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# Who's Standing in the District After *Grayson v. AT&T Corp.*? The Applicability of the Case-or-Controversy Requirement in D.C. Courts

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Who's Standing in the District After *Grayson v. AT&T Corp.*? The  
Applicability of the Case-or-Controversy Requirement in D.C. Courts

## NOTES

# WHO'S STANDING IN THE DISTRICT AFTER *GRAYSON V. AT&T CORP.*? THE APPLICABILITY OF THE CASE-OR- CONTROVERSY REQUIREMENT IN D.C. COURTS

JOHN W. CURRAN\*

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#### INTRODUCTION

In *Grayson v. AT&T Corp.* (*Grayson II*),<sup>1</sup> the District of Columbia Court of Appeals sitting en banc held that a D.C. statute that purportedly granted individuals standing without suffering an injury-in-fact did not actually do so.<sup>2</sup> The court rested on tenuous grounds and held as a matter of statutory interpretation and legislative history that the D.C. Council did not make explicit its intent to overrule years of the court's standing requirements.<sup>3</sup> In doing so, the court avoided a clear opportunity to answer the question of whether the Article III case-or-controversy requirement applies in D.C. courts.

Long-established precedent holds that Article III standing requirements do not apply in state courts and courts of the territories.<sup>4</sup> The local D.C. court system is an anomaly in the United States because it is intended to function as a state court system, but D.C.'s unique nature as a federal enclave implicates constitutional issues that do not encumber state courts.<sup>5</sup> Section 11-705(b) of the D.C. Code appears to be an inconspicuous section governing the logistical administration of the D.C. Court of Appeals, but courts have interpreted its language that “[c]ases and controversies shall be heard and determined by divisions of the court”<sup>6</sup> to statutorily incorporate Article III standing requirements into the D.C. courts. This Note addresses the question that the D.C. Court of Appeals avoided<sup>7</sup>: Does

1. 15 A.3d 219 (D.C. 2011) (en banc).

2. *Id.* at 224; see D.C. CODE § 28-3905(k)(1) (2001).

3. *Grayson II*, 15 A.3d at 238.

4. See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (“[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts.”); *Life of the Land v. Land Use Comm'n*, 623 P.2d 431, 438 (Haw. 1981) (“[T]he courts of Hawaii are not subject to a ‘cases or controversies’ limitation like that imposed upon the federal judiciary by Article III, § 2 of the United States Constitution . . .”).

5. See *Palmore v. United States*, 411 U.S. 389, 397 (1973) (discussing Congress’s plenary power over D.C. provided by Article I’s proscription that Congress may “exercise exclusive Legislation in all Cases whatsoever, over” D.C. (quoting U.S. CONST. art. I, § 8, cl. 17)).

6. D.C. CODE § 11-705(b) (2001) (emphasis added).

7. See Bruce Comly French, *Broadened Concepts of Standing in the Local District of Columbia Courts*, 23 *How. L.J.* 255, 263 (1980) (“[T]he question of a full-blown analysis of the standing doctrine in the District of Columbia local courts has not been undertaken . . .”).

the D.C. Code statutorily incorporate Article III standing requirements?

Part I of this Note examines Congress's plenary power over D.C. and traces the creation of the modern-day D.C. court system as Article I courts. It then examines Congress's analogous power over the territories pursuant to Article IV, focusing on the power's plenary nature and Congress's extraordinary ability to legislate free from other constitutional restraints. Finally, Part I discusses Article III standing rules, which create federal courts of limited jurisdiction, and inconsistent jurisprudence regarding the applicability of standing requirements in D.C. courts. Part II examines the history of the *Grayson* cases and the D.C. Council's attempt to convey standing without injury-in-fact. After analyzing the legislative history of section 11-705(b), implications of the courts' nature as courts of general jurisdiction, and the policies behind Article III standing, this Note concludes that Congress did not statutorily incorporate the case-or-controversy requirement.

## I. BACKGROUND

### A. Congressional Power over D.C.

Article I, section 8, clause 17 of the U.S. Constitution grants Congress plenary power over the District of Columbia.<sup>8</sup> This broad grant of power means that Congress serves the role of both state and federal government in D.C.<sup>9</sup> This permits Congress to regulate conduct in D.C. that it could not regulate in the national arena and allows Congress to exercise police powers and act as a state legislature might.<sup>10</sup> This includes the ability to establish a judicial system, provided that Congress does not violate any other constitutional

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8. U.S. CONST. art. I, § 8, cl. 17 (providing 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”); *Palmore*, 411 U.S. at 397 (stating that Congress's plenary authority in the District includes police and regulatory powers normally exercised by state governments).

9. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619 (1838) (holding that in D.C. “[t]here is . . . no division of powers between the general and state governments”).

10. See *Palmore*, 411 U.S. at 397–98 (distinguishing Congress's power to legislate pursuant to clause 17 from its powers to legislate pursuant to its other section 8 powers); Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 806–07 (2009) (observing that Congress has “the same kind of plenary power that a state legislature possesses” when legislating for D.C.).

limitation on its authority.<sup>11</sup> Although Congress may act similarly to a state legislature, the Court has long held that D.C. is distinct from the states.<sup>12</sup>

Congress's power over D.C. is in many ways analogous to its power over the territories pursuant to Article IV.<sup>13</sup> In *American Insurance Co. v. 356 Bales of Cotton (Canter)*,<sup>14</sup> Chief Justice Marshall held that territorial courts created pursuant to Congress's plenary power under Article IV were "legislative Courts" rather than "constitutional Courts" and thus did not exercise the judicial power of the United States, but could nonetheless exercise jurisdiction over matters enumerated in Article III.<sup>15</sup> Because Congress acted pursuant to its Article IV powers to regulate the territories, these courts were not constrained by Article III and therefore could consist of judges lacking life tenure.<sup>16</sup> In so ruling, Chief Justice Marshall focused on the unique nature of Congress's authority over the territories as the "combined powers of the general, and of a state government."<sup>17</sup> This ruling applied only to the territories and left unanswered the question of whether other non-Article III federal courts also faced a similar lack of constriction.<sup>18</sup>

Subsequent courts have clarified and elaborated on the meaning of Chief Justice Marshall's opinion in *Canter*. Justice Harlan, speaking for a plurality of the Court in *Glidden Co. v. Zdanok*,<sup>19</sup> explained that the practical realities of governing the territories coupled with weak territorial governments meant that judges appointed by Congress of

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11. *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899) (establishing that Congress "may vest and distribute the judicial authority in and among courts . . . as it may think fit, so long as it does not contravene any provision of the constitution").

12. See *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805) (holding that D.C. residents could not bring a diversity suit in federal court because they are not citizens of a state as the Constitution uses the term). The Court in *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), upheld the constitutionality of Congress's expansion of diversity jurisdiction to permit suit by D.C. residents. The Court fractured in its reasoning, with Justice Jackson joined by Justices Black and Burton arguing that the District Clause enabled Congress to legislate beyond the nine heads of judicial power expressed in Article III. *Id.* at 600 (plurality opinion). Justices Rutledge and Murphy argued that D.C. was encompassed within Article III. *Id.* at 625-26 (Rutledge, J., concurring).

13. See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

14. 26 U.S. (1 Pet.) 511 (1828).

15. *Id.* at 546.

16. *Id.*

17. *Id.*

18. See Kenneth G. Coffin, *Limiting Legislative Courts: Protecting Article III from Article I Viscerations*, 16 BARRY L. REV. 1, 4 (2011) (posing questions left unanswered by *Canter*).

19. 370 U.S. 530 (1962).

necessity heard many cases that otherwise would have been heard by state courts.<sup>20</sup> Justice Harlan's language that "[w]hen the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling" indicates that Article III's requirements do not categorically apply in non-Article III courts.<sup>21</sup> The Court has subsequently held that D.C. is another such area where these "peculiar reasons" are present.<sup>22</sup>

### B. Modern-Day D.C. Courts

#### 1. Congressional creation of Article I courts in the District

The District of Columbia Court Reform and Criminal Procedure Act of 1970<sup>23</sup> created the Article I D.C. Superior Court and the D.C. Court of Appeals.<sup>24</sup> The Act bifurcated the previously unified court system in D.C. into separate court systems, modeled after the federal-state court system.<sup>25</sup> Congress created the Article III Court of Appeals for the D.C. Circuit and the federal district court with jurisdiction over matters of national concern, while the Article I D.C. Superior Court and D.C. Court of Appeals were limited to cases of local concern.<sup>26</sup> Congress intended for the local D.C. courts to function similarly to state courts, that is, outside the purview of Article III.<sup>27</sup> As

20. *Id.* at 545 (plurality opinion).

21. *Id.* at 548 (citing *O'Donoghue v. United States*, 289 U.S. 516 (1933)).

22. See *Palmore v. United States*, 411 U.S. 389, 409–10 (1973) (holding that life tenure and salary protections do not apply in the local D.C. courts established pursuant to Article I).

23. Pub. L. No. 91-358, 84 Stat. 473 (codified as amended in scattered sections of the D.C. CODE).

24. D.C. CODE § 11-101(2) (2001) (stating that the courts were "established pursuant to [A]rticle I of the Constitution"); H.R. REP. NO. 91-907, at 44 (1970) ("This title makes clear (section 11-101) that the District of Columbia Courts . . . are Article I courts, created pursuant to Article I, section 8, clause 17 of the United States Constitution, and not Article III courts."); S. REP. NO. 91-405, at 18 (1969) ("The specific reference to the constitutional authority for the creation of the respective court systems makes clear that [A]rticle I, section 8, clause 16 [sic], is relied upon for the creation of [the local D.C. Courts].").

25. H.R. REP. NO. 91-907, at 35 (providing that there will be a "Federal-State court system in the District of Columbia analogous to court systems in the several States").

26. See *Palmore*, 411 U.S. at 408 (discussing Congress's intent to remedy the problem of a unified court system unable to effectively service local and national concerns by creating two court systems with separate jurisdictions).

27. See *Hickey v. D.C. Court of Appeals*, 457 F. Supp. 584, 586 (D.D.C. 1978) ("The D.C. Court of Appeals is the highest court of the District of Columbia, and its status is that of a state supreme court."); see also S. REP. NO. 91-405, at 18 ("By creating the local courts under authority granted by [A]rticle I of the Constitution, the local District of Columbia court structure is not bound by the provisions found in [A]rticle III of the Constitution."); Wesley S. Williams, Jr., *District of Columbia Court Reorganization, 1970*, 59 GEO L.J. 477, 490 (1971) (discussing how Congress intended to "free the [A]rticle I local court system from the judicial tenure constraint in [A]rticle III"). The driving intent of the D.C. court system was to reduce the extreme

part of the bifurcation, the local court judges were explicitly not afforded life tenure, an inescapable aspect of Article III courts.<sup>28</sup> Congress's distinction between the Article I and Article III courts operating in D.C. was intentional.<sup>29</sup>

To enable the local D.C. courts to function as courts of general jurisdiction similar to state courts, Congress granted the D.C. Superior Court the power to hear "any civil action or other matter (at law or in equity) brought in the District of Columbia"<sup>30</sup> and invested the D.C. Court of Appeals with appellate jurisdiction.<sup>31</sup> The Supreme Court exercises appellate jurisdiction over the D.C. Court of Appeals in the same manner as state supreme courts, further evincing Congress's intent to treat the D.C. courts analogously to state courts.<sup>32</sup>

Within the subchapter labeled "Continuation and Organization" of the D.C. Court of Appeals is a curious section labeled "Assignment of judges; divisions; hearings."<sup>33</sup> Section 11-705(b) states: "*Cases and controversies* shall be heard and determined by divisions of the court unless a hearing or a rehearing before the court in banc is ordered."<sup>34</sup> The legislative history of section 11-705(b) in the Court Reform Act is not illuminative on its face, with both the House and Senate Reports stating that it was a "recodification" of prior law providing for the assignment of judges, divisions, and hearings.<sup>35</sup>

The section was originally enacted in 1967 when the number of judges on the then Article III D.C. Court of Appeals was increased from two to five.<sup>36</sup> The legislative history of the original enactment indicates that Congress intended to provide some measure of relief to the beleaguered and backlogged court system by increasing the number of judges on the court.<sup>37</sup> In an effort to increase the court's

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backlog of criminal cases that had developed under the previous unified system. See H.R. REP. NO. 91-907, at 3 (describing Congress's motivation to reduce the high rate of crime that resulted from a court system unable to handle its caseload).

28. H.R. REP. NO. 91-907, at 38; S. REP. NO. 91-405, at 8; see also *Palmore*, 411 U.S. at 409-10 (confirming Congress's power to enact such a provision).

29. *Palmore*, 411 U.S. at 408 (describing these as "a wholly separate court system").

30. D.C. CODE § 1-204.31(a) (2001); D.C. CODE § 11-921 (2001); see also Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292, 299 n.27 (1982) (describing D.C. courts as "quasi-state courts of general jurisdiction, without any attributes of Article III courts").

31. D.C. CODE § 11-721 (granting the court jurisdiction over appeals from "all final orders and judgments of the Superior Court").

32. See 28 U.S.C. § 1257 (2006) (providing that the D.C. Court of Appeals is treated as a "highest court of a State" for purposes of Supreme Court certiorari).

33. D.C. CODE § 11-705.

34. *Id.* § 11-705(b) (emphasis added).

35. H.R. REP. NO. 91-907, at 134 (1970); S. REP. NO. 91-405, at 20 (1969).

36. Act of Dec. 8, 1967, Pub. L. No. 90-178, § 1(3)(A), 81 Stat. 544, 545.

37. H.R. REP. NO. 90-378, at 3-4 (1967) (describing the additional judges as "imperative" to a smooth court system); S. REP. NO. 90-802, at 3 (1967) (focusing on



efficiency even further, Congress permitted the court to sit as a panel of three judges instead of requiring all five.<sup>38</sup> In passing this section, Congress's focus appeared to be on the latter half of the sentence—permitting panels of three judges.<sup>39</sup> The two congressional reports accompanying the bill used the phrase “cases and controversies” one time each and provided no further explanation or analysis of the words. Instead, the reports devote their discussion to the newly created panel system.<sup>40</sup>

In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act,<sup>41</sup> delegating some of Congress's plenary power to a newly created D.C. Council and Mayor.<sup>42</sup> Although Congress delegated many powers to the D.C. Council, it explicitly prohibited the D.C. Council from legislating in several areas, including over the organization and jurisdiction of the judiciary.<sup>43</sup> Congress also retained an ultimate veto over most laws passed by the D.C. Council, with laws only taking effect after presentment to both Houses and the passage of thirty days during which Congress is in session without passing a joint resolution disapproving of the act.<sup>44</sup>

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the increased number of judges as a response to the court's consistently overburdened caseload).

38. H.R. REP. NO. 90-378, at 3–4 (reporting that other courts utilize the division system “to keep up with their work”); S. REP. NO. 90-802, at 3 (expressing the intent to allow the court to “eliminate its present backlog and to keep its docket current”).

39. See H.R. REP. NO. 90-378, at 1 (“This expanded court is to be separated into divisions consisting of three judges each, for hearing and determining cases and controversies, except when a hearing or a rehearing is ordered before the court in banc.”); S. REP. NO. 90-802, at 1 (same).

40. See H.R. REP. NO. 90-378; S. REP. NO. 90-802; see also Williams, *supra* note 27, at 490 (indicating that Congress may have “intended to avoid the case or controversy constraint” in enacting the courts).

41. Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended in scattered sections of the D.C. CODE).

42. See D.C. CODE §§ 1-201.01 to -207.71 (2001).

43. *Id.* § 1-206.02(a)(4) (“The Council shall have no authority to . . . [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts) . . .”); see also H.R. REP. NO. 93-482, at 1008 (1973) (stating the Congress intended to prohibit the D.C. Council from “changing Title 11 of the D.C. Code providing for the organization, administration and jurisdiction of the District Courts”).

44. D.C. CODE § 1-206.02(c)(1). The D.C. Code is considered a law of the United States because it is passed by Congress, regardless of its limited geographical application. See *Palmore v. United States*, 411 U.S. 389, 400 (1973) (making no distinction between acts passed by Congress that are codified in the U.S. Code and those codified in the D.C. Code). *But see* Note, *supra* note 30, at 294 (arguing that the D.C. Code should not be considered federal law because Congress is not acting in its national legislative capacity).

## 2. *Palmore and the constitutionality of Article I D.C. courts*

In *Palmore v. United States*,<sup>45</sup> the Court addressed a challenge to the constitutionality of the newly created D.C. court system.<sup>46</sup> The Court rejected a criminal defendant's claim that his trial before judges lacking Article III tenure and salary protections violated his due process rights and upheld the constitutionality of judges of the D.C. courts to hear criminal cases arising under the D.C. Code.<sup>47</sup> The Court built upon the decision in *Canter* that allowed territorial courts created pursuant to Article IV and courts-martial to operate outside the strictures of Article III.<sup>48</sup>

Justice White drew a distinction between laws of national applicability, which require Article III protections, and laws passed pursuant to Congress's power to legislate for "specialized areas having particularized needs and warranting distinctive treatment."<sup>49</sup> Keying on Congress's concerted intent to create a local court system that functioned like state courts—including judges without life tenure—and the historical ability of state courts to hear federal criminal cases, the Court held that Congress acted constitutionally when it created Article I D.C. courts staffed by judges lacking Article III tenure and salary protections.<sup>50</sup> Although *Palmore* establishes that Article III, section 1 does not apply to D.C. courts, it did not explicitly address the applicability of Article III, section II, including the case-or-controversy requirement.

## 3. *Congress can legislate over D.C. free from Article III constraints*

The Court has examined the reach of *Palmore's* holding in subsequent cases involving the constitutionality of other legislative courts. Justice Brennan's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>51</sup> discussed Congress's power to create bankruptcy courts staffed by judges lacking life tenure empowered to hear matters "arising in or related to" the underlying bankruptcy case.<sup>52</sup> The Court fractured in its reasoning, but held that

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45. 411 U.S. 389 (1973).

46. *Id.* at 390.

47. *Id.* at 410.

48. *Id.* at 402–04 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Canter*, 26 U.S. (1 Pet.) 511 (1828)); see also Coffin, *supra* note 18, at 7–8 (analyzing Justice White's opinion in *Palmore* as depending upon Chief Justice Marshall's theory in *Canter* that Congress can exercise police power over the territories and D.C.).

49. *Palmore*, 411 U.S. at 408.

50. See *id.* at 401–02, 408–10 (implying that the historical fact of federal prosecution in state court is dispositive as to its constitutionality).

51. 458 U.S. 50 (1982).

52. *Id.* at 53–54 (plurality opinion).

the bankruptcy courts were unconstitutional because they were composed of non-Article III judges who exercised Article III judicial power.<sup>53</sup> Noting that the Court in *Canter* and *Palmore* established that Congress can create legislative courts that are an “exception from the general prescription of Art[icle] III,”<sup>54</sup> Justice Brennan limited those holdings based on the courts’ geographic location “outside the States of the Federal Union” and Congress’s “exceptional constitutional grants of power” in those areas.<sup>55</sup>

Justice Brennan focused his analysis on the extraordinary powers granted to Congress in the District Clause, the clause granting Congress power over the Armed Forces, and Article IV, as compared to the limited nature of Congress’s other grants of authority in Article I, section 8.<sup>56</sup> The Court ultimately held that Congress acted unconstitutionally when it created the bankruptcy court system because these historical exceptions were not present.<sup>57</sup> This analysis clarified that when legislating for D.C., Congress utilizes a power “different in kind from the other broad powers conferred on Congress.”<sup>58</sup>

Justice Brennan further limited the language in *Canter* and *Palmore* granting Congress plenary power over “specialized areas having particularized needs”<sup>59</sup> as applying only to “*geographic* areas, such as the District of Columbia.”<sup>60</sup> The limited geographic applicability of the D.C. Code and laws governing the territories, as opposed to the

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53. *Id.* at 76.

54. *Id.* at 64–65 & n.16 (explaining that Congress was empowered to create courts “not in conformity with Art[icle] III”).

55. *Id.* at 70–71 & n.25.

56. *Id.* at 73–74 & n.27; *see also* *United States v. Lopez*, 514 U.S. 549, 589 n.3 (1995) (Thomas, J., concurring) (contrasting Congress’s plenary power under Article I, section 8, clause 17 with its limited power under the Commerce Clause); *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part) (“[U]nlike the District Clause, which empowers Congress ‘[t]o exercise exclusive Legislation,’ the language of the Commerce Clause gives no indication of exclusivity.” (citation omitted)); *Palmore v. United States*, 411 U.S. 389, 397–98 (1973) (“[T]he power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art[icle] I, § 8.”).

57. *N. Pipeline*, 458 U.S. at 73–74 & n.27 (plurality opinion).

58. *Id.* at 76; *see also Palmore*, 411 U.S. at 397 (“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.”); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619 (1838) (“There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government . . .”).

59. *Palmore*, 411 U.S. at 408.

60. *N. Pipeline*, 458 U.S. at 75–76 (plurality opinion) (labeling D.C. as a “unique federal enclave”).

“laws of national applicability and affairs of national concern” that Congress attempted to authorize the bankruptcy courts to entertain, further solidified the distinction.<sup>61</sup> This plenary power allows Congress to legislate over D.C. completely independent of Article III.

### C. *Standing Requirements in Federal Court*

Article III of the Constitution limits federal courts to hearing cases and controversies.<sup>62</sup> This doctrine, known as standing, circumscribes the ability of federal courts to entertain suits.<sup>63</sup> Standing is largely a question of whether a particular plaintiff is entitled to have a court decide the merits of a particular dispute or issue.<sup>64</sup> The Supreme Court has interpreted standing to encompass both constitutional and prudential limitations on the jurisdiction of federal courts.<sup>65</sup>

The constitutional aspects of standing mandated by Article III involve examining whether the plaintiff has demonstrated the existence of a case or controversy between himself and the defendant.<sup>66</sup> There are three constitutional requirements for standing in Article III courts.<sup>67</sup> First, the plaintiff must personally suffer an injury-in-fact, which is the invasion of a recognized interest that is both “concrete and particularized” and also actual or imminent.<sup>68</sup> Second, there must be a causal connection between the injury and the defendant, such that the plaintiff’s injury is “fairly traceable” to the defendant’s conduct.<sup>69</sup> Third, it must be likely that a favorable judgment will redress the injury.<sup>70</sup>

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61. *Id.* at 76.

62. U.S. CONST. art. III, § 2, cl. 1.

63. *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. 2012) (stating that standing functions to prevent courts from ruling on certain claims).

64. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

65. *See id.* (stating that the “inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise”).

66. *See id.* (labeling this “the threshold question in every *federal* case” (emphasis added)).

67. *United States v. Hays*, 515 U.S. 737, 742–43 (1995).

68. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Compare* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184–85 (2000) (holding that plaintiffs in an environmental organization did have standing because they alleged direct injury to their personal interests), *with* *Sierra Club v. Morton*, 405 U.S. 727, 739–41 (1972) (denying standing to an environmental organization seeking to prevent the construction of a ski resort because the pleading did not allege that the construction would personally injure the organization’s members).

69. *Allen v. Wright*, 468 U.S. 737, 751, 757–58 (1984) (holding that the plaintiffs’ injury was not fairly traceable to the defendant because the injury was “highly indirect and result[ed] from the independent action of some third party” (internal quotation marks omitted)); *see also* *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007) (concluding that a plaintiff had standing when it alleged that its property

Additionally, there are “judicially self-imposed limits” on federal court jurisdiction, known as prudential standing requirements.<sup>71</sup> The prudential aspects include a prohibition on asserting the rights of others,<sup>72</sup> the requirement of individualized harm rather than a “generalized grievance,”<sup>73</sup> and the requirement that the plaintiff is within the zone of interests to be protected.<sup>74</sup> Prudential standing requirements can be overridden by Congress and can be granted to the full extent of Article III,<sup>75</sup> while the Article III elements cannot be abrogated by an act of Congress.<sup>76</sup>

The paramount policy rationale underlying the Court’s standing jurisprudence is the separation of powers.<sup>77</sup> This necessitates granting federal courts limited jurisdiction to ensure that the courts do not intrude on matters best decided by the political branches as a democratic principle<sup>78</sup> and as a matter of competency.<sup>79</sup> The

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interests were harmed by the EPA’s refusal to enforce greenhouse gas emission laws because the injury could be traced to the EPA).

70. See, e.g., *Warth*, 422 U.S. at 505–06 (denying standing because economic realities made it unlikely that plaintiffs would benefit from a judgment invalidating the challenged exclusionary zoning provision).

71. *Allen*, 468 U.S. at 751.

72. See *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004) (requiring that the plaintiff assert a claim on his own behalf).

73. See *FEC v. Akins*, 524 U.S. 11, 19–20, 23 (1998) (determining that a suit brought pursuant to a statute that authorized suit by “any party aggrieved” by an agency order did not present a generalized grievance because Congress created a statutory right and its violation by the defendant was sufficient to present a personalized injury).

74. See *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (establishing that the plaintiff must fall within the group of people the law was intended to protect in order to establish standing).

75. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (explaining that Congress can expand standing beyond that ordinarily barred by prudential standing rules); *Warth*, 422 U.S. at 501 (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”).

76. See *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”).

77. See *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Article III standing is built on a single basic idea—the idea of separation of powers.”).

78. See *Warth*, 422 U.S. at 498 (reflecting on the “proper—and properly limited—role of the courts in a democratic society”); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (explaining that the case-or-controversy requirement helps to “define the role assigned to the judiciary in a tripartite allocation of power”).

79. See *Warth*, 422 U.S. at 500 (emphasizing that the political branches are better suited to decide matters of general significance that are not presented in the context of injured individuals); *WRIGHT ET AL.*, *supra* note 63, § 3531.3 (discussing proper limitations on the courts as a function of courts’ unrepresentative identity and inadequacy in addressing certain issues as compared to the political branches).

doctrine of separation of powers prevents Congress from using the courts as a vehicle to indirectly trample on the executive branch.<sup>80</sup>

Article III standing requirements do not apply in state and local territorial courts.<sup>81</sup> Separation of powers concerns are absent when the claim is brought in state court because of the separate protections provided by federalism.<sup>82</sup> All states have a court of general jurisdiction to entertain claims beyond that which a federal court can hear.<sup>83</sup> This allows state courts, as courts of general jurisdiction, to hear a wider range of claims as an original matter.<sup>84</sup>

#### D. D.C. Court Discussions of the Case-or-Controversy Requirement

The D.C. Court of Appeals has provided widely inconsistent jurisprudence regarding the applicability of Article III standing requirements in D.C. courts. Supreme Court precedent indicates that Article III does not apply of its own force in D.C. courts, so the requirement would have to come from another source.<sup>85</sup> Therefore,

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80. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890–97 (1983) (decrying Congress's increased use of the relaxed definition of standing to indirectly circumvent separation of powers by empowering a greater range of individuals to challenge executive actions in the courts). Additional policy reasons for standing include the preservation of scarce judicial resources and the related concept that injured parties have sufficient motivation to present the court with the necessary advocacy. See *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (opining that plaintiffs who assert their own rights will come to court with "the necessary zeal and appropriate presentation" that might otherwise be lacking); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3.1 (6th ed. 2012) (discussing the desire to expend judicial resources only to address an aggrieved party).

81. *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) ("[S]tate courts need not impose the same standing or remedial requirements that govern federal-court proceedings."); see, e.g., *ACLU of N.M. v. City of Albuquerque*, 188 P.3d 1222, 1225–26 (N.M. 2008) ("Under the New Mexico Constitution, state courts are courts of general jurisdiction, and our constitution contains no analogue to the federal 'cases and controversies' language."); *Benavente v. Taitano*, 2006 Guam 15 ¶ 17 ("[T]he Organic Act of Guam provides no express case or controversy requirement similar to the standing requirements found in Article III.").

82. See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (observing that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy" because the "allocation of authority in the federal system" provides a comparable check to separation of powers).

83. See Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1163 & n.76 (1984) (describing how almost all states have a court with original jurisdiction over all matters at law and equity).

84. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (describing federal courts as "courts of limited jurisdiction"); Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. REV. 159, 209 n.300 (2011) ("Article III courts are not courts of general jurisdiction the way state courts are . . .").

85. See French, *supra* note 7, at 267 (emphasizing that the case-or-controversy requirement is not constitutionally mandated and so must be statutorily imposed).

the uncertainty largely revolves around whether section 11-705(b) of the D.C. Code statutorily incorporated the case-or-controversy requirement.<sup>86</sup>

The first D.C. court to cite section 11-705(b) was *United States v. Cummings*,<sup>87</sup> which stated that D.C. courts were limited to hearing cases and controversies.<sup>88</sup> The following year, after the Supreme Court's decision in *Palmore*, the D.C. Court of Appeals stated that D.C. courts "are not bound by the requirements of Article III," but the court implied that its jurisdiction "extends as far as Congress has granted it."<sup>89</sup> The court, however, refused to answer the question of the extent of Congress's grant of jurisdiction.<sup>90</sup> The language of the court that it was following the principles of standing, justiciability, and mootness "to promote sound judicial economy" reflects the view that standing requirements were adopted wholly as a prudential matter rather than statutorily mandated.<sup>91</sup>

Later courts began to cite section 11-705(b) as indicating that Congress statutorily incorporated Article III standing requirements in D.C. courts.<sup>92</sup> In *Lee v. District of Columbia Board of Appeals & Review*,<sup>93</sup> the court took it as a natural progression that because D.C. courts were constrained by a case-or-controversy requirement, it was wise to

86. See *supra* notes 33–40 and accompanying text (discussing the origins of section 11-705(b)).

87. 301 A.2d 229 (D.C. 1973) (per curiam).

88. *Id.* at 231.

89. *District of Columbia v. Walters*, 319 A.2d 332, 338 n.13 (D.C. 1974).

90. See *id.* (citing prior cases that did not "examin[e] the limits of this grant" and not doing so itself).

91. See *id.* (differentiating the two requirements). The *Walters* court did not cite to section 11-705(b) in support of the statement that Congress granted limited jurisdiction to D.C. courts. See *Lee v. D.C. Bd. of Appeals & Review*, 423 A.2d 210, 216 n.13 (D.C. 1980) (observing in a parenthetical citation to *Walters* that the *Walters* court did not cite to section 11-705(b) in support of the statement that Congress granted limited jurisdiction to D.C. courts).

92. See, e.g., *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002) (applying the case-or-controversy requirement despite acknowledging that the court was not established under Article III (citing D.C. CODE § 11-705(b)); *Fisher v. Gov't Emps. Ins. Co.*, 762 A.2d 35, 38 n.7 (D.C. 2000) (stating that the court is bound to hear only cases and controversies by "our own governing statute"); *Cnty. Credit Union Servs., Inc. v. Fed. Express Servs. Corp.*, 534 A.2d 331, 333 (D.C. 1987) ("Although this court is not governed by standing requirements under [A]rticle III of the Constitution, we look to federal jurisprudence to define the limits of '[c]ases and controversies' that our enabling statute empowers us to hear." (second alteration in original)); *Lee*, 423 A.2d at 216 n.13 ("In creating this court . . . Congress provided that we, like the federal courts, should hear only '[c]ases and controversies.'" (alteration in original) (citing D.C. CODE § 11-705(b))); *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1378 n.11 (D.C. 1977) ("[O]ur jurisdiction is limited by the same 'case or controversy' requirement, see D.C. CODE § 11-705(b), as that imposed on the Article III courts . . .").

93. 423 A.2d 210 (D.C. 1980).

also adopt the Supreme Court's standing tests.<sup>94</sup> Courts subsequently expounded upon this view and paralleled the case-or-controversy requirement in section 11-705(b) that allegedly binds D.C. courts to the Article III provision that binds federal courts.<sup>95</sup> These courts established that D.C. standing principles encompass two aspects: Article III requirements incorporated via section 11-705(b) and prudential principles that the D.C. courts adopted.<sup>96</sup>

Other courts have expressly contradicted these statements, declaring that standing in D.C. is purely a prudential matter. In *Banks v. Ferrell*<sup>97</sup> the court noted that it is "true that the judicial power of the local D.C. courts may extend beyond the case or controversy requirement."<sup>98</sup> Elsewhere, the court has stated that it "*generally* adhere[s] to the case and controversy requirement,"<sup>99</sup> but that it is not bound by either the Article III standing requirements in general<sup>100</sup> or the case-or-controversy requirement in particular.<sup>101</sup> This confusion regarding which—if any—aspects of Article III

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94. See *id.* at 216 n.13 (labeling the adoption of the injury-in-fact requirement as a "logical and appropriate component in the test for standing before this court").

95. *Cnty. Credit Union*, 534 A.2d at 333 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982)); see also *Friends of Tilden Park*, 806 A.2d at 1206–07 & n.5 (distinguishing between constitutional standing and prudential principles).

96. See *Speyer v. Barry*, 588 A.2d 1147, 1160 (D.C. 1991) (stating that plaintiffs must meet "both the 'constitutional' requirement of a 'case or controversy' and the 'prudential' prerequisites of standing").

97. 411 A.2d 54 (D.C. 1979).

98. *Id.* at 56 n.7; see also S. REP. NO. 91-405, at 18 (1969) ("By creating the local courts under authority granted by [A]rticle I of the Constitution, the local District of Columbia court structure is not bound by the provisions found in [A]rticle III of the Constitution.").

99. *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1103–04 (D.C. 2008); see also *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004) (per curiam) (stating that the court is "not bound strictly by the 'case or controversy' requirements of Article III"); *District of Columbia v. Grp. Ins. Admin.*, 633 A.2d 2, 12 (D.C. 1993) ("Although we, unlike the federal courts, are not bound by the 'case or controversy' requirement of Article III of the Constitution, we have adopted this requirement for prudential reasons . . .").

100. *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 706 n.4 (D.C. 2009) ("[T]he standing requirements of Article III of the U.S. Constitution do not govern the jurisdiction of our courts.").

101. *Bd. of Dirs. of the Wash. City Orphan Asylum v. Bd. of Trs. of the Wash. City Orphan Asylum*, 798 A.2d 1068, 1074 (D.C. 2002) ("[T]his court is not bound by 'case or controversy' requirements set forth in Article III."); see also *Consumer Fed'n of Am. v. Upjohn Co.*, 346 A.2d 725, 727 n.6 (D.C. 1975) ("[T]he rules of standing as applied in the federal courts are *substantially* the same as those which govern the instant case in Superior Court." (emphasis added)). While it is possible that these courts were referring to the absence of a constitutional requirement rather a statutory mandate, the lack of consistency and clarity nonetheless clouds the issue.



standing are mandated by statute and which have been prudentially adopted by the court has left the area greatly unsettled.<sup>102</sup>

The D.C. Court of Appeals has made it clear that it is not bound by Supreme Court precedent regarding justiciability and can hear cases that would be barred from adjudication in Article III courts. For example, courts have admitted that they have the power to issue advisory opinions,<sup>103</sup> rule on moot cases,<sup>104</sup> and decide cases not yet ripe.<sup>105</sup> Additionally, the D.C. Council may provide a right of action that would otherwise be barred by the courts' prudential standing rules.<sup>106</sup>

Descriptions of the Superior Court as a court of general jurisdiction further muddle the matter. The D.C. Code provides that the Superior Court has jurisdiction over "any civil action or other matter,"<sup>107</sup> leading to the label of the Superior Court as a "court of general jurisdiction."<sup>108</sup> Legislative history of the D.C. Courts Act also includes a reference to the Superior Court as a court of general jurisdiction.<sup>109</sup> When coupled with Congress's intent to create the D.C. courts in the image of state courts, the purported case-or-controversy limitation to the Court of Appeals' jurisdiction raises major questions about the true extent of the D.C. courts' jurisdiction.

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102. See *Grayson II*, 15 A.3d 219, 260 n.9 (D.C. 2011) (en banc) (Ruiz, J., concurring in part and dissenting in part) ("Our opinions have not all adhered to the distinction between what is mandated and what we, by choice, require."); *Grayson I*, 980 A.2d 1137, 1155 n.78 (D.C. 2009) ("[T]his court is not bound by the case or controversy requirement of Article III."), *rev'd en banc*, 15 A.3d 219; see also Andrew Kim, Note, "Standing" in the Way of Equality? *The Myth of Proponent Standing and the Jurisdictional Error in Perry v. Brown*, 61 AM. U. L. REV. 1867, 1885 n.134 (2012) (stating that D.C. "subscribes to Article III principles of justiciability").

103. See *Clayton v. United States*, 429 A.2d 1381, 1384 (D.C. 1981) (expressing "reluctance to render an advisory opinion" on prudential grounds but implying that the court nonetheless retained the power to hear them).

104. See *Lynch v. United States*, 557 A.2d 580, 582 (D.C. 1989) (en banc) ("[T]he decisions of the Supreme Court on the issue of mootness are not binding on this court.").

105. See *Hessey v. Burden*, 615 A.2d 562, 572 n.17 (D.C. 1992) (exercising the court's "flexibility" and "discretion" to decide a ripeness issue).

106. See *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732–33 (D.C. 2000) (holding that the D.C. Council had the power to enact a statute that overrides the prudential standing limits imposed by D.C. courts); *cf. supra* note 75 and accompanying text (recognizing Congress's power to override the Supreme Court's prudential standing requirements).

107. D.C. CODE § 11-921(a)(6) (2001).

108. *E.g.*, *Cormier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 664 n.3 (D.C. 2008); *Andrade v. Jackson*, 401 A.2d 990, 992 (D.C. 1979); see *Williams, supra* note 27, at 484 (describing the D.C. court system as one of "general jurisdiction").

109. H.R. REP. NO. 91-907, at 33 (1970).

## II. D.C. COURTS EXIST UNENCUMBERED BY THE CASE-OR-CONTROVERSY REQUIREMENT

### A. *CPPA and Grayson History*

The D.C. Consumer Protection Procedures Act<sup>110</sup> (CPPA) is a consumer protection statute designed to protect against unfair trade practices.<sup>111</sup> Prior to 2000, the CPPA permitted suit by “[a]ny consumer who suffers any damage” from an illegal trade practice.<sup>112</sup> Under this version, the complainant must be a consumer who personally suffered some damage.<sup>113</sup> In 2000, the CPPA was amended to provide that “[a] person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter.”<sup>114</sup> On its face, this amendment could be interpreted as removing the injury-in-fact requirement from CPPA suits by permitting suit by any person whenever an unfair trade practice injures D.C. consumers, regardless of whether the complainant was personally injured.<sup>115</sup> This amendment raised two separate questions previously left unanswered by the D.C. Court of Appeals: Does the case-or-controversy requirement apply in D.C. courts and, if so, what is its source? If statutorily incorporated by Congress in section 11-705(b), a separate question arises as to whether the D.C. Council passed a law affecting the jurisdiction of the courts, which Congress prohibited.<sup>116</sup> If adopted by the D.C. Court of Appeals as a prudential measure, can the D.C. Council overcome it just as Congress can overcome the prudential standing requirements in Article III courts?<sup>117</sup>

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110. D.C. CODE § 28-3901 to -3913.

111. See *Dist. Cablevision Ltd. P’ship v. Bassin*, 828 A.2d 714, 717 (D.C. 2003) (detailing the purposes of the CPPA).

112. D.C. CODE § 28-3905(k)(1).

113. *Grayson I*, 980 A.2d 1137, 1154 (D.C. 2009), *rev’d en banc*, 15 A.3d 219 (D.C. 2011).

114. D.C. CODE § 28-3905(k)(1) (emphasis added).

115. See Corrected Joint Brief of Appellants Alan Grayson and Paul M. Breakman, *Grayson II*, 15 A.3d 219 (Nos. 07-CV-1264, 08-CV-1089), 2010 WL 7163426, at \*11–12 (arguing that it was “crystal clear” that the D.C. Council intended to remove the injury-in-fact requirement). Such statutes are known colloquially as private attorney general statutes because they permit individuals to bring suits typically enforced only by the government. See Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 622–30 (2005) (describing the standing impediments presented by private attorney general statutes in federal court).

116. D.C. CODE § 1-206.02(a)(4); see also *supra* note 43 and accompanying text.

117. Stated another way, is the distinction between constitutional and prudential standing requirements in Article III courts of any consequence if D.C. courts prudentially adopted them? See *supra* note 106 and accompanying text (identifying the Council’s power to enact statutes overcoming prudential limitations).

Complainants Grayson and Breakman brought separate CPPA claims, but both alleged to bring their claims on behalf of the “general public.”<sup>118</sup> Grayson alleged that telephone companies that had issued prepaid calling cards did not turn over the unused amounts—purportedly amounting to millions of dollars—to the D.C. Mayor as required by law.<sup>119</sup> Breakman alleged that AOL charged current and past members double the price for Internet service that it offered to new members.<sup>120</sup> Notably, Breakman did not allege that he ever subscribed to AOL; rather, he brought the suit “in a representative capacity on behalf of the interests of the general public.”<sup>121</sup>

The trial court dismissed Grayson’s complaint for lack of standing and failure to state a claim for which relief may be granted.<sup>122</sup> The D.C. Court of Appeals in *Grayson v. AT&T Corp. (Grayson I)*<sup>123</sup> performed a short analysis of the standing issue and determined that the 2000 amendment demonstrated the D.C. Council’s intent to eliminate the injury-in-fact requirement, meaning that a complainant need not have personally suffered injury to maintain a suit.<sup>124</sup> The court focused on the fact that the amended section eliminated the “suffer any damages” language to conclude that a complainant could bring suit without any injury to himself.<sup>125</sup> Additionally, the court examined subsection 28-3905(k)(2), which states that nothing in the CPPA prevents a person “who is injured” from exercising other rights or remedies.<sup>126</sup> The court was able to infer a distinction between subsection (k)(1), which applied to all persons, and subsection (k)(2), which applied to only those who were injured.<sup>127</sup> Asserting that “this court is not bound by the case or controversy requirement of Article III,” the court reversed and remanded, holding that injury-in-fact was not required to maintain a claim under the CPPA.<sup>128</sup>

Breakman’s complaint was also dismissed for lack of standing by the trial court.<sup>129</sup> Described as someone who “has never had a contractual relationship with defendant” and was not injured

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118. *Grayson II*, 15 A.3d at 227.

119. *Id.* at 225.

120. *Id.* at 227.

121. *Id.*

122. *Id.* at 227–28.

123. 980 A.2d 1137 (D.C. 2009), *rev’d en banc*, 15 A.3d 219.

124. *Id.* at 1154–55.

125. *Id.* at 1154.

126. *Id.* at 1154–55.

127. *Id.* at 1155.

128. *Id.* at 1155 n.78, 1157–58.

129. *Breakman v. AOL LLC*, No. 2008 CA 532, 2008 WL 8083443, at \*1 (D.C. Super. Ct. July 28, 2008).

personally by AOL's actions, the court easily found that he lacked standing because he suffered no personal injury.<sup>130</sup> The Court of Appeals in an unpublished memorandum opinion reversed and remanded, deeming itself bound by the panel's decision in *Grayson I* that injury-in-fact was not necessary for a CPPA claim.<sup>131</sup> The Court of Appeals then vacated both opinions and granted a consolidated rehearing en banc.<sup>132</sup>

*B. Grayson II Ducks the Question, Throwing Precedent Into Doubt*

The D.C. Court of Appeals sitting en banc in *Grayson II* was presented with a clear opportunity to settle prior inconsistent jurisprudence regarding the applicability of standing requirements in D.C. courts.<sup>133</sup> The court recognized the appellee's argument that the opinion in *Grayson I* effectively "rewr[ote] this Court's standing jurisprudence" and thus presented "a question of exceptional importance" worthy of an en banc sitting.<sup>134</sup> Nonetheless, the court completely avoided the standing question and reversed *Grayson I*. It did so by resting on shaky statutory interpretation and legislative history grounds when it held that the 2000 CPPA amendments "do not reveal an explicit intent of the Council to erase the constitutional standing requirement to which this court has adhered during the past several decades."<sup>135</sup>

In a footnote, the court's true motivations for its holding were made apparent: "Since we conclude that the CPPA retains our injury-in-fact standing requirement, we do not need to address and we take no position on whether Congress by statute has imposed Article III's standing requirement on the local courts of the District of Columbia through D.C. Code § 11-705(b)."<sup>136</sup> By deciding on these grounds,

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130. *Id.* at \*5.

131. *Breakman v. AOL*, No. 08-CV-1089, 2009 WL 4808796 (D.C. Nov. 10, 2009).

132. *Grayson v. AT&T Corp.*, 989 A.2d 709, 709 (D.C. 2010) (en banc) (per curiam) (consolidating the cases and ordering rehearing en banc). *Grayson* also brought a qui tam action under the D.C. False Claims Act. The court in *Grayson I* held that the public disclosure bar in the FCA prohibited *Grayson's* suit. *Grayson I*, 908 A.2d at 1153. That portion of the *Grayson I* opinion was not vacated by the court's grant of en banc. *Grayson II*, 15 A.3d 219, 223 n.1 (D.C. 2011) (en banc).

133. Brief for the Legal Aid Society of the District of Columbia et al. as Amici Curiae Supporting Appellants at 9, *Grayson II*, 15 A.3d 219 (Nos. 07-CV-1264, 08-CV-1089), 2010 WL 7163424, at \*9.

134. *Grayson II*, 15 A.3d at 223 n.1.

135. *Id.* at 224. Interestingly, Judge Inez Smith Reid authored both *Grayson* opinions.

136. *Id.* at 232 n.29. *Grayson II* also avoided the question of "whether it will follow the facial plausibility standard enunciated in *Ashcroft v. Iqbal*," *id.* at 229 n.16, but subsequently answered in the affirmative in a panel decision released nine months later, *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011).

the court was able to avoid answering the difficult question that has troubled D.C. courts for years.<sup>137</sup>

*C. Section 11-705(b) Does Not Incorporate Article III's Case-or-Controversy Requirement*

*Grayson II* left a critical and fundamental question unanswered: Can the D.C. Council pass a statute that does not require injury-in-fact?<sup>138</sup> To answer this question, one must determine first whether Article III's standing requirement was statutorily incorporated via section 11-705(b). If it was, the next question is whether such an amendment would impact the organization or jurisdiction of the courts. If not, then the Council does not appear to have any impediments to enacting the law.<sup>139</sup>

In full, section 11-705(b) states: "Cases and controversies shall be heard and determined by divisions of the court unless a hearing or a rehearing before the court in banc is ordered. Each division of the court shall consist of three judges."<sup>140</sup> One early commentator hypothesized that Congress may have created the D.C. courts pursuant to Article I in order to circumvent Article III's case-or-controversy requirement.<sup>141</sup> The same commentator implored that the use of the words "cases and controversies" in section 11-705(b) "should not be construed to denote the limited category of legal

137. See *supra* notes 85–102 (presenting the various viewpoints regarding the application of the case-or-controversy requirement). The D.C. Council introduced an amendment to the CPPA that would have legislatively overruled *Grayson II* by permitting a non-profit organization to bring suit "regardless of whether or not the organization itself has suffered or would suffer an injury in fact." Consumer Protection Amendment Act of 2011, B19-0581 § 102(c) (as introduced to the D.C. Council Comm. of the Whole, Nov. 16, 2011), available at <http://dcclims1.dccouncil.us/images/00001/20111116102513.pdf>. The D.C. Council ultimately passed the amendment but significantly altered the language to require that the court dismiss any suit brought by a non-profit that "does not have sufficient nexus to the interests involved." Consumer Protection Act of 2012, A19-0647 § 2(b)(3) (enacted Jan. 25, 2013) (to be codified at D.C. CODE § 28-3905(k)(1)(D)(ii)), available at <http://dcclims1.dccouncil.us/images/00001/20130118162155.pdf>.

138. See Brief for the Legal Aid Society, *supra* note 133, at 11 (stating that the question of whether D.C. courts are limited to hearing cases and controversies is a matter of statutory interpretation, not constitutionality); French, *supra* note 7, at 273 ("[T]he broad grant of plenary authority over the District of Columbia courts would allow the Congress to eliminate the requirement of a case or controversy entirely . . .").

139. See French, *supra* note 7, at 267 ("Only if some specific prohibition is found upon the exercise of the Council's power may it fairly be concluded that the Council is without such legislative authority [to expand jurisdiction beyond cases or controversies].").

140. D.C. CODE § 11-705(b) (2001).

141. Williams, *supra* note 27, at 490 ("The explicit reliance on [A]rticle I in the designation of 'District of Columbia Courts' also may be intended to avoid the case or controversy constraint placed upon federal court jurisdiction by [A]rticle III . . .").

business which [A]rticle III of the Constitution describes as being appropriate for cognizance by federal, constitutional courts.”<sup>142</sup> The argument that the phrase “cases and controversies” does not entail its Article III meaning and could be substituted with synonyms such as claims, matters, or disputes without creating any substantive changes is supported by the legislative history and title of the section.<sup>143</sup> In her separate opinion in *Grayson II*, Judge Ruiz argued that subscribing to the case-or-controversy requirement “has been a *choice* that the court has made—not a mandate we must follow.”<sup>144</sup> This is supported by the legislative history, which states that “the local District of Columbia court structure is not bound by the provisions found in Article III of the Constitution.”<sup>145</sup>

The legislative history of the Court Reform Act indicates that Congress intended the local D.C. courts to function analogously to state courts.<sup>146</sup> A near-necessary component of a state court system is a court of general jurisdiction.<sup>147</sup> Although some states do not place general jurisdiction in one particular court, there is at least one court available in the state that does have jurisdiction to hear the claim.<sup>148</sup> Because all original jurisdiction over local matters is vested in D.C. Superior Court, it must be a court of general jurisdiction.

The statutory grant of jurisdiction of the D.C. Superior Court extends to “any civil action or other matter (at law or in equity),”<sup>149</sup> while the D.C. Court of Appeals is empowered to hear “all final orders and judgments of the Superior Court.”<sup>150</sup> It stretches credibility to interpret the Superior Court to hear matters that the Court of Appeals cannot hear on appeal.<sup>151</sup> Likewise, section 11-

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142. *Id.* at 501.

143. *See Grayson II*, 15 A.3d 219, 262–63 (D.C. 2011) (en banc) (Ruiz, J., concurring in part and dissenting in part) (arguing that “[t]he likely explanation is that Congressional drafters . . . used the term [cases or controversies] as ‘shorthand’ for ‘appeal’ without realizing its implications as a constitutional term of art”).

144. *Id.* at 259.

145. S. REP. NO. 91-405, at 18 (1969).

146. *See supra* Part I.B.1.

147. *See* Gordon & Gross, *supra* note 83, at 1163 & n.76 (reporting that almost all states have a court of general jurisdiction, and those that do not have at least one court with jurisdiction).

148. *See supra* note 83 and accompanying text.

149. D.C. CODE § 11-921(a) (2001).

150. *Id.* § 11-721(a)(1); *see also id.* § 11-721(b) (providing that a party may appeal any order or judgment of the Superior Court to the Court of Appeals “as of right”).

151. *See Grayson II*, 15 A.3d 219, 262 (D.C. 2011) (en banc) (Ruiz, J., concurring in part and dissenting in part) (identifying the “truly anomalous and indeed absurd” interpretation that gives the Superior Court far greater jurisdiction than the Court of Appeals); Brief for the District of Columbia as Amicus Curiae in Support of Appellees and Supporting Affirmance, *Grayson II*, 15 A.3d 219 (Nos. 07-CV-001264, 08-CV-001089), 2010 WL 7163423, at \*5.

705(b), which refers only to the Court of Appeals, should not serve as a limitation on the jurisdiction of the Superior Court.<sup>152</sup> The case-or-controversy requirement was designed to apply in federal courts, which are courts of limited jurisdiction.<sup>153</sup> Applying these same standards in courts of purported general jurisdiction is inconsistent with Congress's intent to create a D.C. court system analogous to those in the states.<sup>154</sup> A literal reading of section 11-705(b) could produce the result that the Court of Appeals is limited to hearing cases and controversies only when it sits with three judges, but when the court sits en banc this limitation does not apply.<sup>155</sup> If the word "unless" in the first sentence is read to negate the "cases and controversies" language in addition to the "divisions of the court" language, then this results.<sup>156</sup> Nothing explicit or implicit indicates such a result.<sup>157</sup>

Additionally, Congress's treatment of the D.C. Court of Appeals as a state supreme court for purposes of Supreme Court certiorari<sup>158</sup> underscores its intent to create a court system without the constraints of Article III, including the case-or-controversy requirement.<sup>159</sup> Section 11-705(b) covers the organization of the court when it is in session, the inclusion of the phrase "[c]ases and controversies" does not provide a substantive limitation on the court's jurisdiction.<sup>160</sup>

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152. Brief for the Legal Aid Society, *supra* note 133, at 15 (arguing that allowing the Superior Court to have greater jurisdiction than the Court of Appeals is not "sensible"); Response in Opposition to Burger King Corp.'s Motion to Dismiss at 9 n.27, *Ctr. for Sci. in the Pub. Interest v. Burger King Corp.*, No. 07-CA-003363 B, 2008 WL 6631845 (D.C. Super. Ct. Nov. 20, 2008) (contending that a literal reading of section 11-705(b) would have it apply neither to the Court of Appeals sitting en banc nor the Superior Court, and therefore implying an intent for all D.C. courts to be limited to hearing cases or controversies is inconsistent with Congress's intent for D.C. court to be analogous to state courts).

153. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (noting that federal courts have limited jurisdiction in that they "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree" (citations omitted)).

154. See *Williams*, *supra* note 27, at 484 ("The principal achievement . . . after all, is to create an entirely new local court system of general jurisdiction, independent of the federal judiciary.").

155. See *Grayson II*, 15 A.3d at 262 (Ruiz, J., concurring in part and dissenting in part) (highlighting the incongruous result that panels of three judges would be under jurisdictional constraints while the en banc court would not); *Williams*, *supra* note 27, at 501.

156. See Response in Opposition, *supra* note 152, at 9 n.27 (arguing that Congress should not be presumed to have intended such a result).

157. See *Williams*, *supra* note 27, at 501 ("[T]here is no indication, in general policy or express purpose, of a congressional intent to have 'cases and controversies' heard by three-judge divisions, with other court business to be heard otherwise.").

158. 28 U.S.C. § 1257 (2006).

159. *Williams*, *supra* note 27, at 492.

160. Brief for the District of Columbia, *supra* note 151, at 4.

The use of the phrase “cases and controversies” is meant merely as a way to describe when the court is acting in its judicial function.<sup>161</sup>

The title headings further indicate that Congress did intend section 11-705(b) to serve as a jurisdictional statute. Title headings can be used as an interpretive tool to shed light on the meaning of a section when there is ambiguity or confusion.<sup>162</sup> Reference should be made to titles when the statute lends itself to multiple interpretations.<sup>163</sup> It is clear from four decades of precedent that section 11-705(b) is far from clear.<sup>164</sup> Reference to titles is appropriate because of the ambiguity surrounding section 11-705(b).<sup>165</sup> Title 11 is entitled “Organization and Jurisdiction of the Courts,” section 7 is titled “District of Columbia Court of Appeals,” and subchapter I is titled “Continuation and Organization.” Section 11-705 is titled “Assignment of judges; divisions; hearings.”<sup>166</sup> Subchapter II is titled “Jurisdiction” and contains the jurisdictional provisions relating to the Court of Appeals. Far from indicating that Congress intended to incorporate Article III standing requirements via a nondescript subsection, the titles indicate that section 11-705(b) was intended to merely govern matters incidental to deciding cases.<sup>167</sup> The true intent of section 11-705(b) was to permit the court to sit in

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161. See Brief for the Legal Aid Society, *supra* note 133, at 16 (claiming that the reference is “purely descriptive”).

162. See *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947) (“[The] heading is but a short-hand reference to the general subject matter involved. . . . For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.”); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (“Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.”).

163. *Bellew v. Dedeaux*, 126 So. 2d 249, 251 (Miss. 1961) (“If there is any uncertainty in the body of an act, the title may be resorted to for the purpose of ascertaining legislative intent and of relieving the ambiguity.”).

164. See *supra* Part I.D (chronicling the confusion regarding the meaning of the section); see also *Grayson II*, 15 A.3d 219, 262 (D.C. 2011) (en banc) (Ruiz, J., concurring in part and dissenting in part) (referring to title headings of the D.C. Code to divine the intent behind section 11-705(b)).

165. Cf. 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 18:7, at 76–77 (7th ed. 2009) (“A statute’s title may not be considered to determine whether a statute is ambiguous and thus whether courts may look beyond the language of the statute.”).

166. Brief for the Legal Aid Society, *supra* note 133, at 16 (arguing that the titles undermine any argument that the section is meant to constrain jurisdiction).

167. See *Grayson II*, 15 A.3d at 262 (Ruiz, J., concurring in part and dissenting in part) (imploing that section 11-705(b) is “properly read as an administrative provision directing the composition of divisions of the Court of Appeals in all cases other than those that are heard by an en banc court”).



panels of three judges, not to limit its jurisdiction.<sup>168</sup> While the legislative history is far from dispositive, the titles coupled with an absence of any reference to Article III standing requirements necessitates the interpretation that section 11-705(b) did not statutorily incorporate the case-or-controversy requirement.<sup>169</sup>

In fact, Congress took pains to note that it was creating the courts pursuant to its Article I powers in order to free the courts from Article III's constraints.<sup>170</sup> Although the holding in *Palmore* only covered Article III, section 1, there is no reason it should not also encompass Article III, section 2.<sup>171</sup> Additionally, even if Congress originally intended to incorporate the case-or-controversy requirement, its continued applicability is not clear. Section 11-705(b) was enacted while the D.C. courts were still Article III courts,<sup>172</sup> to which the case-or-controversy requirement does apply. The courts were later reestablished pursuant to Article I.

Policy rationales that underpin the Article III case-or-controversy requirement are not present in D.C. courts. The Court has repeatedly stated that one of the main purposes of the case-or-controversy requirement is to protect the separation of powers between coequal branches of government.<sup>173</sup> The local D.C. courts simply are not in the same position to exert influence equal to that which can be exerted by Article III courts.<sup>174</sup> D.C. courts are not permitted to hear cases that involve many federal issues, as jurisdiction is granted exclusively to the Article III courts.<sup>175</sup> As the Supreme Court has stated, "the law of Art[icle] III standing is built

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168. See *id.* (referring to these as "procedural provisions"); *supra* notes 35–40 (discussing the legislative history of the section).

169. See *Grayson II*, 15 A.3d at 262–63 (Ruiz, J., concurring in part and dissenting in part) (explaining that "[t]he likely explanation is that Congressional drafters inadvertently copied the term [cases or controversies] term from an analogous provision that applies to the federal appellate courts . . . without realizing its implications as a constitutional term of art").

170. H.R. REP. NO. 91-907, at 44 (1969); S. REP. NO. 91-405, at 18 (1969).

171. See *supra* Part I.B.3 (discussing how Congress can legislate over D.C. entirely free from Article III).

172. See *O'Donoghue v. United States*, 289 U.S. 516, 551 (1933) (holding that the prior D.C. court system consisted of Article III courts).

173. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982) (discussing the proper, limited role of *federal* courts in reviewing acts of the executive and legislative branches).

174. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 581 (1962) (plurality opinion) ("The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. . . . Thus those limitations implicit in the rubric 'case or controversy' that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts need have no application in the District." (citation omitted)).

175. See D.C. CODE § 11-921(b) (2001).

on a single basic idea—the idea of separation of powers.”<sup>176</sup> Just as expanded standing in state courts does not threaten the separation of powers and the role of the federal executive and legislative branches, expanded standing in D.C. courts also does not threaten the constitutional structure of separation of powers.<sup>177</sup> D.C. courts do not stand on equal footing with the federal legislative and executive branches, therefore they cannot impinge on those branches’ proper roles.<sup>178</sup> The limited geographic reach of the D.C. courts that Justice Brennan described in *Northern Pipeline* also means that any abuses of the restraint function played by Article III will have a limited impact.<sup>179</sup> The legislative history, titles, and policy principles all indicate that section 11-705(b) does not statutorily incorporate the Article III case-or-controversy requirement. Therefore, the D.C. Council can grant standing absent injury-in-fact.

#### CONCLUSION

The court in *Grayson II* avoided a question with a potentially wide-ranging impact. D.C. courts are not the only non-Article III courts of general jurisdiction. The reach of section 11-705(b) presents deeper constitutional law issues regarding the extent of Congress’s ability to confer jurisdiction on non-Article III courts beyond the limits of Article III. While Congress is the exclusive sovereign in D.C., the territories exercise inherent sovereignty that was only partially ceded to Congress. If Congress can create the D.C. courts unencumbered by Article III requirements, then there is no obvious prohibition on lowering the jurisdictional bar in these federal non-Article III territorial courts to usurp the jurisdiction of the local territorial courts. The territories are not constitutionally differentiated from D.C., only in the level of sovereignty delegated by Congress.

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176. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

177. See *Glidden*, 370 U.S. at 581–82 (plurality opinion) (stating that the case-or-controversy requirement was intended to maintain separation of powers only in relation to federal courts that deal with matters of national concern).

178. While it is true that the D.C. courts’ lack of jurisdiction over federal matters comes from a statute that Congress could potentially amend and provide another avenue for Justice Scalia’s alleged improper interference with the executive branch via the judiciary, this theoretical possibility does not justify the undue limitations it would place on the courts.

179. See Arthur N. Chagris, *Palmore v. United States: The Interrelationship of Article I and Article III of the Constitution*, 23 AM. U. L. REV. 119, 127 (1973) (contending that the “particularized need” for D.C. courts exceeds the benefits imposed by Article III’s protections).