since then, the District has grown “from a village to a vibrant city.” *Id.* The District’s government now has many attributes of a state government, including a school board, an Attorney General’s office, a National Guard, and “a body of laws that are already accorded state-level status by courts.” *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 56 (2014) (statement of Vincent Gray, Mayor, District of Columbia) (“Gray Testimony”).

The District’s population is currently over 700,000 people, which is greater than the populations of Vermont and Wyoming—both of which have a voting member of the House of Representatives and two Senators. *Quick Facts*, U.S. Census Bureau.¹ The District is home to close to 200,000 federal employees and over 30,000 veterans, yet national policy is made without a congressional representative to channel their experienced input. *Federal Employees by State, Governing*²; *Veteran Statistics: District of Columbia*, U.S. Census Bureau.³

In fiscal year 2017, the District paid \$26 billion in federal taxes, which is more than the amount paid by 23 states. Compl. ¶ 72 (citing Internal Revenue Serv., Data Book 11 (2017),

¹ Available at <https://www.census.gov/quickfacts/fact/table/dc,vt,wy/PST045218>.

² Available at <https://www.governing.com/gov-data/federal-employees-workforce-numbers-by-state.html>.

³ Available at <https://www2.census.gov/library/visualizations/2015/comm/vets/dc-vets.pdf>.

<https://www.irs.gov/pub/irs-soi/17databk.pdf>).⁴ Thus, the District generated more federal tax revenue than nearly half the states, which combined have 65 congresspeople and 46 senators. Indeed, on a per capita basis, the District pays more in federal taxes than any other state. *See id.* (citing Internal Revenue Serv., Data Book 11-13 (2017), <https://www.irs.gov/pub/irs-soi/17databk.pdf>; *Annual Estimates of Resident Population*, U.S. Census Bureau (July 1, 2017), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>). Given the District's disproportionate contribution to the nation's coffers, it makes little sense for the District to have no vote in Congress regarding how those funds are spent.

The District's outsized contributions go well beyond tax dollars. The District has a thriving economy, which was ranked first in the nation in 2018. *See* Andy Kiersz, *Every US State Economy Ranked from Worst to Best*, Bus. Insider (Mar. 15, 2018, 6:11 AM).⁵ Its median household income is higher than that of any state, and it has also been a leader in economic equality for women. Gloria G. Guzman, U.S. Census Bureau, ACSBR/17-01, Household Income: 2017, at 4 (issued Sept. 2018)⁶; Maya Rhodan, *These Are the Best and Worst States for Women's Job Equality*, Time (Sept. 4, 2014).⁷ Yet, despite the District's contributions to the national economy, it has no say in national economic policy.

The District is also a leader in the fields of health care and higher education. It is home to 16 hospitals and medical centers, many of which have won numerous awards and recognitions.

⁴ The 23 states are Alabama, Alaska, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

⁵ Available at <https://www.businessinsider.com/state-economy-ranking-q1-2018-2>.

⁶ Available at <https://www.census.gov/content/dam/Census/library/publications/2018/acs/acsbr17-01.pdf>.

⁷ Available at <http://time.com/3270835/map-women-job-equality/>.

Health Care and Life Sciences, D.C. Econ. Strategy⁸; *see, e.g., Awards and Accreditations*, George Washington Univ. Hosp.⁹; *Awards and Recognitions*, MedStar Georgetown Univ. Hosp.¹⁰ The District's health care and social assistance sectors account for 59,000 jobs, and major research institutions in the District are leading innovators in areas such as pharmacology, genomics, and pediatric research. *Health Care and Life Sciences, supra.*

The District is home to two public and eight private, not-for-profit universities. *Higher Education*, D.C. Econ. Strategy.¹¹ This includes Howard University, one of the top nationally ranked Historically Black Colleges and Universities, and the Catholic University of America, the only university founded by the United States Catholic Bishops. *Howard at-a-Glance*, Howard Univ.¹²; *At a Glance*, Catholic Univ. of Am.¹³ Higher education accounts for 27,000 jobs in the District, more than half of all the District's education jobs. *Higher Education, supra.* Notably, the District also has one of the nation's most highly educated workforces. *See* Yesim Sayin Taylor, *Twenty Years After the Revitalization Act, the District of Columbia Is a Different City*, D.C. Policy Ctr. (Dec. 19, 2017) (noting that one-third of District workers have a graduate degree and another third of District workers have a college degree).¹⁴

⁸ Available at <http://dceconomicstrategy.com/coresectors/health-care-life-sciences>.

⁹ Available at <https://www.gwhospital.com/about/awards-accreditations>.

¹⁰ Available at https://www.medstargeorgetown.org/our-hospital/awards-and-recognitions/?_ga=2.157771322.1062493933.1555782567-321318520.1555782567.

¹¹ Available at <http://dceconomicstrategy.com/coresectors/higher-education>.

¹² Available at <https://www2.howard.edu/about/howard-glance>.

¹³ Available at <https://www.catholic.edu/about-us/at-a-glance/index.html>.

¹⁴ Available at <https://www.dcpolicycenter.org/publications/twenty-years-revitalization-act-district-columbia-different-city>.

And yet, when it comes to national healthcare and education policy, the District currently has no vote. It did not have a vote in the passage of the Affordable Care Act in 2009, or in the dozens of votes that Congress has since taken to either repeal or amend the law. Nor did it have a vote in reauthorizing the Higher Education Act, which the Chronicle of Higher Education describes as “*the law that covers how federal dollars are awarded to colleges and students,*” including “everything from loan limits to accreditation, determining who gets money, how much, and when.” *What You Need to Know About Reauthorization*, Chronicle of Higher Educ. (Sept. 19, 2013) (emphasis in original).¹⁵

Other sectors of the District’s economy have made significant national contributions as well. For instance, the District’s retail industry provides 23,000 jobs and contributes \$1.5 billion to GDP. *Retail*, D.C. Econ. Strategy.¹⁶ The hospitality and tourism industries account for nearly 75,000 jobs. *Hospitality and Tourism*, D.C. Econ. Strategy.¹⁷ And the District also supports close to 125,000 jobs in professional services, which includes fields such as consulting and legal services. *Professional Services*, D.C. Econ. Strategy.¹⁸

Considering the District’s strong contributions to the national economy, it is inequitable for the District to have no vote when it comes to setting federal economic priorities. Because the District is an economic powerhouse and policy incubator, the nation as whole is deprived of the benefit of its input in congressional debate.

¹⁵ Available at <https://www.chronicle.com/article/What-You-Need-to-Know-About/141697>.

¹⁶ Available at <http://dceconomicstrategy.com/coresectors/retail/>.

¹⁷ Available at <http://dceconomicstrategy.com/coresectors/hospitality-and-tourism>.

¹⁸ Available at <http://dceconomicstrategy.com/coresectors/professional-services/>.

II. District Residents Are Harmed By Their Lack Of Full Representation In Congress.

A. District residents have been unfairly denied representation in Congress for more than two centuries.

Historically, one of the principal bases for denying District residents representation has been the erroneous—and at times race-based—perception that District residents are incapable of governing themselves. This perception has persisted since the early years of the Republic,¹⁹ and for over two centuries Congress has unfairly denied District residents representation.

For much of the District’s early history the franchise was limited to white men. However, in 1867, Congress overrode a veto by President Andrew Johnson and granted black men in the District the right to vote. Chris Myers Asch & George Derek Musgrove, *Chocolate City: A History of Race and Democracy in the Nation’s Capital* 146 (2017).²⁰ After the 1869 election, black men held positions at every level of the District’s local government. *Id.* at 154.

At the same time, proposals that would eliminate elected government in the District began to emerge as a way of limiting the influence of black voters. *Id.* at 156-57. Despite opposition from District voters, Congress created a new “democratic hybrid” government for the District in 1871 that included a presidentially appointed governor and upper chamber of City Council. *Id.* at 160. Three years later, Congress replaced that government with a board of three commissioners

¹⁹ For example, in a letter to his wife in 1800, Treasury Secretary Oliver Wolcott claimed that “[m]ost of the inhabitants [of the District] are low people, whose appearance indicates vice and intemperance, or negroes.” Chris Myers Asch & George Derek Musgrove, *Chocolate City: A History of Race and Democracy in the Nation’s Capital* 38 (2017) (citing Letter from Oliver Wolcott to Mrs. Wolcott (July 4, 1800)). Several years later, Representative James Asheton Bayard of Delaware asserted that District residents were “children, over whom it is not our wish to tyrannise, but whom we would foster and nurture.” 12 *Annals of Cong.* 494 (1803) (statement of Rep. Asheton).

²⁰ Johnson argued that the bill would give black voters “supreme control of the white race” and that it “would engender a feeling of opposition and hatred between the races.” Asch & Musgrove, *supra*, at 146.

appointed by the President, completely eliminating local democracy in the District. *Id.* at 165. The three commissioners—all of whom were white men—“routinely ignored” the concerns of the District’s black residents, who had no way of holding them accountable. *Id.* at 173. As Senator John Tyler Morgan of Alabama later described the situation, Congress decided “to burn down the barn to get rid of the rats . . . the rats being the negro population and the barn being the government of the District of Columbia.” 22 Cong. Rec. 165 (1890) (statement of Sen. Morgan).

The three-man commission remained in effect until the 1960s when President Lyndon Johnson began to push for District voting rights as a part of his broader civil rights agenda. Harry S. Jaffe & Tom Sherwood, *Dream City: Race, Power, and the Decline of Washington, D.C.* 44 (1994). Johnson was particularly concerned about “the injustice of a majority black city that was run by white congressmen.” *Id.* In 1967, Congress passed a bill creating an appointed City Council and Mayor/Commissioner, and Johnson appointed a black man, Walter Washington, as the first Mayor/Commissioner. *Id.* at 62. When Washington sent his first budget to Congress, House District Committee Chair John McMillan of South Carolina responded by sending a truckload of watermelons to Washington’s office. *Id.* The District did not achieve home rule until the 1970s due to opposition from McMillan and other segregationist members of Congress. *Id.* at 100.²¹

Although modern opponents of District voting rights have not rooted their opposition in express racial terms, they have continued to point to the District’s supposed inability to govern

²¹ The Home Rule Act that ultimately passed Congress still faced significant opposition, and opponents of the Act managed to secure a number of key concessions. Jaffe & Sherwood, *supra*, at 102-03. One of those concessions was keeping the federal government in control of local criminal prosecutions; as a result, a series of presidentially appointed, predominantly white male United States Attorneys continued to oversee criminal prosecutions in the District. *Id.* at 103. The Act also prevented the City Council from limiting the powers of the United States Attorney. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, tit. VI, § 602(a)(8), 87 Stat. 774, 813 (1973) (codified as amended at D.C. Code § 1-206.02(a)(8)).

itself as a reason for continuing to deny District residents voting rights. For example, when a District statehood bill came before Congress in 1993, Representative Tom Delay of Texas exclaimed that “[t]he District, a liberal bastion of corruption and crime has yet to come even close, in this member’s eyes, to deserving the awesome privilege and responsibility of statehood.” 139 Cong. Rec. 31,509 (1993) (statement of Rep. DeLay). Representative Joel Hefley of Colorado further argued that “the ‘Self-Rule’ experiment in the District of Columbia” had been a failure. *Id.* at 31,519 (statement of Rep. Hefley). The statehood bill failed despite Delegate Eleanor Holmes Norton’s plea that members cast their votes “on the basis of democratic principles and not District bashing.” *Id.* at 31,509 (statement of Del. Norton). More than two decades after the failed statehood vote, the District still does not even have a single voting representative in Congress.²²

As then-Mayor Vincent Gray stated at a 2014 congressional hearing, the District is “the only place in the United States of America where Americans serve in the military, fight and die in wars, serve on juries, and are taxed, without voting representation in either house of Congress.” Gray Testimony, *supra*, at 55. On top of that, the United States is the only democracy in the world that does not grant voting representation to people who live in its capital city. *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 2 (2014) (statement of Sen. Tom Carper, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs). Consequently, multiple international organizations have taken the extraordinary step of finding the District residents’ lack of representation in Congress to be a human rights violation. *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia*

²² The House and Senate both passed bills in the late 2000s to give the District a voting member in the House, but neither bill was enacted into law. *See* S. 160, 111th Cong. (2009); H.R. 1905, 110th Cong. (2007).

Admission Act of 2013: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 113th Cong. 92 (2014) (statement of Wade Henderson, President & CEO, The Leadership Conference on Civil & Human Rights).²³ Given the historical racial underpinnings of the District’s disenfranchisement, this international condemnation is hardly surprising.

B. Congress can and does override the will of District residents.

In many ways, Congress has more authority over the District than it has over any individual state. Although the District has Home Rule, the D.C. Council’s powers are “[s]ubject to the retention by Congress of the ultimate legislative authority over the nation’s capital.” D.C. Code § 1-201.02(a). As a consequence, Congress can overturn any District law and impose its own policy preferences on District voters without their consent.

Acts of the Council of the District of Columbia are subject to a 30-day review period in Congress. *Id.* § 1-206.02(c)(1). During that period, Congress can enact a joint resolution of disapproval invalidating the law. *Id.* Congress “reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject.” *Id.* § 1-206.01. It can also “amend or repeal any law in force in the District . . . and any act passed by the Council.” *Id.* As such, the District’s lack of representation can be particularly harmful.

²³ See, e.g., Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the Fourteenth Annual Session, ¶ 58 (July 1-5, 2005) (“[C]all[ing] on the Congress of the United States to adopt such legislation as may be necessary to grant the residents of Washington, D.C. equal voting rights in their national legislature in accordance with its human dimension commitments.”); *Statehood Solidarity Comm. v. United States*, Case 11.204, Inter. Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 ¶ 117 (2003) (“The Commission hereby concludes that the State is responsible for violations of the Petitioners’ rights under Articles II and XX of the American Declaration by denying them an effective opportunity to participate in their federal legislature.”).

In 2009, Professor Garry Young of George Washington University conducted a review of congressional actions between 1995 and 2008 that either restricted the District’s autonomy or otherwise interfered with District governance. *See* Garry Young, *The District of Columbia and Its Lack of Representation in Congress: What Difference Does It Make?* 31-33 (2009).²⁴ For example, after the D.C. Council passed an Act in 1992 extending health care benefits to people in domestic partnerships, *see* D.C. Act 9-188 (Apr. 15, 1992), Congress restricted its implementation, *see, e.g.*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 132, 110 Stat. 1321, 1321-91 (“[N]or shall any funds made available pursuant to any provision of this Act otherwise be used to implement or enforce D.C. Act 9-188.”). And in 1997, Congress passed the Assisted Suicide Funding Restriction Act, which prevented the District from using federal or local funds for physician-assisted suicide. Pub. L. No. 105-12, § 8, 111 Stat. 23, 26 (1997) (applying the Act’s restrictions at the federal level to the District).

In 1998, the D.C. Council passed an ordinance that required newly hired District employees to become residents within 180 days of their appointments. *See* D.C. Act 12-340 (Apr. 22, 1998). Later that year, Congress repealed the ordinance in an appropriations bill. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 153, 112 Stat. 2681, 2681-146 (1998). And after District voters approved an initiative legalizing medical marijuana in 1998, Congress passed numerous bills restricting its implementation. *See, e.g.*, Consolidated Appropriations Act, Pub. L. No. 110-161, § 823(b), 121 Stat. 1844, 2042 (2007) (“The Legalization of Marijuana for Medical Treatment Initiative of 1998, also known as Initiative 59, approved by the electors of the District of Columbia on November 3, 1998, shall not take effect.”).

²⁴ Available at <https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/DC%20Representation%20Main%20Report%20Final.pdf>.

In 2001, the D.C. Human Rights Commission issued an order requiring the Boy Scouts of America to reinstate scout leaders who were discharged on the basis of sexual orientation. *See In re Roland Pool & Michael Geller v. Boy Scouts of Am. & Nat'l Capital Area Council*, Nos. 93-030-(PA) & 93-031-(PA) (D.C. Comm'n on Human Rights June 18, 2001).²⁵ Congress responded by preventing the Human Rights Commission from using funds to enforce the order. *See* District of Columbia Appropriations Act, Pub. L. No. 108-335, § 324, 118 Stat. 1322, 1344 (2004) (“None of the funds contained in this Act may be used to issue, administer, or enforce any order by the District of Columbia Commission on Human Rights relating to docket numbers 93-030-(PA) and 93-031-(PA).”).

Congress has also passed numerous restrictions on the District’s needle exchange program. *See, e.g.*, § 814, 121 Stat. at 2038 (“None of the Federal funds contained in this Act may be used for any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug.”). And congressional appropriations bills have often required the D.C. Council to allow insurance companies to include a moral or religious exception for contraceptive coverage. *See, e.g.*, District of Columbia Appropriations Act, Pub. L. No. 107-96, § 128, 115 Stat. 923, 953 (2001) (“[I]t is the intent of Congress that any legislation enacted on [contraceptive coverage by health insurance plans] should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions.”).

In the past decade, Congress has re-enacted the Dornan Amendment—a District-specific version of the Hyde Amendment—which restricts the use of both federal and local funds for abortion. *See* Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, § 1572, 125 Stat. 38, 138 (2011); Jon O. Shimabukuro, Cong. Res. Serv., RL33467,

²⁵ Available at <http://www.glaa.org/archive/2001/poolandgellerruling0621.pdf>.

Abortion: Judicial History and Legislative Response 16 (2012). Congress also restricted implementation of the District's 2014 ballot initiative legalizing marijuana. *See* Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 809(b), 128 Stat. 2130, 2394 (2014).

Congressional actions such as these frequently go against the will of the District's voters. As Delegate Eleanor Holmes Norton asserts, "residents object strongly to interference from Congress, which is unaccountable to residents, in local D.C. laws and spending." Press Release, Eleanor Holmes Norton, Norton Welcomes New Members of Congress to D.C., Encourages Them to Support D.C. Statehood and Respect Home Rule (Nov. 15, 2018).²⁶ Under the current system, members of Congress from other states can impose their own views and policy priorities on the District, but District residents have no say.

C. Lack of full representation exacerbates numerous practical issues for the District.

The District's unique status as a federal territory also creates numerous practical issues for the District, and this situation is exacerbated by the District's lack of voting representation in Congress. One example is the administration of the District's state-level court system. Congress exercises exclusive authority over the District's court system, which was established through Congress's Article I authority. *See* D.C. Code § 11-101(2). All appointees to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals are nominated by the President from a list provided by the District of Columbia Judicial Nominating Commission and confirmed by the Senate. *Id.* § 1-204.33(a). District residents lack an important voice in this process because they do not have representation in the Senate.

²⁶ Available at <https://norton.house.gov/media-center/press-releases/norton-welcomes-new-members-of-congress-to-dc-encourages-them-to-0>.

Due to this aberrational process, the District can face considerable delays in filling vacancies on its courts. As Delegate Eleanor Holmes Norton recently pointed out in a letter to members of congressional leadership, 10 of 62 seats on the Superior Court and 2 of 9 seats on the Court of Appeals are currently vacant. Letter from Eleanor Holmes Norton to Mitch McConnell et al. (Mar. 28, 2019).²⁷ The Superior Court has “the highest number of case filings per capita in the United States,” *id.*, and “[d]elays in confirming nominees lead to greater strains on the court, greater caseloads and overwork for current judges” as well as “denial of due process and possibly even an inability to keep certain offenders in jail.” *Id.*; *see also* Letter from Irvin B. Nathan, Chairman, Council for Court Excellence, to Ron Johnson et al. (July 30, 2018).²⁸ The work of these courts is intensely local; they handle everything from misdemeanors and disputes over zoning to landlord-tenant issues and cases of child abuse. Yet their ability to function is entirely dependent on Congress, where the District has no vote.

In addition, under D.C. Code § 23-101(c), local felonies are prosecuted by the United States Attorney for the District of Columbia, who is appointed by the President with the advice and consent of the Senate, 28 U.S.C. § 541(a), and unaccountable to District residents.²⁹ In 2002, 82 percent of District voters supported an advisory referendum to create an elected District Attorney with authority to prosecute local crimes. *See* Press Release, Eleanor Holmes Norton, Norton Introduces Bill to Give D.C. a Local Prosecutor, Same Right Already Enjoyed by U.S.

²⁷ Available at <https://norton.house.gov/media-center/press-releases/norton-calls-on-senate-to-address-vacancy-crisis-in-local-dc-courts>.

²⁸ Available at http://www.courtexcellence.org/uploads/publications/73018_CCE_Ltr_to_Senators_re_DC_judicial_vacancies.pdf.

²⁹ The District prosecutes juveniles who commit felonies except for those who are charged with the felonies listed in D.C. Code § 16-2301(3)(A). Those individuals are prosecuted as adults by the United States Attorney unless she declines to do so, at which point the District may elect to prosecute.

Territories (Jan. 31, 2019).³⁰ To this day, Congress has failed to give the District a local prosecutor to handle felonies even though all United States territories other than the District currently have a local prosecutor for this purpose. *Id.* Again, the District has little recourse because it has no vote.

Congress's control over the District's judicial system also prevents the District from reforming its judicial processes. As Council Chairman Phil Mendelson stated at a congressional hearing, the District "cannot fix inequities in criminal sentencing without the approval of the United States Attorney General, and [it] cannot update the limits on small claims or strengthen [its] Anti-SLAPP law because [the City Council] cannot legislate judicial process." *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 65 (2014) (statement of Phil Mendelson, Chairman, Council of the District of Columbia).

The problems go beyond the judicial system. Although District voters approved a local budget autonomy referendum in 2013 providing that the portion of the District's budget consisting of local funds would automatically go into effect after the 30-day congressional review period, D.C. Act 19-632 (Jan. 18, 2013), a significant portion of the District's budget still has to be appropriated by Congress, *see* Ed Lazere, *How Does the DC Budget Get Put Together Every Year?*, Greater Wash. (Feb. 11, 2019).³¹ The congressional appropriations process is often marred by delays. In 2014, then-Mayor Vincent Gray stated that Congress had not passed the District's budget on time for the previous 16 years. Gray Testimony, *supra*, at 57. He added that waiting

³⁰ Available at <https://norton.house.gov/media-center/press-releases/norton-introduces-bill-to-give-dc-a-local-prosecutor-same-right-0>.

³¹ Available at <https://ggwash.org/view/70887/how-does-the-dc-budget-get-put-together-every-year>.

on Congress “creates costly and inefficient uncertainties for the agencies, residents, and businesses that have to plan their affairs under the District’s laws.” *Id.*

The increased frequency of federal government shutdowns has also severely impacted the District—a process that District residents are powerless to resolve through a representative in Congress. During the most recent shutdown, over one-third of the 144,000 impacted federal workers and contractors were District residents. *See* Press Release, Muriel Bowser, Statement on the Federal Government Shutdown’s Impact of the District of Columbia Government’s Revenue Estimates (Jan. 22, 2019).³² This had ripple effects on the District’s local economy and cost the District \$40 million in lost revenue. *Id.*; *see generally* Letter from Jeffrey S. DeWitt, Chief Fin. Officer, to Muriel Bowser & Phil Mendelson 1 (Jan. 22, 2019).³³

* * *

Although gaining full representation in Congress would not end the District’s reliance on Congress—a feat that could only be accomplished through statehood—it would give District residents a greater voice, and with it more control, over their own affairs. Just like American citizens who live in states, District residents are entitled to a vote in Congress.

CONCLUSION

For the foregoing reasons, the Court should deny defendants’ motion to dismiss and grant plaintiffs’ motion for summary judgment.

³² Available at <https://mayor.dc.gov/release/statement-federal-government-shutdown%E2%80%99s-impact-district-columbia-government%E2%80%99s-revenue>.

³³ Available at https://mayor.dc.gov/sites/default/files/dc/sites/mayoromb/release_content/attachments/OCFO%20Letter.pdf.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

/s/ Gavin N. Palmer
GAVIN N. PALMER
Assistant Attorney General
D.C. Bar Number 1619264
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 442-9842
(202) 730-0589 (fax)
gavin.palmer@dc.gov