No. 05-970

In The
Supreme Court of the United States

JAMES M. BANNER, JR., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, ALBERTO GONZALES, in his official capacity as Attorney General of the United States, the STATE OF MARYLAND, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

THE COMMONWEALTH OF VIRGINIA'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Constitution's unique treatment of the District of Columbia and its residents require the application of heightened scrutiny for Equal Protection and Uniformity Clause purposes?

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BRIEF IN OPPOSITION

The Attorney General of the Commonwealth of Virginia, Robert F. McDonnell, responds to the Petition for a Writ of Certiorari.[1]

INTRODUCTION

The Constitution gives Congress exclusive authority to create and govern a distinct geographic area – to serve as the Nation's Capital – in order that the National Government might operate in a place where Congress controls the circumstances and safety of the place in which it conducts its business. U.S. Const. art. I, § 8, cl. 17. The Constitution does not, however, accord the residents of that federally created District a representative in Congress.[2] Thus, the unique conditions of the District and its residents as citizens without a representative in the legislature that taxes them, living in a distinct geographic region, reflects the clear and purposeful intent of the Framers to provide Congress with exclusive control over the seat of the National government. *See The Federalist No. 43* (James Madison) (Clinton Rossiter, ed. 1961).

[1] On February 16, 2006, this Court extended the time for such filing to and including April 5, 2006.

[2] The Twenty-third Amendment, U.S. Const. amend. XXIII, confirms the absence of such Constitutional grant by altering the original provisions to permit residents of the District to vote in Presidential elections. Only a similar constitutional amendment could alter the status of residents in the District with regard to representation in Congress.

Residents of the District enjoy the many constitutional protections accorded to individual citizens. However, those protections are not implicated by Congressional legislation concerning delegation of taxing authority to the District's local government. Moreover, that local government, as a creation of Congress, has no inherent or sovereign powers but only the powers delegated to it by Congress. It has no rights against the Sovereign that created it.

Petitioners' allegations of exorbitant tax rates, "structural deficits," and the intrinsic unfairness of their Constitutional lot are political rather than legal issues. Decisions about how to fund the operation of the Nation's capital city, and how to solve its financial challenges, are fundamentally legislative and executive in character. Untangling the web of financial and administrative actions that brought the District of Columbia to its current financial situation is a task well outside the proper role of any court. Thus, Petitioners' underlying cause and their Petition fail to present a substantial issue of law in need of resolution by this Court.

In the face of the lower courts' unequivocal rejection of their novel legal theories, Petitioners retreat from their frontal assault on the authority of Congress and seek certiorari on a narrower question. They ask this Court to consider whether the unique conditions of the District, as established by the Constitution and described above, mean that Congress' exercise of its authority to withhold from its local government the power to impose a commuter tax, must be subjected to strict scrutiny. This is not an important constitutional question because the answer is not in

doubt. For that reason alone, the Petition should be denied. In addition, however, Petitioners arguably lack standing to bring their challenge: a jurisdictional problem that also ought to preclude this Court's review.

STATEMENT OF THE CASE

1. Background

The Constitution gives Congress exclusive legislative authority in all matters pertaining to the District of Columbia. U.S. Const. art. I, § 8, cl. 17. It was the intention of the Framers that the National Government would reside and operate in a place where, because Congress had plenary authority over the operation of the place, it could not be "harassed or neglected by local interests." *App.* at 10a. When it legislates for the District, it does so "in like manner as the legislature of a state." *Gibbons v. District of Columbia*, 116 U.S. 404, 407 (1886). It stands in the same relation to the residents of the District as a state legislature does to residents of its own State. *See Mercury Press v. District of Columbia*, 173 F.2d 636, 637 (D.C. Cir. 1948). Thus, Congress not only legislates for the District's residents as citizens of the Nation, it also legislates for them separately and locally, as citizens of the Nation's Capital. In the latter capacity, Congress may "exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973).

Over the years, Congress has carried out its exclusive authority over the District in different ways: once providing for three distinct local governments in the District; later creating a three-person commission for governing a unified District; and, in the 1970's, adopting what is known, colloquially, as "Home Rule." *See* District of Columbia Self-Government and Governmental Reorganization ("Home Rule") Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). The Home Rule Act creates a local government for the District and delegates particular powers to it. In so doing, it expressly continues Congress' close involvement in the management of the District's finances.

Though delegating power and autonomy on many subjects, the Home Rule Act is clear that the powers delegated remain "[s]ubject to the retention of Congress of the ultimate legislative authority over the nation's capital." *D.C. Code* § 1-201.02(a). The Act expressly provides that the enactments of the local government will only become law if Congress does not act to disapprove them within thirty (or sixty) days. It provides also that Congress has full power to repeal the enactments of the local government, at any time. *See D.C. Code* §§ 1-206.01, 1-206.02(c)(1)-(c)(2).

In addition, the Home Rule Act specifically limits the local government's powers, identifying a list of matters that are not "rightful subjects" of legislation by the local government. *D.C. Code* §§ 1-203.02, 1-206.02(a). Among those are: taxation of federal property; regulation of local (and federal) courts; height restrictions on the construction of new buildings; and the prohibition challenged here – imposition of an income tax on the income "of any individual not a resident of the District. . . ." *Id.* § 1-206.02(a). As noted by the district court below, the

balance of authority struck by the Home Rule Act may be characterized as "a reasonable and rational accommodation between the interests of all Americans in their Nation's Capital and the basic principle that government should be responsible to the people." *App.* at 23a (quoting legislative history).

2. Proceedings in the District Court

Petitioners in this matter are: (1) the District of Columbia itself; (2) its City Council; (3) the members of the City Council in their official capacities; (4) the Mayor of the District; and (5) several District residents. Together these government entities, public officials and individuals sued the United States, the United States Department of Justice, and the Attorney General in his official capacity. They alleged that Congress' decision to withhold from the local government of the District the power to tax non-residents is unconstitutional. The Commonwealth of Virginia and the State of Maryland intervened on the side of the United States.

Petitioners' complaint asserted that: (1) Congress' refusal to allow the District to impose a commuter tax violates the Equal Protection aspect of the Fifth Amendment's Due Process Clause because it disfavors District residents in favor of non-residents, in a circumstance where the non-residents are represented in Congress and the residents are not; (2) the prohibition must, therefore, meet the test of strict scrutiny; and (3) the prohibition violates the Uniformity and Privileges and Immunity Clauses of the Constitution. "[T]he claims [were] premised on a series of Supreme Court tax cases that [Petitioners] use to craft a legal principle outlawing discrimination in

the imposition of taxes against unrepresented citizens in favor of represented ones. Applying this principle to Congress' ban on the District's use of a commuter tax, Petitioners argue that the Prohibition must be invalidated." *App.* at 26a.

The United States, Maryland, and Virginia each filed a motion to dismiss the complaint for failure of subject matter jurisdiction and its failure to state a claim. Virginia pointed first to the important jurisdictional issues presented by Petitioners' complaint. It challenged the standing of the Government Plaintiffs because their allegations presented a purely political question. Virginia also challenged the sufficiency of the allegations of the individual residents of the District for the purposes of satisfying the requisites of Article III standing.

The district court ruled that the individual residents satisfied the Article III requirements, but then dismissed the complaint on the merits. In so doing, the district court held that "Congress' plenary power over the District and its residents and their unique status within our constitutional framework" mean that the challenged prohibition does not violate Equal Protection, the Uniformity Clause or the Privileges and Immunities Clause of the Federal Constitution. *App*. at 63a. Moreover, the court ruled that because residents of the District are not a suspect class but a constitutionally created one, and because the District's local government has no fundamental right to tax anyone, and the residents have no fundamental right to be treated the same as non-residents for purposes of taxation or for any other purpose, strict scrutiny did not apply. *App*. at 52a, 54a.

3. The Appeals

Petitioners appealed the dismissal of their complaint to the Court of Appeals for the District of Columbia Circuit. In a per curiam opinion, the court of appeals affirmed the district court's dismissal of the complaint. In doing so, the court of appeals rejected Petitioners' argument that Congress' prohibition of a commuter tax should be subjected to strict scrutiny and held that "the commuter tax restriction does not violate equal protection or the Uniformity Clause of the Constitution." *App.* at 16a. The court of appeals concluded that because, "[i]n governing the District, Congress can 'exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes' . . . it undoubtedly has the authority to enact taxes for the District alone, just as a state could." *App.* at 12a-13a (quoting *Palmore*, 411 U.S. at 397). It explained further that

> [t]he commuter tax restriction is more properly viewed as simply an aspect of Congress' authority to levy local taxes on the District and therefore entirely consistent with the Uniformity Clause. Congress has delegated to the District government the power to levy an income tax while restricting the kinds of income the District may tax.

App. at 15a. Finally, the court of appeals rejected Petitioners' Equal Protection argument because it ignored "the special character of the District under the Constitution." *App.* at 10a.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, the Petitioners' legal theory not only has no basis in the Constitution but is contrary to it. Second, even if there were some basis for Petitioners' novel legal theory, they lack standing to challenge Congress' action.

I. THE FACT THAT THE DISTRICT IS NOT A STATE DOES NOT WARRANT STRICT SCRUTINY.

Petitioners ask this Court to review the decision below only insofar as the Court of Appeals declined to subject the challenged legislative action to strict scrutiny. Yet, strict scrutiny is appropriate only where the government has taken action that either relies upon suspect classifications or impinges upon a fundamental right. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997); *Massachusetts Bd. of Retirement v. Mulgia,* 427 U.S. 307, 312 (1976). Those circumstances are not present here. Though Petitioners labor mightily to fit the square peg of the challenged legislation into the round hole of government action that requires strict scrutiny, the effort cannot succeed. It cannot succeed because at its foundation is the premise that the law of taxation, as it applies to Congress and the States, applies the same to Congress and the District. This premise is false. As a matter of constitutional structure neither the District nor its residents have the same rights to tax – or to be taxed – as States and the residents of States. The Petition for Certiorari should be denied.

A. Because the District Has Unique Constitutional Status, It May Be Treated Differently than States Without Raising Equal Protection Concerns.

As the area designated by the Constitution as "the seat of the government of the United States," the District is unique among American cities. U.S. Const. art. I, § 8, cl. 17. It is "the very heart of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised. . . ." *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973) (quoting *O'Donoghue v. United States*, 289 U.S. 516, 539 (1933)). It is "truly *sui generis* in our governmental structure." *Carter,* 409 U.S. at 432. Thus, it is beyond question that the District is "constitutionally distinct from the States." *Palmore*, 411 U.S. at 395.

The unique situation of the District, particular aspects of which are offered by Petitioners in support of the application of strict scrutiny to the federal legislation they challenge, is a set of circumstances created for the District by the Constitution itself. Such constitutionally established circumstances: (1) that Congress has exclusive power to legislate for the District on all subjects, in spite of its dual role and the potentially competing interests of its members; and (2) that the District does not have a representative in Congress and therefore does not have a vote in the legislature that legislates for it, simply cannot render Congressional legislation for the District subject to strict scrutiny. Only if the District and its residents were clothed with the rights and protections accorded to the States – by virtue of their separate sovereignty – could Petitioners' arguments succeed. However, the Constitution

is to the contrary on this point. It grants the attributes of sovereignty to the National Government only, and preserves them to the States. It does not bestow them upon the District created to serve as the seat of the National government. Indeed, to do so would be to encourage the very danger that the Seat of Government Clause was adopted to prevent: that the National Government would sit and conduct its affairs in a location subject to and dependant upon a sovereign power other than its own, and thus be subject to neglect or difficulty at the whim of that power.[3] *See The Federalist No. 43* at 240-41.

Congress' exclusive legislative authority, pursuant to the Seat of Government Clause, is distinct from its limited authority to legislate for the Nation. In our system of dual sovereignty, when Congress legislates for the Nation, there are boundaries it cannot go beyond without violating the sovereignty of the States. No such boundaries constrain

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[3] The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it not only the public authority might be insulted and its proceedings 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. This consideration has the more weight as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence.

The Federalist No. 43, at 240.

Congress' power when it legislates for the District. Thus, Congress is empowered to act in dual capacities, not only as the federal legislature acting for the citizens of the Nation, but also as the District's legislature, acting for the citizens who reside there. This is true notwithstanding the fact that the District is not represented in Congress. *App.* at 10a. ("[T]he fact that District residents do not have congressional representation does not alter that constitutional reality."). Unlike the New Hampshire legislature in *Austin v. New Hampshire*, 420 U.S. 656 (1975) (invalidating, under the Article IV Privileges and Immunities Clause, a New Hampshire commuter tax on the grounds that out-of-state residents who worked in New Hampshire paid taxes on income earned there, whereas New Hampshire residents did not), Congress is not "a foreign sovereign" in relation to the residents of the District. Therefore, Congress' power to tax with regard to the District is not limited as if it were.

To the extent the District's local government enjoys taxing power at all, it is by virtue of a delegation from Congress, not by virtue of the sort of sovereign authority possessed by the States. *See Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 527 (1950) ("When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government of violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests."). That Congress has expressly declined to delegate the power to tax some particular income earned in the District – the income of non-residents who work there – simply does not implicate the same interests protected in *Austin* or addressed in *Wheeling Steel Corp. v. Glander*,

337 U.S. 562 (1949), *Allied Stores*, 358 U.S. at 522, or *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). The interests addressed in those cases flowed from the separate sovereignty of the several States in our constitutional structure. Similarly, the decisions in *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819) and *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938), involved the relative power of the States to reach beyond their own citizens with their sovereign powers. Neither has any relevance to – or places any limitation on – the power of Congress to legislate for the District pursuant to the Seat of Government Clause.

Like citizens of a locality within a State who have no fundamental right to be free from taxes imposed uniquely and pursuant to delegated power by their local government, residents of the District do not have any fundamental right to be free from a tax burden imposed by the acts of their own legislature. Nor do they have any right to share that burden with those who are non-residents of the Nation's Capital. At best, such unique treatment by a State, or by a local government empowered by a State, would be subject to rational basis scrutiny; so to, when Congress exercises – or delegates – its power to tax or not, pursuant to the Seat of Government Clause. Whatever the present day equities of the District's circumstances have become, Petitioners' effort is entirely without foundation in the law and therefore the Petition must be denied. Only by constitutional amendment can such a change be wrought.

B. The Uniformity Clause Does Not Apply To Congress' Taxation Legislation for the District.

Finally, the Constitutional creation of the District, as the seat of the National Government and a national city belonging to all of the citizens of the Nation, cannot create a suspect class, comprised of the District's residents, when Congress treats them differently than the residents of the several States. It is precisely this difference that the Founders contemplated. The very point of having a National Capital was to subject that location to Congressional rather than State authority for the benefit of the National Government. Thus, the Constitution anticipates that Congress will weigh both local and national interests when it legislates for the seat of the National government. That national considerations, rather than local ones, might in the end control Congress' decisions pursuant to its authority under the Seat of Government Clause does not render residents of the District a suspect class, or deprive them of any fundamental constitutional right, because the fact of their different treatment is contemplated by, and incorporated in, the Constitution itself. The District was, after all, created in the national interest; that it is in some particular aspect governed in the same way – in favor of the interests of all the citizens of all the States, rather than in the sole interest of the residents of the District – simply cannot violate the Uniformity Clause.

II. PETITIONERS LACK ARTICLE III STANDING TO BRING THEIR CHALLENGE.

Even if the District's dilemma did raise an important and undecided constitutional issue in need of this Court's consideration, this would not be the proper case in which

to examine the question. Before deciding any matter presented to it, a federal court must assure itself that it has jurisdiction to entertain the claim. It is not at all clear that these Petitioners satisfy the three prong test for Article III standing.[4] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-5 (1998). Moreover, "only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process' " should federal courts exercise their power – and then only as a last resort and a necessity. *Flast v. Cohen*, 392 U.S. 83, 97 (1968); *Chicago & Grand Trunk Ry. Co. v. Wellman,* 143 U.S. 339, 345 (1982).

The District, its City Council, the members of City Council and the Mayor (the "Government Petitioners"), as public entities and office holders, respectively, exist only by virtue of Congress' exercise of its Constitutional authority under the Seat of Government Clause. Thus, this action by the Government Petitioners, against Congress and other Federal agencies and officials, is no more than a complaint – by a creation of Congress – about the terms of its creation. Such a dispute is a purely political question. It does not implicate constitutional limitations and is in no

[4] Pursuant to Article III of the Constitution, federal jurisdiction requires: (1) a concrete and particularized "injury in fact" that is actual or imminent; (2) that the injury be fairly traceable to the challenged action; and (3) that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Steel Co.,* 523 U.S. at 103; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

way amenable to the subject matter jurisdiction of federal courts.[5]

Petitioners who are individual residents of the District allege as injury higher taxes and local revenue deficiencies. These complaints are available to all of the citizens of the District and, thus, state no cognizable injury. They do not identify any particularized harm specific to any individual, but support only a generalized "taxpayer" sort of standing generally disfavored by the courts. *Flast*, 392 U.S. at 102 ("[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I § 8 of the Constitution.").

Assuming, however, that higher taxes and local revenue deficiencies somehow satisfy the injury prong of Article III standing, the allegations of the complaint probably state the necessary causal connection between those injuries and Congress' decision to withhold power to impose a commuter tax to satisfy the second prong. However, it is impossible to predict whether the relief sought by Petitioners – a declaration that Congress' prohibition of a commuter tax was unconstitutional – would provide any remedy at all for those identified injuries. In spite of the District's commitment to adopt a commuter tax if permitted to do so, given Congress' long history of rejecting imposition of such a tax itself, it is quite possible that Congress would simply respond by withdrawing the power to impose any income tax from the District. This assumes,

[5] Because they decided that the plaintiffs who were District residents satisfied the requirements of Article III standing, neither the district court nor the court of appeals addressed the question of the standing of the Government Petitioners.

also, that Congress would not respond to the District's adoption of a commuter tax by simply vetoing or repealing any such tax, but rather would seek to correct the constitutional flaw declared by the Court rather than repeating it.

Moreover, there is no assurance whatsoever that the revenue generated by a commuter tax would result in reduction of the income tax rates imposed upon residents of the District. Indeed, it is in no way certain that additional revenues would be recognized, much less expended to reduce the "structural deficit" or infrastructure. It is entirely possible, even likely, that the imposition of a nonresident income tax would result in decisions by businesses to relocate just across the Potomac River, where prices – and local tax rates – would be lower.

Likewise, to assume that any additional revenues that might be recognized – over whatever time period they could be sustained – would result in a reduced tax burden on residents of the District is to assume that more attractive opportunities for economic development or investment would not present themselves and that City Council would resist them if they did. The series of independent business and political choices necessary before the imposition of a commuter tax in the District might remedy the injuries complained of is altogether too speculative a series of events to support Article III standing. It also serves to highlight the fundamentally political nature of Petitioners' complaint – a complaint which, at its heart, is subject only to political solution, not the jurisdiction of a federal court.

CONCLUSION

The Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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