May 22, 2021

The Honorable Nancy P. Pelosi
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

The Honorable Kevin O. McCarthy
Minority Leader
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Schumer
Majority Leader
United States Senate
Washington, D.C. 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20515

Re: Washington, D.C. Admission Act,
H.R. 51 and S.51 (the "D.C. Admission Act")

Dear Congressional Leaders:

As scholars of the United States Constitution, we write to correct claims that the D.C. Admission Act is vulnerable to a constitutional challenge in the courts. For the reasons set forth below, there is no constitutional barrier to the State of Washington, Douglass Commonwealth (the "Commonwealth") entering the Union through a congressional joint resolution, pursuant to the Constitution's Admissions Clause, just like the 37 other states that have been admitted since the Constitution was adopted. Furthermore, Congress's exercise of its express constitutional authority to decide to admit a new state is a classic political question, which courts are highly unlikely to interfere with, let alone attempt to bar.

The D.C. Admission Act. The House passed the Act, as H.R. 51, on April 22, 2021, and as of this writing, the substantively identical companion bill (S.51) is under consideration by the Senate. The Act provides for the issuance of a congressional joint resolution declaring the admittance as a State of most of the territory currently comprising the District of Columbia, while the seat of government (defined as the "Capital") will fall outside of the boundaries of the new State and remain under federal jurisdiction. The Act also repeals the provision of federal law that establishes the current mechanism for District residents to participate in presidential elections, pursuant to Congress's authority under the Twenty-Third Amendment; and provides for expedited consideration of the repeal of that Amendment.

The Admissions Clause grants Congress constitutional authority to admit the Commonwealth into the Union. The starting point for a constitutional analysis of the Act is the Constitution's Admissions Clause (Art. IV, Sect. 3), which provides that "New States may be admitted by the Congress into this Union." The Clause "vests in Congress the essential and discretionary authority to admit new states into the Union by whatever means it considers

appropriate as long as such means are framed within its vested powers."[1] *Every* State admitted into the Union since the Constitution was adopted has been admitted by congressional action pursuant to this Clause; *no* State has been admitted pursuant to a constitutional amendment.

The Supreme Court has broadly construed Congress's assigned power to admit new states and has never interfered with Congress's admission of a state, even when potentially legitimate constitutional objections existed. For example, in 1863, Congress admitted into the Union West Virginia, which had been part of the State of Virginia, in potential violation of a provision of the Admissions Clause that bars the formation of a new State out of a portion of the territory of another State without the consent of the ceding State. The Supreme Court, however, did not bar West Virginia's admission; to the contrary, it later tacitly approved of it.

Some critics of the D.C. Admission Act have suggested that Maryland's consent might be required under the foregoing provision of the Admissions Clause. This objection mistakenly presupposes that Maryland retains a reversionary interest in the territory currently composing the District of Columbia, which Maryland ceded to the federal government when the District was established in 1791. In fact, Maryland expressly relinquished all sovereign authority over the territory at issue when the federal government accepted it. The express terms of the cession state that the territory was "for ever ceded and relinquished to the congress and government of the United States, in *full and absolute right*, and *exclusive jurisdiction* …."[2] As Viet D. Dinh, who served as an Assistant Attorney General during the presidency of George W. Bush, has explained, because Maryland's cession of the territory now constituting the District was full and complete, it severed D.C. residents' now far distant "political link with" Maryland.[3] The current District is not part of Maryland, and Maryland has no claim on any portion of the District's territory. There is accordingly no basis to require Maryland's consent for the establishment of the new State.

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[1] Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 Case W. Res. J. Int'l L. 315, 317 (1981).

[2] Prepared Statement of Viet D. Dinh, Before the Committee of Homeland Security and Governmental Affairs of the United States Senate (Sept. 14, 2014) ("Dinh Statement") (quoting 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), quoted in Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev.,60 Geo. Wash. L. Rev. 160, 179 (emphasis added) (1991).

[3] As Dinh has further explained, the formation of the State of Ohio provides a direct precedent. A portion of what, in 1802, became Ohio had previously been part of Connecticut. But, because Connecticut had unqualifiedly ceded the territory at issue to the United States (just as Maryland ceded the territory now composing the District), Congress did not require, and did not seek, Connecticut's permission when it approved Ohio's admission to the Union. Dinh Statement, *supra* (citing The Enabling Act of 1802, 2 Stat. 173 (1802); 5 *The Territorial Papers of the United States* 22-24 (Clarence Edwin Carter ed., 1934)); *see also* Raven-Hansen, *supra*, at167-69 (same).

The Constitution's District Clause poses no barrier to admitting the Commonwealth into the Union. The Constitution's District Clause grants Congress power to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[4] Based on this Clause, Congress established the current District of Columbia, which (as explained) was taken from territory ceded by Maryland, as well as Virginia.

The D.C. Admission Act complies with the District Clause because it provides that the Capital -- which is defined in the Act to include (among other things) 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 -- will not become part of the new State and will remain under the sovereignty of the federal government.

Some critics have argued that the District Clause somehow mandates that the District of Columbia permanently retain all of its current territory, and that its size may neither be increased or reduced by Congress. The plain language of the District Clause says no such thing; it does not mandate that the District be any size or shape, except it limits the *maximum* size of the federal enclave to ten square miles.

Historical practice confirms that Congress can change the size of the District. In 1791, Congress altered the District's southern boundary to encompass portions of what are now Alexandria, Virginia and Anacostia. Then, in 1846, Congress retroceded Alexandria and its environs back to Virginia. As a result, the territory composing the District was reduced by a third.[5]

At the time of the 1846 retrocession, the House's Committee on the District of Columbia considered, and rejected, the very argument that critics of the D.C. Admission Act are raising today, reasoning that the "true construction of [the District Clause] would seem to be solely that Congress retain and exercise exclusive jurisdiction" over territory comprising the "seat of government." The language of the District Clause, the legislators observed, places no mandate on the size, or even the location, of that seat of government, other than preventing the government from "hold[ing] more than ten miles for this purpose."[6] The House's judgment was correct in 1846, and remains so today.

The Twenty-Third Amendment does not prevent Congress from granting the Commonwealth statehood. Opponents of statehood have suggested that the Twenty-Third

[4] U.S. Const. art. I, § 8, cl. 17.
[5] *See* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).
[6] Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 29-325, at 3-4 (1846).

Amendment bars Congress from exercising its constitutionally enumerated authority to grant statehood to the Commonwealth. In fact, the Amendment poses no barrier to the admission of the Commonwealth into the Union through an act of Congress, in accordance with the plain language of the Admissions Clause, just as Congress has done in connection with the admission of several other States, including most recently Alaska and Hawaii.

Section 1 of the Twenty-Third Amendment, which was ratified in 1961, provides:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State.[7]

By its plain terms, the Amendment poses no barrier to Congress's admission of the Commonwealth into the Union. Indeed, it is entirely silent on the matter.

The only question raised by the existence of the Twenty-Third Amendment is a practical, not a constitutional one: How best to address the Twenty-Third Amendment's provision for the assignment of presidential electors to what will become a vestigial seat of government, with virtually no residents? The Act satisfactorily addresses this question by providing for the repeal of the provision of federal law that establishes the current mechanism for District residents to participate in presidential elections, pursuant to Congress's authority under the Twenty-Third Amendment, as well as by commencing the process for repealing the Amendment itself.

Initially, the Act provides for an expedited process for repeal of the Twenty-Third Amendment, a process that should move forward to ratification swiftly and successfully once the Commonwealth is admitted as a State. None of the other 50 States has reason to seek to retain three electors for a largely unoccupied seat of government.

But the Act also addresses the possibility that the Twenty-Third Amendment is not promptly repealed by mandating the immediate repeal of the provision of federal law that provides the current mechanism for District residents to participate in federal elections.

In 1961, following the adoption of the Twenty-Third Amendment, Congress exercised its enforcement authority by enacting legislation (codified at 3 U.S.C. § 21), providing that the District residents may select presidential electors; the votes of the electors are currently awarded to the ticket prevailing in the District's presidential election.[8]

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[7] U.S. Const. amend. XXIII, § 1.
[8] 3 U.S.C. § 21.

The existing statutes fall within the broad authority granted to Congress by the Twenty-Third Amendment to define the terms of, and effectuate, the District's participation in presidential elections. The Amendment allows for the appointment of a number of Electors "in such manner as the Congress may direct." The Amendment also allows Congress to select the number of Electors the District may receive, subject only to a maximum: The District may participate in the presidential Electoral College through the appointment of no more electors than those of the smallest State, *i.e.*, three. And section 2 of the Amendment grants Congress the power to "enforce" the provision "by appropriate legislation," as it did in 1961.

But once Congress acts again, pursuant to its express grant of constitutional authority, and repeals the legislation that creates the existing procedure for District residents to select presidential electors, that will remove the legislative provision providing for the District's participation in presidential elections. Without such a provision, there is no mechanism for identifying the Capital area's electors or allocating their votes.[9]

Some scholars have questioned whether that approach is satisfactory. They contend that the Twenty-Third Amendment is self-enforcing, and effectively mandates the appointment of electors on behalf of the District of Columbia, regardless of whether such appointment is called for under a federal statute. Some of us disagree; indeed, the very existence of Section 2 of the Amendment makes clear that enabling legislation is required to effectuate the District's participation in the presidential election process.[10] And Congress's 1961 enforcement legislation supports this interpretation.

Even if this self-enforcement argument were to be accepted, however, Congress could easily address it by replacing the current law mandating that the Capital area's electors vote in accordance with the outcome of the popular vote in the District with a new legislative mandate that the Capital area's electors vote in other ways. For example, Congress could require District electors to vote in favor of the presidential ticket that receives the most Electoral College votes (of the remaining 538 electors).[11] Or, alternatively, Congress could require that District electors vote for the winner of the national popular vote winner.

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[9] Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U. L. Rev. 311, 348-49 (1990) (arguing Twenty-Third Amendment is not self-executing, so Congress can simply decline to provide electors for the District); *see also* Raven-Hansen, *supra*, at 187-88.

[10] Section 2 supports a distinction between the Twenty-Third Amendment and other arguably self-executing provisions such as Art. I, Section 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended…."), which may require the availability of the writ in some form even in the absence of legislation. Unlike the Twenty-Third Amendment, the Suspension Clause makes no reference to the role of Congress.

[11] Furthermore, even assuming, wholly *arguendo*, that Congress lacks the authority to prevent electors from being appointed on behalf of the District, no potential litigant would suffer the constitutionally cognizable injury required to establish standing to bring a court challenge to

A recent Supreme Court decision confirms that a legislative directive to the Capital area's electors would be enforceable. The Twenty-Third Amendment provides that the District "shall appoint" electors "in such manner as Congress may direct"; this language is a direct parallel to the Constitution's grant of broad authority to each of the States to appoint and instruct their respective electors. In its recent decision in *Chiafalo v. Washington*,[12] the Supreme Court held that electors do not have discretion to decide how to cast their Electoral College votes, but rather are legally bound to follow the instructions given by their respective states.

As Columbia Law School Professors Jessica Bulman-Pozen and Olatunde Johnson have observed, it follows from the Court's holding in *Chiafalo* that Congress could legally bind any electors to vote in accordance with the overall vote of the Electoral College or the national popular vote, just as the existing enabling statute currently binds them to vote in the Electoral College in accordance with the outcome of the popular vote in the District.

In sum, none of the critics' constitutional objections to the D.C. Admission Act are meritorious; and the contention that a constitutional amendment is required to admit the Commonwealth into the Union is incorrect. The D.C. Admission Act calls for a proper exercise of Congress' express authority under the Constitution to admit new states, a power that it has exercised 37 other times since the Constitution was adopted.

Courts are unlikely to second-guess Congress's exercise of its constitutional authority to admit the Commonwealth into the Union. Apart from the fact that the legal objections to admission of the Commonwealth as a State are without merit, it is also unlikely that the courts will ever consider those objections. As Mr. Dinh has observed, the decision whether to admit a state into the Union is a paradigmatic political question that the Constitution expressly and exclusively assigns to Congress.[13] The Supreme Court has long, and strenuously, avoided

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such legislative action. This is because the only individuals whose putative rights could even arguably be prejudiced by Congress preventing D.C. from participating in the Electoral College would be the exceedingly small number of voting age adults who reside in the territory of the Capital (likely the President and her family, and a smattering of people with residences in the Capital Hill neighborhood). Furthermore, under the terms of the Act, such residents of the "Capital" will be fully entitled to vote in their last state of residence before taking up residence in the seat of the federal government. Therefore, as George Washington University Law School Professor Steven Saltzburg has observed, these individuals will not incur the type of injury required for standing to bring an action changing the D.C. Admission Act in court. *See* Fauntroy, *A Simple Case of Democracy Denied, An Analysis of the D.C. Voting Rights Amendment by the Office of U.S. Delegate*, http://m.dcvote.org/simple-case-democracy-denied-analysis-dc-voting-rights-amendment-office-us-delegate-walter-e.

[12] 140 S. Ct. 918 (2020).

[13] Dinh Statement, *supra*.

adjudicating disputes respecting matters that the Constitution makes the sole responsibility of the coordinate, elected branches.[14]

The remaining objections to Statehood do not concern applicable constitutional law, but rather matters of policy.

For example, some have argued that the District should not be admitted to the Union because it is a single city and have instead proposed that most of the District's territory be retrocessioned to Maryland. There is, however, no constitutional barrier to a large, diverse city, with a population comparable to that of several existing States, joining the Union. Furthermore, the Maryland retrocession proposal is subject to many of the same supposed constitutional objections raised by those who object to statehood for the District. For example, retroceding the District to Maryland would decrease the size of the remaining federal enclave, which objectors to District Statehood have claimed is constitutionally impermissible. A forced merger of the District and Maryland would also do nothing to address the purported constitutional objection to leaving the residual seat of government with three potential electors, pursuant to the terms of the Twenty-Third Amendment, prior to the Amendment's repeal.

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Opponents also argue that Congress should not grant the District statehood because it will lead to a lawsuit. But any court challenge will be without merit, and indeed likely will be dismissed as presenting a political question. We respectfully submit that Congress should not avoid exercising its express constitutional authority to admit the Commonwealth into the Union because of meritless threats of litigation.

Sincerely yours,

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[14] *See* Baker v. Carr, 369 U.S. 186 (1962); Nixon v. United States, 506 U.S. 224 (1973).

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