MEMORANDUM

August 29, 2017

TO: DC Appleseed

FROM: Hunton & Williams LLP
Arent Fox LLP
Goldblatt Martin Pozen LLP

RE: DC Voting Rights – DC Council Authority to Amend the “Delegate Act”

INTRODUCTION

In 1970, Congress enacted the District of Columbia Delegate Act (“Delegate Act”), creating a nonvoting Delegate in Congress for the District of Columbia. Under that Act, Congress gave the new Delegate all the rights and privileges of other Members of Congress, except for the right to vote on measures as finally enacted by Congress.

You have asked us to analyze the authority of the D.C. Council under the Home Rule Act to amend this statute, the Delegate Act, to give the Delegate voting rights in Congress on issues applying exclusively to the District. As explained in this memorandum, we conclude that the Council does have the authority to enact such a measure because:

- First, Congress’s “plenary authority” over the District of Columbia granted under the District Clause of the Constitution, empowers it to grant D.C.’s Delegate the right to vote on matters applying exclusively to the District.

- Second, Congress broadly delegated its District Clause authority to the Council through the Home Rule Act, empowering the Council to legislate – and even amend or repeal Congressional legislation – regarding matters that apply exclusively to the District, provided that they do not concern the property or functions of the United States.


Third, the Delegate Act itself addresses a matter peculiar to the District – its lack of voting representation in Congress – and would not affect the functions or property of the United States.

Such a measure, of course, would be subject to review and possible disapproval by Congress under the procedures of the Home Rule Act.

As discussed further in this memorandum, the Council in the past has amended and even repealed Congressional legislation on a wide variety of topics, and courts have upheld such actions.

DISCUSSION

I. CONGRESS HAS CONSTITUTIONAL AUTHORITY UNDER THE DISTRICT CLAUSE TO GRANT THE D.C. DELEGATE FULL CONGRESSIONAL VOTING RIGHTS ON ISSUES APPLYING EXCLUSIVELY TO THE DISTRICT.

Consistent with analyses of the proposed DC Voting Rights Act addressed in the 110th and 111th Congresses, the fact that the District is not a “State” does not prevent Congress from giving it a voting representative, notwithstanding the Constitution’s “Composition Clause,” which provides that Members of the House of Representatives be chosen “by the People of the several States.”

Congress has acted legislatively to treat the District as a state for various purposes, including situations in which the Constitution addresses certain rights or responsibilities applicable only to “States.”

3 Compare Hepburn & Dundas v. Ellzey, 6 U.S. 445, 452-53 (1805) (concluding that the District is not a state within the meaning of Article III diversity jurisdiction); and District of Columbia v. Carter, 409 U.S. 418, 419 (1973) (concluding that the District is not a state for purposes of 28 U.S.C. § 1983); with National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 600 (1949) (upholding Congressional act deeming the District a state for purposes of diversity jurisdiction); and Settles v. U.S. Parole Comm’n, 429 F.3d 1098, 1103-04 (D.C. Cir. 2005) (recognizing § 1983 liability for acts pursuant to certain D.C. laws). In other instances, the courts themselves have concluded that the word “State” should be deemed to include the District, despite the District’s unique status. See, (cont’d . . .)
The basis for this action is that Congress has sweeping authority to legislate for the District—but not for the states—through the District Clause. That Clause 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 . . . .”

Congress already has recognized that this plenary authority permits it to create a voting representative; indeed, the House and the Senate overwhelmingly approved a bill giving the D.C. Delegate full voting rights in two different Congresses. Moreover, numerous public officials and legal scholars from across the ideological spectrum agree that Congress may constitutionally create for the District a full voting member of Congress. Because Congress can give the District

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4 U.S. CONST. art. I, § 8, cl. 17.

5 Both the Senate and the House passed legislation in two different Congresses to give the District full voting representation by wide margins. The House, 241 to 177, passed the District of Columbia Fair and Equal House Voting Rights Act, H.R. 1905, 110th Cong. (2007). In 2009, the Senate passed the same legislation, 61 to 37, the District of Columbia House Voting Rights Act, S. 160, 111th Cong. (2009).


In addition, in Adams v. Clinton, the United States District Court for the District of Columbia in a 2-to-1 opinion by a three-judge panel rejected a challenge to the District’s lack of voting rights and concluded that the violations (cont’d . . .)
full voting representation, it follows that Congress could also give the District the more limited voting representation proposed here: the right to vote on matters applying exclusively to the District.

II. THROUGH THE HOME RULE ACT, CONGRESS HAS BROADLY DELEGATED ITS DISTRICT CLAUSE AUTHORITY TO THE DISTRICT OF COLUMBIA COUNCIL, EMPOWERING THE COUNCIL TO LEGISLATE ON MATTERS APPLYING EXCLUSIVELY TO THE DISTRICT, AND TO AMEND CONGRESSIONAL LEGISLATION ON SUCH MATTERS.

Congress is constitutionally empowered to legislate with regard to the District in two distinct capacities: first, as a federal legislature promulgating laws of nationwide application; and second, as a state or local legislature promulgating laws applicable to the District. Many courts have recognized Congress’s dual role as both the country’s federal legislation and a local legislature vis-à-vis the District. As the U.S. Supreme Court explained, “Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes.”

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claimed by plaintiffs could be remedied only in a non-judicial venue. 90 F. Supp. 2d 35 (D.D.C. 2000). The majority decision may be read as tacitly acknowledging Congress’s authority to confer full voting rights on the District. See id. at 56-72 (majority opinion); compare with id. at 72-107 (Oberdorfer dissent).


exercises its District Clause authority, the resulting law is regarded as local law, even though it was enacted by the federal legislature.9

As explained below, when Congress delegated this authority to the District of Columbia Council in the Home Rule Act,10 it authorized the Council to amend or repeal laws enacted by Congress that apply exclusively to the District, provided that they do not affect the functions or property of the United States—even if those laws were enacted by Congress.11 Courts have construed this provision broadly, holding that legislation does not affect federal functions even if

9 These laws, for example, do not give rise to federal subject-matter jurisdiction under 28 U.S.C. § 1331, even though they were passed by Congress. See, e.g., Thomas v. Barry, 729 F.2d 1469, 1471 (D.C. Cir. 1984) (holding that a section of the Home Rule Act provided a basis for federal-question jurisdiction because the section did not apply exclusively to the District); McKinney-Byrd Academy Pub. Charter Sch. v. District of Columbia, No. 04 Civ. 2330, 2005 WL 1902873, at *2 (D.D.C. July 21, 2005); Roth, 160 F. Supp. 2d at 108 (noting that, when Congress acts as a local legislature and enacts a provision that is exclusive to the District of Columbia, the legislation does not provide the basis for federal-question jurisdiction).

10 D.C. Code §§ 201.01 to 1.207.71.

11 Id. § 602(a)(3) (codified at D.C. Code § 1-206.02(a)(3)). Although not determinative, the fact that the Home Rule Act is codified in the D.C. Code provides support for the argument, consistent with McKinney-Byrd. 2005 WL 1902873, at *3.

The court rejected the plaintiff’s argument that, because Congress had enacted the legislation in question, the federal court could exercise federal question jurisdiction. Id. at *2. The fact that the School Reform Act is codified in the D.C. Code, not the U.S. Code, was not by itself determinative. See id. at *3. The court also noted that the text of the Act indicated that it applied exclusively to the District. See id.

The court’s position in McKinney-Bird accords with that in District of Columbia v. Greater Washington Central Labor Council, 442 A.2d 110 (D.C. 1982), cert. denied, 460 U.S. 1016 (1983); and McConnell v. United States, 537 A.2d 211 (D.C. 1988), both discussed in depth in Part II.B. infra. These cases make clear that the Council has the authority under the Home Rule Act to amend Congressional acts codified in the U.S. Code, or to enact separate legislation affecting federal legislation, as long as the Council’s enactment meets the “appli[es] exclusively . . . to the District” standard. D.C. Code § 1-206.02(a)(3). As the United States Court of Appeals for the D.C. Circuit has stated, such legislation “should – absent evidence of contrary congressional intent – be treated as local law, interacting with federal law as would the laws of the several states.” District Properties Associates, 743 F.2d at 27.
it affects federal officials, so long as it concerns those officials in their administration of local laws that are local in scope.\(^\text{12}\)

A. Congress Broadly Delegated Its District Clause Authority to the District’s Council.

Congress delegated much of its constitutional authority to legislate exclusively for the District to the Council through the Home Rule Act.\(^\text{13}\) In enacting the Home Rule Act, Congress sought to “relieve Congress of the burden of legislating upon essentially local District matters.”\(^\text{14}\) Congress made clear that its delegation of legislative authority to the Council is broad, “extend[ing] to all rightful subjects of legislation within the District consistent with the Constitution of the United States,”\(^\text{15}\) subject to several specified limitations.\(^\text{16}\)

These limitations are outlined in §§ 601 to 603 of the Home Rule Act, and the Home Rule Act specifically states that “[t]he Council shall have no authority to pass any act contrary to the provisions of [the Act].”\(^\text{17}\) These sections also reaffirm that, despite enactment of the Home Rule Act, Congress maintains its right to exercise its authority to legislate for the District.\(^\text{18}\)

\(^{12}\) See, e.g., Greater Wash. Cent. Labor Council, 442 A.2d at 116 (“Congress intended . . . to withhold from local officials the authority to affect or to control decisions made by federal officials in administering federal laws that are national in scope as opposed to laws that relate solely to the District of Columbia.”); see also Myerson v. United States, 93 A.3d 192, 197–98 (D.C. 2014) (“The term ‘federal function’ is narrowly construed and pertains only to those activities that explicitly impact the federal government’s ability to operate. The enforcement of traffic laws [by federal law enforcement officers] on a local street is not a ‘federal function.’” (citations omitted))

\(^{13}\) Id. § 102(a) (codified at D.C. Code § 1-201.02(a)) (“the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia.”) Thus, Congress’s authority to delegate its District Clause powers to the District is undisputed. See, e.g., Firemen’s Insurance, 483 F.2d at 1327 (citing District of Columbia v. Thompson Co., 346 U.S. 100, 109 (1953)); see generally Stoutenburgh v. Hennick, 129 U.S. 141, 147 (1889).

\(^{14}\) Home Rule Act § 102(a) (codified at D.C. Code § 1-201.02(a)).

\(^{15}\) D.C. Code § 1-203.02.

\(^{16}\) Id. § 1-206.02(a).

\(^{17}\) Id. § 1-206.02(a).

\(^{18}\) Id. § 1-206.01.
Furthermore, with certain exceptions, the Home Rule Act requires that the Chair of the Council transmit all legislation passed by the District to Congress.\(^{19}\) The District’s legislation then is subject to a 30-day review period by Congress;\(^{20}\) it becomes law unless both houses of Congress disapprove of the District’s legislation and the President signs legislation confirming such disapproval.

Section 602(a) of the Home Rule Act restricts the Council’s authority to pass legislation on ten specifically enumerated subjects.\(^{21}\) These subjects include taxation of commuters,\(^{22}\) taxation of United States property,\(^{23}\) and certain height limits on buildings.\(^{24}\) Only one of those limitations clearly has relevance here. It prohibits the Council from “[e]nact[ing] any act, or enact[ing] any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District.”\(^{25}\)

The Home Rule Act includes no provision that would prohibit the District from amending the Delegate Act. Accordingly, the issue is how to determine whether a Council amendment applies exclusively to the District and does not concern the functions or property of the United States.

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\(^{19}\) Id. § 1-206.02.

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id. § 1-206.02(a)(5).

\(^{23}\) Id. § 1-206.02(a)(1).

\(^{24}\) Id. § 1-206.02(a)(6).

\(^{25}\) Id. § 1-206.02(a)(3).
B. Using Its Delegated Authority, the Council May Amend Acts of Congress That Apply Exclusively to the District and Do Not Concern the Functions or Property of the United States.

The Home Rule Act expressly empowers the Council to legislate on matters that apply “exclusively in or to the District” and do not “concern[] the functions or property of the United States.” This authority includes the power to amend or repeal acts of Congress that apply only to the District and do not concern federal functions or property. Courts have repeatedly affirmed this conclusion. In doing so, they have recognized that the Council’s Home Rule Act authority includes the power to legislate even if resulting legislation incidentally affects federal officials, so long as it concerns them only in their capacity to administer laws that apply exclusively to the District.

The question is not whether a given law has an effect in any way outside the District or involves the federal government. Instead, the inquiry must focus on whether the law “relate[s] solely to the District of Columbia” as opposed to being “national in scope.” The D.C. Circuit enunciated the distinction clearly in District Properties Associates:

26 Id.

27 Id.

28 See, e.g., Greater Wash. Cent. Labor Council, 442 A.2d at 115–17 (holding that the Council could repeal a prior Act of Congress regarding federal workers’ compensation for private sector employees working in the District); cf. Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 115 (D.D.C. 1986), vacated on other grounds, 1987 WL 1367570 (D.C. Cir. June 2, 1987) (holding that the Council could close a street titled to the United States because closing streets traditionally had been a local function); McConnell, 537 A.2d at 215 (holding that the Council had not eliminated judges’ authority to sentence defendants pursuant to the Narcotic Addicts Rehabilitation Act of 1966 because the Act was a federal statute that applied nationwide and therefore did not apply exclusively to the District and was outside the Council’s power to amend).


30 Greater Wash. Cent. Labor Council, 442 A.2d at 116. While of course Greater Washington Central Labor Council and its progeny control the analysis of the Council’s legislative authority under the Home Rule Act, see supra n.12 and text associated with nn.13-14, cases interpreting federal-question jurisdiction discussed in n.9 supra (cont’d . . .)
When Congress acts as the local legislature for the District of Columbia and enacts legislation applicable only to the District of Columbia and tailored to meet specifically local needs, its enactments should – absent evidence of contrary congressional intent – be treated as local law, interacting with federal law as would the laws of the several states.\textsuperscript{31}

In the leading case defining the Council’s authority to amend federal legislation, the D.C. Court of Appeals upheld the Council’s repeal of \textit{District of Columbia v. Greater Washington Central Labor Council}, an act of Congress.\textsuperscript{32} That case addressed the federal Longshoremen’s and Harbor Workers’ Compensation Act,\textsuperscript{33} enacted by Congress in 1927, which established a workers’ compensation program for certain maritime workers.\textsuperscript{34} At the time of enactment, public employees in the District enjoyed federal workers’ compensation benefits, but private employees had no such protection.\textsuperscript{35} In 1928, Congress passed a workers’ compensation law for the District (the “1928 Act”), administered by the United States Department of Labor, thereby extending the worker-compensation protections of the federal Longshoremen’s Act to private-sector employees in the District.\textsuperscript{36} In 1979, after passage of the Home Rule Act, the Council enacted the Workers’ Compensation Act of 1979.\textsuperscript{37} The Council’s 1979 act, which became law (. . . cont’d)

\begin{footnotesize}
\begin{enumerate}
\item District Properties Associates, 743 F.2d at 27.
\item 442 A.2d at 115-17.
\item 33 U.S.C. §§ 901 \textit{et seq.}
\item 442 A.2d at 112.
\item \textit{Id.} at 113.
\item \textit{Id.}
\item \textit{Id.} at 114.
\end{enumerate}
\end{footnotesize}
after Congress failed to disapprove in accordance with the provisions of the Home Rule Act.\textsuperscript{38} repealed Congress’s 1928 Act and created a new administrative scheme for workers’ compensation claims filed by the District’s private-sector employees.\textsuperscript{39}

The D.C. Court of Appeals rejected the trial court’s determination that the 1928 Act affected a “function[] . . . of the United States” because the federal Department of Labor administered the compensation plan and federal courts enforced and reviewed claims.\textsuperscript{40} The court instead held that Congress had passed the 1928 Act pursuant to its District Clause powers, as DC’s local legislature making it a local law subject to the Council’s power to amend or repeal.\textsuperscript{41} The court explained that the mere fact that federal officials were exclusively charged with administering the program did not transform an otherwise local program into a “function” of the United States.\textsuperscript{42} The court further explained that the purpose of the Home Rule Act limitation was to protect the “integrity of the federal domain as it relates to administration of federal legislation having national implications.”\textsuperscript{43} In amending the workers’ compensation law enacted by Congress, the court held that the Council did not “affect or control decisions made by federal officials in administering laws that are national in scope as opposed to laws that relate solely to the District.”\textsuperscript{44} The law was administered by the United States Department of Labor for

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\footnote{38} D.C. Code § 1-204.04(e).
\footnote{39} Greater Wash. Cent. Labor Council, 442 A.2d at 114; see also D.C. Code §§ 32-1501 et seq. (2001) (formerly §§ 36-301 et seq.).
\footnote{40} 442 A.2d at 115.
\footnote{41} Id. at 115–17.
\footnote{42} Id. at 116.
\footnote{43} Id. (emphasis added).
\footnote{44} Id.
\end{footnotes}
convenience, not to federalize the District’s workers’ compensation program. Accordingly, the court concluded that Congress was acting as the District’s local legislature when it passed the 1928 Act, and, therefore, the Council had the power to repeal the 1928 act and replace it with legislation with effects exclusively in the District.

Most recently, the D.C. Court of Appeals relied on Greater Washington Central Labor Council’s reasoning in Myerson v. United States. The court in that case considered the argument that the Council had exceeded its authority under the Home Rule Act by criminalizing assault on a police officer on the ground that the officers there, United States Park Police officers, performed a “federal function.” Citing Greater Washington, the court disagreed, explaining that “[t]he term ‘federal function’ is narrowly construed and only pertains to those activities that explicitly impact the federal government’s ability to operate.” The court upheld the criminal conviction because, at the time of the incident, the federal officers were performing a local function—enforcing local traffic laws. The court concluded that the Council legislation in question “did not interfere with ‘the integrity of the federal domain as it relates to administration of federal legislation having national implications.’” This analysis applies with equal weight to the changes to the Delegate Act proposed here.

The United States District Court for the District of Columbia conducted a similar analysis of “property of the United States” for the purposes of the Home Rule Act in Techworld

45 Id.
46 Id. at 116–17 (citing Gudmundson v. Cardillo, 126 F.2d 521, 525 (D.C. Cir. 1942)).
47 Myerson, 98 A.3d at 197.
48 Id.
49 Id. at 198 (quoting Greater Wash. Cent. Labor Council, 442 A.2d at 116.)
Development Corp. v. District of Columbia Preservation League. There, the court held that the legislation enacted by the Council did not involve “property of the United States” within the strictures of the Home Rule Act even though it not only closed a city street, title to which was vested in the United States, but also transferred title to that street to various private developers. The court relied on the fact that Congress had delegated its District Clause authority to close local streets to the District for more than 50 years. The court also found that the Home Rule Act restriction existed “to ensure that the local government d[id] not encroach on matters of national concern,” and, thus, precluded the exercise of Council authority over “property used by the United States in connection with federal government functions, only over property of national significance.”

Finally, in McConnell v. United States, the D.C. Court of Appeals concluded that the Council “may repeal a congressionally-enacted statute limited in application to the District of Columbia” but that the Council could not amend the statute in question because that statute applied nationwide and therefore did not constitute local legislation. That law – the federal Narcotic Addicts Rehabilitation Act of 1966 (“NARA”) – created a nationwide scheme rendering certain defendants eligible for alternative sentencing. In response to a voter initiative

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51 Id. at 109.
52 Id. at 111.
53 Id. at 115.
54 537 A.2d at 215.
56 537 A.2d at 213.
passed by District residents, however, the Council enacted separate legislation that arguably altered or repealed certain of the conditions under which defendants would otherwise be eligible for such sentencing.\textsuperscript{57} In assessing the Council’s action, the court rejected the argument that, with respect to offenders convicted under D.C. law, “Congress was acting, in effect, as a local legislative body,” and that District voters and the Council for that reason had the right to repeal NARA as applied to the District.\textsuperscript{58} The court reasoned that NARA was national legislation that had “no distinct chapter . . . applicable to the District of Columbia.”\textsuperscript{59} Accordingly, D.C. sentencing judges retained discretion to sentence defendants in accordance with NARA where applicable eligibility requirements were met.\textsuperscript{60} More recently, the D.C. Court of Appeals

\textsuperscript{57} Id.
\textsuperscript{58} Id. at 215.
\textsuperscript{59} Id. at 214-15.
\textsuperscript{60} Id. at 215; see also Brizill v. D.C. Bd. of Elections & Ethics, 911 A.2d 1212, 1216 (D.C. 2006) (“Because section 1175 [of the Johnson Act] does not apply exclusively to the District, neither the Council nor the voters through initiative may amend or repeal th[e] Congressional prohibition on using and possessing gambling devices within the District of Columbia.”).

As earlier noted (supra n.9), another line of cases interprets similar language, “exclusive[] to the District,” found in 28 U.S.C. § 1331, which sets forth the requirements for the federal courts’ subject-matter jurisdiction over federal questions. See \textit{Thomas v. Barry}, 729 F.2d 1469 (D.C. Cir. 1984) (holding that the Home Rule Act provides a basis for federal-question jurisdiction question); \textit{Roth v. D.C. Courts}, 160 F. Supp. 2d 104 (D.C. Cir. 2001) (holding that an amendment to a federal statutory scheme did not apply “exclusively to the District” where the federal statutory scheme implicated at least three other federal entities). We have concluded that, while relevant and helpful to interpretation of the meaning of “exclusive[] to the District,” these cases do not undercut the strategy proposed here because they interpret an entirely different statute, 28 U.S.C. § 1331, which deals with jurisdiction of the federal courts, not the Home Rule Act.

Simply because these two statutes contain similar language does not mean that language carries identical meaning. See, e.g., \textit{Towne v. Eisner}, 245 U.S. 418, 425 (1918); \textit{Lamar v. United States}, 240 U.S. 60, 65 (1916). In one context, the courts defined what “exclusive[] to the District” means for purposes of federal-court jurisdiction. See \textit{Thomas}, 729 F.2d at 1471. In the other, the courts determined that “exclusive to the District” means vis-à-vis the Home Rule Act. See \textit{Greater Wash. Cent. Labor Council}, 442 A.2d at 116. Moreover, these two statutes rest on fundamentally different policy rationales. As stated in the Home Rule Act, “the intent of Congress [in enacting the Home Rule Act] is . . . to the greatest extent possible[] . . . to relieve Congress of the burden of legislating upon essentially local District matters.” D.C. Code § 1-201.02(a). In contrast, as the Supreme Court has made clear, the rationale for federal-question jurisdiction is that “the experience, solicitude, and hope for uniformity that a federal forum offers” makes federal courts the most appropriate forum for cases arising under federal law. \textit{Grable & Sons} (cont’d . . .)
confirmed McConnell’s holding in Brizill v. D.C. Board of Elections & Ethics, in which it held that the Council could not amend a particular “section” of a Congressional act because it did not apply exclusively to the District.\(^{61}\)

Thus, under McConnell and Brizill, the Council is authorized to amend or repeal laws that are national in scope so long as the amendment is targeted at a distinct, District-specific portion of that law and not the law as a whole as it applies to the District.

C. The Council on Many Occasions Since 1971 Has Amended, and Even Repealed, Congressional Legislation

As shown by the discussion above, many courts have affirmed the Council’s authority to amend and even repeal Congressional legislation when it applies exclusively to the District. In addition, examples of federal statutes amended—or repealed—by the Council are legion; because such legislation applied “exclusively” to the District, Congress has not disturbed them, allowing them to become law after expiration of its passive-review period. We can provide a list of such Council legislation upon request.

III. UNDER THE STATED PRINCIPLES, THE COUNCIL HAS THE AUTHORITY TO AMEND THE DELEGATE ACT TO ALLOW D.C.’s DELEGATE TO VOTE ON MATTERS APPLYING EXCLUSIVELY TO THE DISTRICT.

Finally, the Council has the legislative authority to amend the Delegate Act to allow the Delegate to vote when Congress acts as D.C.’s local legislature because the Delegate Act applies

\(^{61}\) 911 A.2d 1212, 1216 (D.C. 2006).
exclusively to the District and does not concern the functions or property of the United States. This is true even though the Delegate under such legislation would operate within a federal body because he or she would vote only when Congress performs a local function: enacting laws that are local in scope. In addition, such an amendment is not barred by any of the enumerated restrictions in Sections 601–603 of the Home Rule Act. In fact, Congress delegated such authority to the Council by providing that the Council may legislate on matters applying “exclusively to the District,” unless otherwise specifically prohibited.

A. The Council May Amend the Delegate Act Because It Applies Exclusively to the District and Does Not Concern the Functions or Property of the United States.

As shown above, if the federal act establishing the District’s nonvoting Delegate to the House of Representatives applies exclusively to the District and does not concern the functions or property of the United States, the Council may amend it. We conclude that the Council may do so for the following reasons. The Delegate Act is directed exclusively to the rights of the “people of the District of Columbia,” giving them a voice in their own government and outlining the parameters of that representation. It makes no mention of any state or territory

62 D.C. Code §§ 1-206.01–1-206.03.
63 Id. § 1-206.02(a)(3).

The people of the District of Columbia shall be represented in the House of Representatives by a Delegate, . . . who shall . . . have a seat in the House of Representatives, with the right of debate, but not of voting, [and] shall have all the privileges granted a Representative by section 6 of Article I of the Constitution, and shall be subject to the same restrictions and regulations as are imposed by law or rules on Representatives.

Id. § 201(a) (codified at 2 U.S.C. § 25a).
65 Id.
other than the District. In these respects, therefore, the Act is “applicable only to the District.” It does not authorize the Delegate to vote when Congress acts as the national legislature; the Council could not do so because such a law would clearly concern the “functions . . . of the United States.” The proposed amendment is instead aimed only at the Delegate’s involvement in the deliberation and passage of purely local legislation.

Furthermore, the Delegate Act is “tailored to meet specifically local needs.” D.C. residents’ lack of a voice in the federal legislature (and accordingly their need for a Delegate) is a phenomenon specific to the District, not one applicable to any of the several states. For these reasons, the Delegate Act is fundamentally concerned with the welfare and rights of District residents, and only District residents, and should be treated as a local law. As the court in Lederman v. United States observed, “[l]aws that have been held to apply exclusively to the District are concerned with the welfare and rights of District residents District-wide . . . .” Under these circumstances, it is reasonable to conclude that the Delegate Act applies exclusively to the District within the meaning of the Home Rule Act.

66 District Properties Associates, 743 F.2d at 27.


68 Id.

69 Roth, 160 F. Supp. 2d at 108 (observing that “[t]here is a distinction between an Act enacted for a purpose which is exclusive to the District of Columbia, and a statutory scheme which applies to the District of Columbia, as well as other entities”); cf. id.(concluding that the statute at issue gave rise to federal question jurisdiction because, although it addressed local needs, it “applie[d] to federal agencies, the Tennessee Valley Authority, the United States Postal Service, and the District of Columbia.”). This also distinguishes the District from the Territories because Territories are subject to a different provision of the Constitution that does not contain the same “exclusive legislative” language. Compare the District Clause (U.S. Const. art. I, § 8, cl. 17), with the Territories Clause (id. art. IV, § 3).


71 The Delegate Act’s local character was not altered by the inclusion of a provision for a Commission on the Organization of the Government of the District of Columbia. This provision specifically sought to implement (cont’d . . .)
No different conclusion is warranted simply because the District’s Delegate acts in the context of a body that performs federal functions. The Delegate Act constructs a framework allowing D.C. residents, and only D.C. residents, to elect the Delegate. The Delegate is an elected official of the District. The Delegate Act itself does not grant the Delegate the right to vote on any measures as finally enacted by the House.72 As such, the Delegate is not a Member of Congress authorized to vote on national matters, and has only incidental impact outside the District.73 As courts have concluded, legislation is not deprived of its local character solely on account of such incidental impacts.74 Although Congress is a federal body, the amendment affects national legislators only when they legislate on local D.C. matters. In Greater Washington Central Labor Council, the court emphasized that the mere fact that a federal agency

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Congress’s policy of “promot[ing] economy, efficiency and improved service in the transaction of the public business in the departments, bureaus, agencies, boards, commissions, offices, independent establishments, and instrumentalities of the District of Columbia” by recommending cost-control measures, streamlining services and functions, and clarifying official roles and responsibilities. Act of Sept. 22, 1970, Pub. L. No. 91-405, § 101, 84 Stat. 845-46 (1970). In an effort to accomplish that objective, the provision established a commission to study the governmental organization of the District and make recommendations to further Congress’s stated objectives. Id. § 102, 84 Stat. at 846.

Given the task with which the commission was charged, it is clear that this provision was concerned solely with the affairs of the District. The commission was required to report its findings and recommendations to Congress; however, because Congress exercises authority over the structure of the District’s governmental organization pursuant to the District Clause, the reporting at issue was to Congress in its capacity as the District’s local legislature, not to Congress in its capacity as the federal legislature.


73 See, e.g., CSX Transp., Inc. v. Williams, No. 05 Civ. 338, 2005 WL 902130, at *22-23 (D.D.C. Apr. 18, 2005) (holding that, where legislation does not directly conflict with or repeal federal law, having financial implications outside the District is an incidental effect that does not render legislation federal, rather than local, in scope), vacated on other grounds by 406 F.3d 667, 672, 674 (D.C. Cir. 2005) (finding the District’s hazardous materials statute preempted by federal law); AmCouncil of Life Ins. v. District of Columbia, 645 F. Supp. 84, 88–89 (D.D.C. 1986) (AmCouncil) (rejecting claim that an insurance law prohibiting AIDS-related discrimination violated the territorial limits on the Council’s authority because it could subject out-of-state insurers doing business in the District to penalties, as the legislative history of the law demonstrated that the statute would apply only when an insurer was doing business in the District).

administered a local program established by Congress did not “transform the function into a
‘function of the United States’ for the purposes of [the Home Rule Act].”\textsuperscript{75} As was the case in
\textit{Greater Washington Labor Council}, the amendment would not “affect or . . . control decisions
made by federal officials in administering federal laws that are national in scope,”\textsuperscript{76} but would
instead affect or control only those decisions made by federal officials in administering what are
effectively local laws.

Similarly, no different conclusion is warranted because the Delegate Act provides the
Delegate with certain privileges granted to Representatives under Article I, Section 6 of the
Constitution.\textsuperscript{77} Those privileges relate to maintaining separation of powers and the right to
speech and debate.\textsuperscript{78} Neither of these privileges confers on the Delegate any authority to act on
issues outside the District. Instead, these provisions further define the Delegate’s role in context.
Any effect that these rights have on national interests, rather than local interests, is purely
incidental. Finally, to the extent that the Delegate’s rights at a point in time are broader than
those afforded under the Delegate Act, those rights derive from House rules and House
precedent.\textsuperscript{79} The existence of any rights under House rules and precedent does not undermine
the local character of the Delegate Act.\textsuperscript{80}

\textsuperscript{75} 442 A.2d at 116; see also \textit{Myerson}, 98 A.3d at 198.
\textsuperscript{76} Id.
\textsuperscript{78} See id.
\textsuperscript{79} See \textit{Michel v. Anderson}, 14 F.3d 623, 626–27 (D.C. Cir. 1994) (noting that only the House of Representatives has
the authority to determine the rules governing its proceedings).
\textsuperscript{80} Congress’s delegation of authority to the Council is broad with respect to acts that apply exclusively in or to the
District. As discussed above, Congress did, however, carve out several specific exceptions. See D.C. Code § 1-
206.02(a)(1), (5)–(6). Accordingly, even if Congress’s enactment of legislation on any of the matters identified in
(cont’d . . .)
B. The Proposed Legislation Would Not Grant Authority to Other State or Local Legislatures.

Using the Council’s amendment authority to give the D.C. Delegate the right to vote on local D.C. issues in no way suggests that any other city or state has comparable authority. This is so for two important reasons. First, Congress has delegated to the District Congress’s power to enact local legislation pursuant to its authority over the District arising from the District Clause. The Constitution does not contain special clauses like the District Clause that relate to other cities or states. In addition, Congress has not delegated any such power to any other state or city.

Second, the District’s relationship with Congress is unique. As discussed above, in addition to sitting as a national legislature for all of the United States, Congress acts as the District’s local legislature. Congress’s relationship to the 50 states, by contrast, is solely that of a national legislature charged with promulgating national laws of more or less equal application. Each of those states relies on its own state legislature – not Congress – to promulgate laws applicable solely within the bounds of the state. Similarly, Congress has no authority to act as a local legislature for cities or municipalities. Because the District is uniquely situated with respect to its relationship to Congress, the Council’s enactment of the proposed legislation sets no precedent for similar action by decision-making bodies in the states. Indeed,

(. . . cont’d)

these specific exceptions were to be considered local legislation, the Council could neither pass such legislation itself nor confer on the Delegate the right to vote on such legislation in the House. It is axiomatic that the Council lacks the authority to grant the Delegate a vote on matters over which it has no power in the first instance.

81 Home Rule Act § 102(a) (codified at D.C. Code § 1-201.02(a)).
82 U.S. CONST. art. I, § 8, cl. 17.
83 Id. art. I, § 8.
while the Constitution explicitly grants Congress the authority to “exercise exclusive Legislation” over the District, Congress has no similar power over the states.

C. The Proposed Legislation Should Survive Congressional Review.

Not only is the proposed amendment legally defensible, it is worth noting that it would likely survive Congressional review. First, leaders of both the Democratic and Republican Parties have long expressed support for extending voting rights to citizens of District. The Home Rule Act, for example, passed Congress in 1973 with the support of both parties, and it was signed into law on December 24, 1973, by President Richard M. Nixon. More recently, large majorities in both houses of Congress have voted in favor of the District voting rights bills brought to a floor vote. Thus, in 2007, the House of Representatives passed the District of Columbia Fair and Equal House Voting Rights Act by a vote of 241 to 177 with the support of current Speaker of the House Paul Ryan. In 2009, the Senate passed the same legislation by a vote of 61 to 37. The current President has said that it would be “okay” for D.C. residents to have voting representation in the House.

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84 Id. art. I, § 8, cl. 17.
85 Once the Mayor approves a bill or the Council overrides a mayoral veto, the Chair of the Council transmits the bill to Congress pursuant to the Home Rule Act. D.C. Code § 1-204.04(e). The bill becomes law after 30 legislative days unless Congress passes a joint resolution of disapproval that is signed by the President. Id.
86 See, e.g., 155 CONG. REC. H11431 (daily ed. Oct. 15, 2009) (Statement of Rep. Hoyer) (“It is somewhat ironic that, in the symbol of democracy around the world, that our fellow citizens, some 600,000 of them, don’t have voting representation in their parliament, the House of Representatives, the people’s house. I think that’s an egregious undermining of the principles for which our men and women fight, for which we stand and to which we have pledged support of our Constitution.”); Hatch, “No Right Is More Precious,” supra n.5.

(cont’d . . .)
Second, Congressional disapproval of such Council legislation is unlikely as a practical matter because Congress has disapproved of Council legislation only three times in the more than 40 years since the Home Rule Act was passed in 1973. Furthermore, we believe that Congress’s failure to disapprove the amendment would constitute a ratification of the Council’s legislation, rendering it the equivalent of an act of Congress applying exclusively to the District and therefore permissible under Congress’s own District Clause authority.

90 The three instances of Congressional disapproval of Council legislation are confirmed in:

(1) S.J. Res. 84, 102d Cong. (1991) (disapproving act authorizing development that would violate Height of Buildings Act);
(2) H.R. Res. 208, 97th Cong. (1981) (disapproving act decriminalizing sodomy); and
(3) S. Cong. Res. 63, 96th Cong. (1979) (disapproving act preventing foreign chanceries from being built in residential neighborhoods).

91 The following court decisions equate Congress’s failure to vote to disapprove Council legislation with ratification or, as courts have called it, “tacit” or “implicit” approval by Congress:

- *Techworld Development*, 648 F. Supp. at 114 (noting that Congress expressed its “tacit approval” that the D.C. Council acted within its authority to close a street when the council had passed legislation doing so and Congress did not object);

Chief Justice John Roberts has used this reasoning as well. For example, in *Jackson v. District of Columbia Board of Elections & Ethics*, the court denied petitioners’ stay motion in part based on Congress’s decision not to veto the law at issue, with the Chief Justice concluding that it “weigh[ed] against granting applicants’ request for a stay, given that the concern is that action by the Council violates an Act of Congress.”). 559 U.S. 1301, 1301 (2010). This proposition also aligns with courts’ inferences of Congressional acquiescence from Congressional inaction in certain circumstances. See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 106 (2007) (finding that Congress’s failure to exercise its disapproval authority over a Sentencing Commissioner amendment showed that Congress “tacit[ly] accept[ed] the amendment” because, while Congress “ordinarily . . . resist[s] reading congressional intent into congressional inaction[,] . . . in this case, Congress failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority”); see also *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (internal quotations marks omitted) (“Once an agency’s statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter (cont’d . . .)
CONCLUSION

For the foregoing reasons, we believe that the Council’s enactment of legislation giving D.C.’s Delegate to Congress the right to vote in the U.S. House of Representatives on measures pertaining solely to the District is a legally defensible exercise of the legislative power that Congress delegated to the Council.

As a threshold matter, Congress itself could grant the District voting representation on matters applying exclusively to the District. Next, Congress delegated its constitutional authority to legislate for the District to the Council in the Home Rule Act. Using this authority, the Council can amend or repeal Congressional legislation that applies only to the District and does not concern the functions or property of the United States. Council legislation meets this standard even if affects federal officials, as long as it affects them only in their administration of laws that are local in scope.

Finally, both the Delegate Act itself, and an amendment of the Act giving D.C.’s Delegate voting rights in the House of Representatives on matters applying exclusively to the District, are matters that apply only to the District, and are therefore within the Council’s legislative authority. While the Delegate operates within the country’s national legislature, the amendment would concern Congress only in those instances when it acts as the District’s local legislature.

(. . . cont’d)
the interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.”).
We conclude, therefore, that the amendment comports with the strictures of the Home Rule Act and may be enacted by the Council.\textsuperscript{92}

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\textsuperscript{92} We recognize that such an amendment may be controversial and may lead to litigation. We conclude for the reasons explained in this memorandum that the Home Rule Act and the relevant case law interpreting the Act support the proposed amendment. We will recruit a team of nationally recognized appellate lawyers to defend any litigation brought challenging such Council legislation.