No. 00-97

In the Supreme Court of the United States

LOIS E. ADAMS, ET AL., APPELLANTS

v.

WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.

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

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the three-judge court had jurisdiction over this case.

2. Whether appellants have standing.

3. Whether the equal protection component of the Fifth Amendment requires that Congress admit the District of Columbia (or at least the portion of the District outside the National Capital Service Area) as a State or make it part of an existing State.

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Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the President of the United States of America, respectfully moves that the appeal be dismissed or, in the alternative, that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. A1-A61, C1-C62) is reported at 90 F. Supp. 2d 35.

JURISDICTION

The judgment of the district court (J.S. App. B1-B2) was entered on March 20, 2000. The notice of appeal (J.S. App. H1-H2) was filed on May 17, 2000. The jurisdictional statement was filed on July 17, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

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

Congress has provided by statute that the Secretary of Commerce shall take the decennial census and report to the President "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141 (a) and (b). The President must, within one week of the convening of the new Congress following the decennial census, transmit to Congress "a statement showing the whole number of persons in each State * * * and the number of Representatives to which each State would be "entitled" under an apportionment of the then-existing number of Representatives by the method known as the method of equal

proportions. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992) (sustaining constitutionality of equal proportions method). Each State is entitled to the number of Representatives set forth in the President's statement, and the Clerk of the House of Representatives must, within 15 days of receiving the President's statement, send the executive of each State a certificate indicating that number. 2 U.S.C. 2a(b) (1994 & Supp. IV 1998).

Article I, Section 8 of the Constitution provides that Congress shall have Power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. Art. I, § 8, Cl. 17. Since the District of Columbia became the Seat of Government of the United States nearly two hundred years ago, District residents have not been considered residents of any State for purposes of the decennial census and representation in Congress. Accordingly, the District has never been apportioned any Representatives in the House of Representatives, and provision has not been made for the citizens of the District to vote in congressional elections. See J.S. App. A38, C13.

2. a. On June 30, 1998, appellants—a group of District residents—commenced this action against President Clinton, the Clerk and Sergeant at Arms of the House of Representatives, and the District of Columbia Financial Responsibility and Management Assistance Authority (Control Board). Appellants contended that the District is similarly situated to three types of areas over which the United States has exercised or currently exercises exclusive legislative authority: (1) federal enclaves located within States; (2)

the land originally within the District of Columbia but subsequently retroceded to Virginia; and (3) the former continental territories of the United States. J.S. App. F11, ¶¶ 60-61; J.S. 1-2. Appellants noted that, by granting jurisdiction over enclaves to the States, granting statehood to the continental territories, and retroceding a portion of the District of Columbia to Virginia, Congress has enabled the residents of each of those areas to vote in congressional elections. See J.S. App. F9-F11, ¶¶ 46-49, 57-59; J.S. 6-9. In light of those congressional actions, appellants alleged that the equal protection component of the Due Process Clause of the Fifth Amendment requires Congress either to grant statehood to the District or to retrocede it to an existing State. See J.S. App. F24-F27. Appellants also alleged that their lack of congressional representation and the absence of "a state government, insulated from Congressional interference in matters of local concern," violates the Guarantee Clause of Article IV, Section 4. J.S. App. F19-F20, ¶¶ 102-104, 109-111. That Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. Art. IV, § 4.

Appellants requested judgments declaring that: (1) they have the right to congressional representation and to be included within a congressional apportionment; (2) they have a right to a state government insulated from congressional interference; (3) Congress's failure to ensure that the District is apportioned Representatives is unconstitutional; and (4) the imposition by Congress of the Control Board and all other actions uniquely

directed at the District are unconstitutional. J.S. App. F22-F24. Appellants also requested injunctions that would remain in effect until the portion of the District that falls outside the "National Capital Service Area" is admitted as a State or becomes part of an existing State.[1] The injunctions would: (1) prohibit the President from approving, implementing, or enforcing any Congressional action directed solely to the District (unless that action has been ratified by the citizens of the District or their elected representatives); (2) require the President to transmit to Congress an apportionment of one Representative for each State (or no apportionment at all); (3) require the defendant House Officers to certify, enroll, and admit to the House floor at most one Representative for each State; and (4) require the Control Board to cease operations. *Id.* at F24-F28.

The district court consolidated this case with *Alexander* v. *Daley*, Civ. No. 98-2187 (D.D.C.), a separate suit by the District of Columbia and various District residents alleging, *inter alia*, that the District should be treated as a "State" under Article I of the Constitution and that its residents are therefore entitled to representation in both the House of Representatives and the Senate. See J.S. App. G2. The district court determined that the consolidated cases should be heard by a three-judge district court under 28 U.S.C. 2284(a), which requires that a three-judge court

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[1] The National Capital Service Area includes "the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building" and the immediately surrounding streets. See 40 U.S.C. 136(a), (f) and (g).

pass on claims "challenging the constitutionality of the apportionment of congressional districts." See J.S. App. G1-G10.

b. On March 20, 2000, the three-judge court dismissed appellants' claims insofar as they relate to the apportionment of Representatives. J.S. App. B1-B2. The court held that appellants present a justiciable case or controversy and that they have standing to pursue their claims. See *id.* at A6-A15. The court, however, rejected appellants' claims on the merits. See *id.* at A49-A61.[2]

As relevant to appellants' claims, the court held that the lack of representation of residents of the District of Columbia in the House of Representatives does not

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[2] The three-judge court also entered judgment against the plaintiffs in *Alexander* on their claims concerning apportionment of Representatives. See J.S. App. B1-B2. The appeal from that judgment is currently before this Court in No. 99-2062, and we have filed a separate motion to affirm in that case. To the extent appellants and the plaintiffs in *Alexander* raised claims relating to representation in the Senate, the three-judge court remanded those claims to the single-judge court. J.S. App. A4, B2. The three-judge court also remanded to the single-judge court appellants' claims challenging "Congress's continuing exercise of exclusive authority over matters of local concern, particularly their challenge to the existence of the Control Board." *Id.* at A4; see also *id.* at A54 n.63. The three-judge court concluded that the remanded claims "do not directly challenge congressional apportionment and therefore * * * fall outside the language of [28 U.S.C.] 2284(a)." *Ibid.* The single-judge court entered judgment against the *Alexander* plaintiffs and appellants on the remanded claims, see 90 F. Supp. 2d 27 (D.D.C. 2000), and both the *Alexander* plaintiffs and appellants have appealed to the United States Court of Appeals for the District of Columbia Circuit. No. 00-5238 (D.C. Cir.) (*Alexander*) (held in abeyance pending this Court's resolution of the appeal in S. Ct. No. 99-2062); No. 00-5239 (D.C. Cir.) (*Adams*) (motion to hold in abeyance pending).

deprive its residents of the equal protection of the laws. See J.S. App. A50-A54. The court explained that the "right to vote in federal elections is conferred by Art. I, § 2, of the Constitution." *Id.* at A51 (quoting *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). That provision, however, withholds from District residents the right to vote. See J.S. App. A17-A34 (summarized in U.S. Mot. to Affirm at 9-24 in *Alexander* v. *Mineta*, No. 99-2062). Thus, the court concluded, "the inability of District residents to vote is a consequence of Article I." J.S. App. A53. Similarly, the court reasoned, "the contrasting ability of enclave residents to vote is not the consequence of legislative line drawing, but rather of [this] Court's decision in *Evans* [v. *Cornman*, 398 U.S. 419 (1970),] that enclave residents have a constitutional right to vote" because they are citizens of the State in which the enclave is located. See J.S. App. A53. The district court concluded that it was unable to extend the holding in *Evans* to residents of the District of Columbia "both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of [this] Court's decision in *Albaugh* [v. *Tawes*, 379 U.S. 27 (1964)]," which summarily affirmed a ruling that the District of Columbia is not a part of Maryland for the purpose of electing United States Senators. J.S. App. A53; see also *id.* at A34-A35, A45-A49.[3]

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[3] To the extent that appellants challenge as a violation of equal protection "Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar authority to the states in the federal enclaves * * * *regardless* of whether District residents may vote for Congress," the three-judge court remanded that claim to the single-judge court. J.S. App. A54 n.63. See also note 2, *supra*.

The court also rejected appellants' claim under the Guarantee Clause of Article IV, Section 4. J.S. App. A58-A59. The court questioned whether that claim presents a political question improper for judicial resolution, but concluded that, in any event, the claim "does not present a substantial federal question." *Id.* at A59. The court explained that the Constitution itself places the District under the exclusive control of Congress and does not grant District residents the right to congressional representation. The court accordingly concluded that the Guarantee Clause does not confer voting rights that were withheld from District residents by Article I. *Ibid.*

Judge Oberdorfer concurred in part and dissented in part. J.S. App. C1-C62. He agreed with the court's rulings with respect to standing and jurisdiction but dissented from its holdings on the merits. *Id.* at C1 n.1, C5. Judge Oberdorfer would have held that the cession of the land that became the District could not terminate the voting rights of the residents of that land before the cession, nor could it terminate those rights with respect to the current residents of the District, who are the "political posterity" of the 18th Century residents. *Id.* at C16-C24. Judge Oberdorfer also would have held that denying District residents the right to vote in national elections is an equal protection violation because, in his view, the United States has no legitimate interest in denying that right to residents of the District of Columbia, while granting it to residents of States and federal enclaves and to overseas residents. *Id.* at C49-C62.

ARGUMENT

The three-judge district court lacked jurisdiction over appellants' claim that equal protection principles require Congress either to admit the District of Columbia (or at least the portion of the District outside the National Capital Service Area) as a State or to make the District part of an existing State. Moreover, appellants lack standing to seek the relief that they have requested from any federal court. In these circumstances, this Court should dismiss the appeal. Alternatively, the Court should affirm the judgment of the three-judge court because appellants' constitutional claim lacks merit.[4]

1. a. The three-judge court did not have jurisdiction over appellants' equal protection claim. A three-judge court has jurisdiction to decide actions "challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. 2284(a). Appellants in this case, however, are not "challenging the constitutionality of the apportionment of congressional districts" within the meaning of Section 2284(a).[5]

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[4] In their jurisdictional statement to this Court, appellants do not press the claim under the Guarantee Clause of Article IV, Section 4, that they raised in the district court. In any event, the district court correctly rejected that claim, which is not justiciable and, if justiciable, lacks merit. See J.S. App. A58-A59 (rejecting claim on the merits); *Baker* v. *Carr*, 369 U.S. 186, 218-227 (1962) (explaining why most claims under the Guarantee Clause are not justiciable).

[5] Although the government did not argue before the three-judge court that the court lacked jurisdiction over appellants' claim, the government did make that argument to the single-judge court when the single-judge court was considering the motion to convene a three-judge court. See President Clinton's Response to the Amici Curiae Memorandum Addressing the Issue of the Three-

The gravamen of appellants' equal protection claim is that "Congress violates the rights of D.C. residents because it has not placed D.C. residents in *the same status* (actual citizenship in states) as it has placed all other people over whom Congress has or has had identical powers." J.S. 15. Their claim is thus a challenge to the status of the District of Columbia and its residents. If appellants were to prevail on their claim, and Congress were to make the District a State or part of an existing State, the consequence could well be a change in the apportionment of Representatives. But the mere fact that a suit could trigger a chain of events that would lead to a change in apportionment does not make the suit itself a challenge to "the constitutionality of the apportionment of congressional districts" under Section 2284(a). See *City of Philadelphia* 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); see also *Federation for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 577-578 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980).

Unlike the plaintiffs in a suit that is properly within the purview of a three-judge court, appellants do not contend that the current apportionment of any congressional district is unconstitutional. Compare *Franklin* v. *Massachusetts*, 505 U.S. 788, 790-791 (1992) (suit challenging method of counting federal employees serving overseas for apportionment purposes that had resulted in the shift of a Representative from Massachusetts to

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Judge Court 1-5. In any event, the question whether the three-judge court had authority to pass on appellants' claim is jurisdictional and can therefore be raised at any time.

Washington); *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 446 (1992) (suit challenging the constitutionality of method of apportionment that had resulted in Montana losing one of its Representatives). Nor do appellants contend that the District of Columbia, in its current status, is entitled to be allocated a Representative under the apportionment of Representatives required by Article I, Section 2 of the Constitution and Section 2 of the Fourteenth Amendment. Rather they contend that the status of the District must first be changed. Appellants therefore recognize that an Act of Congress is required in order for District residents to become citizens of a State and thereby acquire a right under the Constitution to vote in congressional elections. See J.S. 3 n.2, 16, 22. Thus, as appellants acknowledged to the single-judge court during proceedings on the claims remanded from the three-judge court, appellants "*do not* come to court demanding 'representation' in Congress." 98-1665 Pls.' Reply to Defs.' Opp. to Mot. for Summary J. 2 (D.D.C. Apr. 12, 2000) (referencing appellants' original complaint). As a result, appellants' claim was not properly before the three-judge court.[6]

"When an appeal to this Court is sought from an erroneously convened three-judge district court, [this Court] retain[s] the power to make such corrective order as may be appropriate to the enforcement of the limitations which 28 U.S.C. § 1253 imposes" on this Court's jurisdiction. *Norton* v. *Mathews*, 427 U.S. 524,

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[6] Indeed, appellants seem to acknowledge that there is substantial doubt whether their claim was properly before the three-judge court. See J.S. 21-27 (discussing the issue); J.S. 30 (acknowledging that this Court might "doubt[] its jurisdiction over this appeal").

531 (1976). One course of action is for this Court to vacate the district court's judgment and remand the case for the entry of a fresh decree from which an appeal may be taken to the court of appeals. *Ibid.*; *e.g.*, *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974). Here, however, as in *Norton*, 427 U.S. at 531-532, that course of action is unnecessary. As we explain below, appellants lack standing to seek the relief they have requested from any federal court; and, as we explain below, and in our motion to affirm in *Alexander*, appellants' claims are insubstantial on the merits. In these circumstances, and especially if the Court affirms the judgment of the three-judge court in *Alexander*, there is no point in remanding the case for further consideration. Instead, the Court should dismiss the appeal. Cf. *id.* at 530-533 (appeal dismissed because claim was wholly insubstantial in light of companion case decided the same day, even though three-judge court may have lacked jurisdiction); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (explaining Court's holding in *Norton*); *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 344 (1999) (dismissing appeal from three-judge court for lack of substantial federal question because of ruling in companion case, even though there was a threshold question of the standing of the House of Representatives to sue, see *id.* at 364-365 (Stevens, J., dissenting)).[7]

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[7] That course of action is particularly appropriate because it is not entirely clear whether the three-judge court rejected the claim that appellant raises here on the merits or remanded that claim to the single-judge court. As explained in note 3, *supra*, the three-judge court remanded appellants' equal protection claim to the extent it challenged "Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar

b. As we have noted above (see p. 10, *supra*), the gravamen of appellants' equal protection claim is their contention (J.S. 15) that "Congress violates the rights of D.C. residents because it has not placed D.C. residents in *the same status* (actual citizenship in states) as it has placed all other people over whom Congress has or has had identical powers." Appellants thus seek to have the District of Columbia made a State or part of an already-existing State. But Congress must act affirmatively to provide such relief, and no court can properly order Congress to take such action.[8] Appellants candidly acknowledge this difficulty:

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authority to the states in the federal enclaves * * * *regardless* of whether District residents may vote for Congress." J.S. App. A54 n.63. At the same time, however, the court entered judgment against appellants on those claims that "challenge the apportionment of congressional districts." *Id.* at B1-B2. It is unclear whether the three-judge court considered the claim appellants press in this Court—which seeks to require Congress to change the status of the District—to have been encompassed in its remand or its judgment of dismissal.

[8] As we note at page 18, *infra*, Article IV, Section 3, Clause 1 of the Constitution entrusts exclusively to Congress the decision whether to admit a new State to the Union. In addition, the Speech and Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, and the separation of powers prohibit courts from enjoining Congress or its Members regarding the performance of their constitutional responsibilities. See *Gravel* v. *United States*, 408 U.S. 606, 624-625 (1972); *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment).

Because considerations similar to those limiting the authority of the courts to issue injunctive relief against Congress and the President apply to the issuance of declaratory relief, see *Swan* v. *Clinton*, 100 F.3d 973, 976 n. 1 (D.C. Cir. 1996), the declaratory relief that appellants seek is beyond the power of the courts to provide. See also *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (equivalence of effect between declaratory and

> No court can order Congress to admit the District of Columbia as a state, nor can a court determine that the District already *is* a state. Admission to statehood is a political act which lies with Congress. * * * Neither does *Adams* ask the Court to conclude that, after 200 years of legal and political separation from the State of Maryland, the District of Columbia always has remained part of Maryland. * * * [A]ctual unification of the District with Maryland would require *political* acts by the people of the District and Maryland and by Congress.

J.S. 3 n.2.

Appellants therefore do not seek an injunction ordering Congress to make the District of Columbia a State or part of an already-existing State. Instead, as described above, appellants request injunctions requiring the President to transmit to Congress an apportionment of at most one Representative per State—and requiring the defendant House Officers to certify, enroll, and admit to the House floor at most one

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injunctive relief against federal officers dictates an equivalence of criteria for issuance). To the extent that appellants seek a declaration that the District of Columbia must be made a State or part of an existing State, that declaration would have much the same practical effect as an injunction that Congress must admit the District as a State or make it part of an existing State. Declarations that appellants have the right to congressional representation and that Congress's failure to ensure that the residents of the District have a status that in turn entitles them to vote for a Representative is unconstitutional would also have a comparable effect because, as appellants concede (J.S. 16, 22), they can vote for a Representative only if Congress acts to make them citizens of a State. (The requested declaration that the Control Board and all other actions uniquely directed at the District are unconstitutional relates to appellants' remanded claims, see note 9, *infra*, and is thus not at issue in this appeal.)

Representative from each State—until the District of Columbia is made a State or a part of a State. See p. 5, *supra*.[9] Those injunctions, however, would not themselves redress appellants' alleged injuries They would not require Congress to treat the District the same as it has treated federal enclaves, the continental territories, or the portion of the District that Congress retroceded to Virginia. Nor would they allow appellants to vote in congressional elections. And appellants have not demonstrated that it is "'likely', as opposed to 'merely speculative'" that the injunctions would (as a result of independent action by Congress) lead to those results. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Moreover, the requested injunctions (see J.S. App. F25-F27) would require the President and the House Officers to violate the Constitution. Article I, Section 2 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." U.S. Const. Art. I, § 2, Cl. 3; see also *id.* Amend. XIV, § 2. That provision forms part of the "Great Compromise" that ensured equal representation among States in the Senate and representation based on population in the House of Representatives. See *INS* v. *Chadha*, 462 U.S. 919, 950 (1983). The proposed injunctions would destroy the

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[9] In the district court, appellants also requested that the President be enjoined from approving, implementing, or enforcing any Congressional action directed solely to the District (unless that action has been ratified by District residents or their elected representatives). See p. 5, *supra*. That request related to appellants' claim concerning Congress's continuing exercise of exclusive authority over matters of local concern, which the three-judge court properly remanded to the single judge. See notes 2-3, *supra*. In any event, the courts lack authority to issue such an injunction for the reason described in note 11, *infra*.

Great Compromise by apportioning no more than a single Representative to each State instead of apportioning Representatives by population. See J.S. App. F25-F27.[10] Neither the President nor the House Officers may properly be ordered to undertake such action.[11]

If the three-judge court properly had jurisdiction under 28 U.S.C. 2284(a) over appellants' claim, this

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[10] The injunctions would also require the President and House Officers to violate 2 U.S.C. 2a, which appellants have not challenged in this suit and which requires that the "method of equal proportions" be used to apportion the House. See 2 U.S.C. 2a(a) and (b) (1994 & Supp. IV 1998); *Montana*, 503 U.S. at 451-455, 465-466.

[11] The injunction that plaintiffs seek against the President is beyond the power of the courts to issue for the additional reason that the courts cannot enjoin the President to perform a non-ministerial task. See *Franklin*, 505 U.S. at 802-803 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White & Thomas, JJ.); *id.* at 827 (Scalia, J., concurring in part and concurring in the judgment). As explained above, appellants seek an injunction requiring the President to transmit to Congress an apportionment in which each State is apportioned no more than one Representative. Such action (which conflicts with the Constitution and a federal statute) is not ministerial. Cf. *id.* at 824-825 (Scalia, J.). In *Franklin*, a plurality of this Court reasoned that the plaintiffs had standing notwithstanding any bar to issuing an injunction against the President because the plaintiffs also sought an injunction against the Secretary of Commerce. See 505 U.S. at 803 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White & Thomas, JJ.). The Secretary of Commerce is not, however, a party to this action; nor is he capable of granting any of the relief that appellants have requested. (He is a party in the *Alexander* case, but consolidation does not "make those who are parties in one suit parties in another." See *Johnson* v. *Manhattan Ry.*, 289 U.S. 479, 496-497 (1933)). Given the other fatal defects in appellants' suit, there is no reason to permit appellants to add the Secretary as a party at this juncture.

Court would be warranted in affirming that court's dismissal of appellants' claim on the alternative ground that appellants lack standing. However, dismissal of the appeal rather than affirmance of the judgment is warranted because there is at least a substantial question as to the jurisdiction of the district court under Section 2284(a), but appellants' lack of standing clearly forecloses their ability to obtain relief from the federal courts. Cf. *Norton*, 427 U.S. at 530-533; *Department of Commerce*, 525 U.S. at 344.[12]

2. If this Court does not dismiss this appeal, the Court should affirm the judgment of the district court either because, as we have just explained, appellants lack standing, or because, as we explain below, appellants' equal protection claim lacks merit.

a. Appellants contend (J.S. 2, 9-11, 17) that equal protection principles require Congress to treat residents of the District of Columbia identically to the residents of federal enclaves, the former continental territories, and the retroceded portion of the District. Because the residents of those areas are eligible to vote in congressional elections, appellants contend that Congress must provide similar treatment for residents of the District, either by admitting into statehood the portion of the District that falls outside the National Capital Service Area or retroceding that portion of the

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[12] That course of action is fully consistent with this Court's holding in *Steel Company*, 523 U.S. at 94-95, that courts may not bypass potential jurisdictional defects and resolve the merits of a claim. Standing is also a jurisdictional question and thus this Court may properly resolve it without first resolving the jurisdictional question under Sections 2284(a) and 1253. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693, 704 (2000); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66-67 (1997); see also *Steel Co.*, 523 U.S. at 98.

District to an existing State. See also J.S. App. F24-F27.

The inability of the residents of the District of Columbia to vote in congressional elections is, however, simply one of the attributes that distinguishes the District from the States under the Constitution. Appellants' contention that Congress must transform the District, and essentially abandon its distinct status, in order to eliminate that one consequence is wholly without merit.

Appellants' claim that Congress must treat the District, federal enclaves, and the territories in an identical manner with respect to inclusion within a State 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"); *id.* Art. IV, § 3, Cl. 2 (Congress may "dispose of and make all needful Rules and Regulations respecting" the territories); *Northern Pipeline 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. *United States*, 37 U.S. (12 Pet.) 524, 619 (1838). There is no indication in the text that Congress must exercise that plenary authority in the same manner with respect to all of the areas. Similarly, Congress's authority to admit new States into the Union is limited only by the prohibition against forming new States within the jurisdiction of existing States or by joining the whole or parts of existing States without the consent of the existing States. See U.S. Const. Art. IV, § 3, Cl. 1.

Congress's power to exercise its plenary authority over the District, federal enclaves, and territories differently with respect to each type of area is reinforced by the Constitution's use of separate language to convey the authority over each. The grant of authority over the territories is contained in a separate article of the Constitution from the grant of authority over the District and the enclaves. Compare U.S. Const. Art. IV, § 3 with *id.* Art. I, § 8, Cl. 17. And, although the grants of authority over the District and the enclaves are both contained in Clause 17 of Article I, Section 8 of the Constitution, that Clause separately addresses first the District and then the enclaves. See *id.* Art. I, § 8, Cl. 17. Moreover, the Clause distinguishes between the District and the enclaves in terms of their relationship to the States. It refers to the "State in which [an enclave] shall be," but provides that the District constituting the Seat of Government is to be created by "Cession of particular States," thereby contemplating a complete severance of the District from those States.

Consistent with the Constitution's text and structure, Congress has, for two hundred years, treated the District, federal enclaves, and territories differently from one another, and Congress has made statehood and retrocession decisions on a case-by-case basis. Under appellants' theory, in contrast, once the first continental territory was admitted as a State, Congress presumably was required immediately to admit all other territories and to acquire no new territory without granting it immediate statehood, to relinquish exclusive jurisdiction over all federal enclaves and never to exercise exclusive jurisdiction over an enclave in the future, and to admit the District as a State or make it part of an existing State. It is unlikely that

such a requirement, if it existed, would have gone unremarked for so extended a period of time.

Appellants' contention that Congress must make the District a State or part of an existing State is also inconsistent with the purpose of the District Clause. The Founders believed that an independent Seat of Government was necessary to ensure that the National Government would not have to depend on another sovereign for its protection. As Madison explained, if the Seat of Government were located 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.

The Federalist No. 43, at 289 (Jacob E. Cooke ed. 1961). Indeed, as the district court pointed out (J.S. App. A24 n.25), the Continental Congress confronted that problem when Pennsylvania failed to call out its militia to protect the Congress from protesting soldiers in Philadelphia, and the Congress was forced to adjourn abruptly to New Jersey.

b. Appellants attempt to overcome the above considerations by contending that Congress need retrocede or admit into statehood only the portion of the current District outside the National Capital Service Area, which includes the principal government buildings and offices. See J.S. 2 n.1; p. 5 & note 1, *supra*. Defining the proper boundaries of the District, however, is a matter for Congress, and Congress's decision not to reduce the

size of the District to encompass only the National Capital Service Area does not violate equal protection principles.

As we have explained, Congress has plenary authority over the District. See p. 18, *supra*. That authority includes the power to determine the District's boundaries, subject only to the Constitution's express limitation that the District may not exceed "ten Miles square," U.S. Const. Art. I, § 8, Cl. 17. Because the current District complies with that limitation, the decision whether to retrocede to Maryland the portion of the District that rests outside the National Capital Service Area or to admit that portion of the District into statehood lies squarely within the discretion committed to Congress by the text of the Constitution. Congress's exercise of that discretion is not an appropriate subject for judicial review. See *Downes* v. *Bidwell*, 182 U.S. 244, 312 (1901) (White, J., concurring) (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). Cf. *Nixon* v. *United States*, 506 U.S. 224, 229-231 (1993).[13]

Even if we assume *arguendo*, however, that congressional judgments regarding the District's boundaries are subject to some measure of judicial review for

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[13] It is unclear whether Congress has the power to make the District part of an existing State without that State's acquiescence. Adding the District to an existing State would change that State's borders, and altering a State's borders requires the State's consent in at least some circumstances. See U.S. Const. Art. IV, § 3, Cl. 1 (discussed at p. 18, *supra*); cf. *M'Laughlin* v. *Janney*, 47 Va. (6 Gratt.) 609, 610 (1850) (noting that Virginia enacted two statutes accepting retrocession of the land it had previously ceded for the District).

compliance with equal protection principles, appellants err in suggesting (J.S. 10, 18, 29) that those judgments are subject to heightened scrutiny. Rather, the Court must sustain Congress's judgments if they are supported by a rational basis. As explained above, the Constitution vests Congress with plenary authority over the District, and its judgments in this area are therefore entitled to great deference. Cf. *Harris* v. *Rosario*, 446 U.S. 651, 651-652 (1980) (per curiam) (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). That is so even though voting rights may be affected. 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); *Montana*, 503 U.S. at 464 (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).[14]

Contrary to appellants' contention (J.S. 2), Congress has a sound basis for treating residents of the District of Columbia differently from residents of federal enclaves and the continental territories. Federal enclaves, unlike the District, are located within the

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[14] Appellants do not (nor could they) contend that District residents are entitled to heightened scrutiny as 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, 135-136 & n.12 (D.C. Cir. 1984) (en banc) (Scalia, J.) (stating same in dictum).

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* v. *Cornman*, 398 U.S. 419, 421 (1970). In addition, both federal enclaves and the continental territories are temporary in nature. Continental territories were "impermanent" and "from the beginning destined for admission as * * * states." *O'Donoghue* v. *United States*, 289 U.S. 516, 537, 538 (1933). 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.* v. *Lowe*, 114 U.S. 525, 542 (1885). By contrast, the District is 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 (accepting the District "for the permanent seat of the government of the United States").

Congress also has a rational basis for treating the remaining portion of the District differently from the land that Congress retroceded to Virginia in 1846. In the statute providing for retrocession, Congress explained that the retroceded portion of the District was not similarly situated to the remainder:

> [N]o more territory ought to be held under the exclusive legislation given to Congress over the District which is the seat of the General Govern-

> ment than may be necessary and proper for the purposes of such a seat; and * * * experience hath shown that the portion of the District of Columbia ceded to the United States by the State of Virginia has not been, nor is ever likely to be, necessary for that purpose.

An Act to Retrocede the County of Alexandria, in the District of Columbia to the State of Virginia, ch. 35, 9 Stat. 35. Congress thus has made the determination, based on actual experience, that the remaining portion of the District is, or at least may at some time be, "necessary and proper for the purposes of" the "seat of the General Government." See *ibid.* There is no cause to second- guess that reasonable judgment.[15]

c. Finally, appellants' contention that the Constitution requires Congress to make the District of Columbia (or at least the portion where its citizens reside) either a State or part of an existing State ignores the significance of the Twenty-third Amendment to the Constitution. Far from eliminating the unique status

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[15] Because strict scrutiny does not apply, appellants' reliance (J.S. 25-26) on this Court's intrastate redistricting decisions (*e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964)) is misplaced. Moreover, as the district court explained (J.S. App. A17-A34), the provisions of Article I preclude residents of the District of Columbia from voting in congressional elections, and the principle of "one person, one vote" has never been held to override the representation scheme established by the Constitution itself. Indeed, the Senate and the Electoral College do not comport with the "one person, one vote" principle, but that does not render them unconstitutional. See *Reynolds*, 377 U.S. at 574-575; *Gray* v. *Sanders*, 372 U.S. 368, 378 (1963). Similarly, the constraints on the apportionment of Representatives dictated by Article I, Section 2 itself make the goal of complete voting equality that is reflected in the one person, one vote cases "illusory for the Nation as a whole." *Montana*, 503 U.S. at 463; see also *Wisconsin* v. *City of New York*, 517 U.S. at 17.

of the District of Columbia, as appellants urge, the Twenty-third Amendment preserves the status of the District as distinct from that of a State. The Amendment addressed the previous inability of District residents to vote in *any* federal election by providing for the District to appoint electors for President and Vice President. But the Amendment does not provide for the election of Senators and Representatives from the District. See U.S. Motion to Affirm at 13-14 in *Alexander* v. *Mineta*, No. 99-2062. The result appellants seek—to eliminate the special status of the District and to require Congress to provide a way for District residents to vote in congressional elections as well—is fundamentally inconsistent with the course that Congress and the States chose in proposing and ratifying the Twenty-third Amendment.

CONCLUSION

The appeal should be dismissed. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 2000