No. 05-970

In the Supreme Court of the United States

JAMES M. BANNER, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Exercising its plenary authority to legislate for the District of Columbia, Congress enacted D.C. Code § 1-206.02(a)(5) (2001), which prohibits the District of Columbia Council from imposing a tax on the personal income of nonresidents. The questions presented are:

1. Whether that provision discriminates against District residents in violation of the equal protection component of the Fifth Amendment.

2. Whether the provision violates the Uniformity Clause of the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 428 F.3d 303. The opinion and order of the district court (Pet. App. 19a-64a) are reported at 303 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on November 4, 2005. The petition for a writ of certiorari was filed on February 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1-206.02(a)(5) of the D.C. Code prohibits the District of Columbia Council (D.C. Council) from imposing a personal income tax on persons who do not reside within its borders. Petitioners (certain District of Columbia taxpayers, the District of Columbia, the D.C. Council, the members of the Council, and the Mayor of the District of Columbia) filed suit against the United States and the Attorney General, challenging that restriction. Pet. App. 65a-91a. Petitioners alleged, *inter alia*, that the restriction violates the equal protection component of the Due Process Clause and the Uniformity Clause of the Constitution, Amend. V, Art. I, § 8, Cl. 1. See Pet. App. 83a-87a.

The State of Maryland and the Commonwealth of Virginia intervened as defendants, and the federal defendants and the intervenors moved to dismiss the complaint. Pet. App. 5a. The district court granted those motions. *Id.* at 19a-64a.

The district court held that the equal protection component of the Fifth Amendment is not implicated because District residents are not similarly situated to nonresidents who work in the District. Pet. App. 44a-50a. The court alternatively held that, even if the equal protection component of the Fifth Amendment were implicated, the prohibition on taxing non-residents would not be subject to heightened scrutiny and would readily withstand rational-basis review. *Id.* at 45a-58a.

The district court also held that the Uniformity Clause does not limit Congress's power under the District Clause (U.S. Const. Art. I, § 8, Cl. 17) to enact local laws applicable to the District. Pet. App. 58a-61a. The court alternatively held that even if the Uniformity

Clause were applicable, the prohibition against taxing non-residents is a permissible means of addressing a geographically isolated problem. *Id.* at 61a.

2. The court of appeals affirmed. Pet. App. 1a-16a. The court rejected petitioners' contention that strict scrutiny is required because the restriction on taxing non-District residents discriminates against District residents. *Id.* at 6a-11a. The court noted that the Constitution gives Congress plenary authority to legislate for the District, *id.* at 9a, and it concluded that petitioners' claim amounted to a dispute "with the plan of the Constitution and the judgment of its Framers." *Id.* at 10a. The court also held that the restriction easily satisfies rational basis review. *Id.* at 11a. The court explained that "Congress may have been concerned that a commuter tax would cause District businesses to relocate to nearby Maryland and Virginia, where income tax rates are generally lower," * * * [o]r it may have decided that the enhanced burden of financing the District's operation should fall on the nation at large, rather than on the residents of neighboring states." *Ibid.*

The court of appeals also rejected petitioners' claim that the restriction on taxing non-District residents violates the Uniformity Clause because it prefers the States at the expense of the District. Pet. App. 12a-15a. The court explained that petitioners' argument "is inconsistent with Congress's constitutional authority over the District." *Id.* at 14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The Constitution gives Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever" with respect to the District of Columbia. U.S. Const. Art. I, § 8, Cl. 17. Under that grant of authority, Congress may not only apply statutes of nationwide application to the District, but it "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." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973). The restriction on the D.C. Council's authority to tax the personal income of non-District residents falls squarely within Congress's constitutional authority to legislate for the District.

2. Petitioners contend (Pet. 18-23) that the restriction at issue here triggers strict scrutiny under the equal protection component of the Due Process Clause because it discriminates against District residents and in favor of non-District residents. In support of that contention, petitioners rely (Pet. 19) on decisions of this Court that have invalidated *State* taxes that discriminated against *non-residents* of the State.

Petitioners' reliance on those cases is misplaced. When Congress legislates with respect to the District, its treatment of District residents is not comparable to a State's treatment of non-residents. To the contrary, because Congress has exclusive legislative authority over the District (U.S. Const. Art. I, § 8, Cl. 17), "when it legislates for the District, [it] stands in the same relation to District residents as a state legislature does to residents of *its own* state." Pet. App. 9a. Just as state legislation that singles out state residents for taxation raises no equal protection concerns, congressional legislation that singles out District residents for taxation raises no equal protection concerns.

More generally, equal protection principles require only that similarly situated persons be treated alike. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Under the structure of the Constitution, residents of the District and non-District residents are not similarly situated. As the district court explained, "the residents of the District are treated under the Constitution as a distinct class that is not comparable to any other group of citizens." Pet. App. 45a.

Nor does petitioners' equal protection claim gain force from the fact that District residents do not vote for Members of Congress. Instead, as the court of appeals explained, under the Constitution's structure, "Congress is the District's government, * * * and the fact that District residents do not have congressional representation does not alter that constitutional reality." Pet. App. 10a. At bottom, petitioners' plea for strict scrutiny in this context cannot be reconciled "with the plan of the Constitution and the judgment of its Framers." *Ibid.*

To the extent that any equal protection analysis is warranted in this context, the relevant inquiry is whether Congress had a rational basis for prohibiting the D.C. Council from imposing taxes on non-District residents. That standard is easily satisfied here. As the court of appeals explained, Congress may have imposed a restriction on taxing non-District residents because it was concerned that such a tax might cause District businesses to relocate, or because it concluded that the additional money necessary to fund the District should come from the Nation as a whole, rather than from the residents of neighboring States. Pet. App. 11a.

3. Petitioners' claim based on the Uniformity Clause (Pet. 24-26) is equally without merit. The Uniformity Clause provides that "Congress shall have Power To lay

and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1.

Because Congress has authority to legislate separately for the District, the Uniformity Clause can have little or no application to such legislation. As the court of appeals explained, "[g]iven Congress's authority under the District Clause, the Uniformity Clause would appear to have little relevance to Congress's local taxation of the District." Pet. App. 13a.

Relying on *Binns* v. *United States*, 194 U.S. 486 (1904), petitioners contend (Pet. 24-26) that the Uniformity Clause limits Congress's authority to enact legislation for the District. In that case, however, the Court held that the United States could commingle tax revenue generated in the then-territory of Alaska with other funds in the Treasury. 194 U.S. at 494. That holding provides no support for petitioners' argument here. Petitioners rely on the Court's statement in dicta that a different result might obtain in a case in which "Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States revenue for the benefit of the nation, as distinguished from that necessary for the support of the territorial government." *Id.* at 496. But that dicta does not assist petitioners. As the court of appeals explained, the restriction at issue here "does not generate surplus tax revenue beyond the needs of the District for the benefit of the nation." Pet. App. 14a. To the contrary, the restriction "raises no revenue at all." *Ibid.* Moreover the taxes the District *does* raise, within the limits imposed by Congress, are

used to support the District Government, not the Nation as a whole.

Even if the Uniformity Clause applied to the restriction on taxation of non-District residents, that Clause "'does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *United States* v. *Ptasynski*, 462 U.S. 74, 83-84 (1983) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974)). The restriction on taxation of non-District residents reflects Congress's recognition that the District of Columbia is the capital of the Nation as a whole, that it has unique attributes as a result, and that responsibility for funding the District Government should not fall disproportionately on Maryland and Virginia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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