No. _____

In The
Supreme Court of the United States

JOHN TYLER CLEMONS, JESSICA WAGNER, KRYSTAL BRUNNER, LISA SCHEA, FRANK MYLAR, JACOB CLEMONS, JENNA WATTS, ISSAC SCHEA, and KELCY BRUNNER,
Appellants,

v.

UNITED STATES DEPARTMENT OF COMMERCE, GARY LOCKE, Secretary of the United States Department of Commerce, BUREAU OF THE CENSUS, and ROBERT GROVES, Director of the Bureau of the Census,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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Questions Presented

The interstate apportionment of Congress after the Census of 2000 resulted in a disparity of 410,012 persons comparing the largest district to the smallest. Because the House is frozen by statute at 435 seats, this disparity will exceed 450,000 after the Census of 2010 and will exceed 600,000 after the Census of 2030.

1. Does the Constitution's requirement of one-person, one-vote apply to the interstate apportionment of the U.S. House of Representatives?

2. Does the current level of inequality violate this standard?

3. Does Congress need to increase the size of the House to remediate this inequality?

List of Parties

All parties are listed in the caption. There are no corporate parties.

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Prior Decisions

The Federal Supplement citation for the decision of the three-judge panel in the District Court is not yet available. The Westlaw citation is 2010 WL 2732610.

Basis for Jurisdiction in this Court

The decision of the three-judge panel was entered on July 8, 2010. The notice of appeal was filed on July 9, 2010. Service was made upon the Solicitor General as required by Supreme Court Rule 29.

Direct appeal to this Court is authorized by 28 U.S.C. § 1253 and Supreme Court Rule 18.1. This is a challenge to the constitutionality of the interstate apportionment of the House of Representatives seeking the invalidation of a portion of 2 U.S.C. § 2a and a related injunction.

Constitutional Provisions and Statutes

U.S. Const. Art. I, § 2 (in part)

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union, according to their respective Numbers . . . .

> The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . .

U.S. Const. Amend. 14, § 2 (in part)

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

2 U.S.C. § 2a (in part)

> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.
>
> (b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or

> subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. . . .

Statement of the Case

Nine voters from five different states have challenged the constitutionality of the interstate apportionment of the United States House of Representatives. They contend that fixing the size of the House at 435 seats results in unconstitutional levels of inequality between voters in various states.

The interstate apportionment of the House is governed by a mathematical process (the "method of equal proportions") established by statute. 2 U.S.C. § 2a. This same statute fixes the number of seats in the House at 435—albeit indirectly.

The Secretary of Commerce conducted the decennial census in 2000 and is in the latter stages of the 2010 census. Pursuant to 13 U.S.C. § 141, in 2001 the Secretary transmitted the results of the census to the President for the purpose of calculating the number of representatives for each state. This same process will be followed by Secretary Gary Locke in 2011. The President will then transmit the results to the Clerk of the House. The Clerk will then issue a certificate of entitlement informing each state of the number of representatives to which it will be entitled.

This process resulted in significant inequality between the states after the 2000 census.[1] The nine plaintiffs are voters in the five most under-represented states in the nation.

- Montana, with one district, has 410,012 more residents than Wyoming, which also has one district. This is a ratio of 1.83 voters in Montana per voter in Wyoming. The total percentage disparity is 63.38%.

- Delaware, with one district, has 289,764 more residents than Wyoming, and a ratio of 1.59 to 1.

- South Dakota, with one district, has 261,570 more residents than Wyoming, and a ratio of 1.53 to 1.

- Utah, with three districts, has 250,267 more residents in each of its districts than the district of Wyoming and a ratio of 1.51 to 1. This results in a statewide under-representation of 750,801 persons.

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[1] All statistical citations are taken from Plaintiffs' briefs and expert affidavits in the District Court, unless otherwise indicated. The District Court noted that all such statistical information was uncontested by the government. App. 4, n. 1.

- Mississippi, with four districts, has 217,928 more residents in each of its districts than the district of Wyoming, and a ratio of 1.44 to 1. This results in a statewide under-representation of 871,712 persons.

Plaintiffs submitted uncontested testimony from expert witnesses projecting the results of the 2010 census. After the 2010 census, Rhode Island, with two districts, will replace Wyoming as the most over-represented state. Utah will gain a seat and will no longer be under-represented. The remaining states will continue to be among the most under-represented in the nation. The maximum deviation after the 2010 census is projected to be between 453,747 and 457,483 according to the uncontested expert projections. The maximum percentage deviation will be between 64.0% and 64.47%. Using Bureau of the Census data, the experts testified that the maximum deviation after the 2020 census will be 491,787 and after the 2030 census will be 629,962.

The experts also presented uncontested testimony that the only available method to reduce these levels of inequality is to increase the size of the House. Using the data from the 2000 census, the experts established that the following levels of inequality would result from various increases in the size of the House.

Size of House	Maximum Deviation
435	410,012
441	332,410
523	270,200
658	190,359
932	76,667
1405	49,484
1741	16,884

Similar calculations show the deviation stated as a percentage for various sizes:

435	63.38%
441	52.09%
529	49.87%
913	33.17%
932	25.39%
1664	17.55%
1760	9.91%

After the 2010 census, similar adjustments in the size of the House would result in similar decreases in the level of inequality. Similar improvements would also occur after the 2010 census. Increasing the House by just 11 seats would reduce the maximum percentage disparity by 5.28 percentage points. Increasing the House to 543 seats would result in all five of the plaintiffs' states receiving an additional representative. With 543 seats the maximum disparity would be 294,798 rather than 457,336 for 435 seats.

Procedural History

On September 17, 2009, John Tyler Clemons, a voter from Mississippi, along with four others, voters from Montana, Delaware, South Dakota, and Utah, filed this action in the United States District Court for the Northern District of Mississippi. The core allegation was that 2 U.S.C. § 2a was unconstitutional insofar as it fixed the number of representatives in the House at 435.

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1341 since it involved a challenge to the constitutionality of an Act of Congress. Declaratory and injunctive relief was sought pursuant to 28 U.S.C. §§ 2201 and 2202. Venue was proper in the Northern District of Mississippi since at least one of the Plaintiffs resided therein. 28 U.S.C. § 1391(e)(4).

The original Defendants were the United States Department of Commerce; Gary Locke, the Secretary of Commerce; Robert Groves, Director of the Bureau of the Census; and Lorraine C. Miller, Clerk of the United States House of Representatives. By agreement, Clerk Miller was dismissed from the action as an unnecessary party. The government stipulated at oral argument in the District Court that all necessary parties were before the court. App. 2.

On September 17, Plaintiffs also filed a motion to convene a three-judge panel pursuant to 28 U.S.C. § 2284(a). One day later, the Honorable Edith H. Jones, Chief Judge of the Fifth Circuit,

granted the motion naming W. Allen Pepper, Jr. and Michael Mills, judges from the Northern District of Mississippi, and Leslie H. Southwick, from the United States Court of Appeals for the Fifth Circuit, to serve as the panel.

On December 21, 2009, the government filed its "Motion to Dismiss, or in the Alternative, for Summary Judgment." The motion to dismiss asserted that the Plaintiffs' claims were barred either by the statute of limitations or the doctrine of laches. The motion for summary judgment was based on the contention that the constitutional principle of one-person, one-vote was inapplicable to the federal government's interstate apportionment of the House. The government argued that the only constitutional requirements for interstate apportionment are that: (1) each state must receive at least one representative, (2) districts may not cross state lines, and (3) districts may not consist of less than 30,000 persons.

On January 7, 2010, the Plaintiffs filed an Amended Complaint as of right. It removed Lorraine C. Miller as a defendant and added four additional plaintiffs who were voters all 18 or 19 years-old. The Amended Complaint made modest additional changes which made it clear that the Plaintiffs were challenging the constitutionality of the application of 2 U.S.C. § 2a to the results of the 2010 census.

On February 19, 2010, Plaintiffs filed both their opposition to the government's motion and their Motion for Summary Judgment. In these briefs, the Plaintiffs expressly waived all relief

relative to the 2010 elections and relied exclusively on claims concerning the reapportionment that would follow the 2010 census.

In support of their motions, each Plaintiff filed an affidavit establishing his or her status as registered voters from a relevant state. These affidavits also established that seven of the plaintiffs were less than 18 years old in 2001 when the current reapportionment was done.

Plaintiffs also filed two affidavits from expert witnesses concerning statistical matters relating to the equality of the interstate apportionment of the House throughout the nation's history with special focus on both 2000 and 2010. Dr. Jeffrey Ladewig is a professor at the University of Connecticut who performed all of the calculations concerning the current inequality of the House. Kimball Brace is the President of Election Data Services, Inc., who has advised the Census Bureau and numerous states concerning matters of reapportionment. He also served as an expert witness for Gore-Lieberman in the *Bush v. Gore* litigation in 2000. Mr. Brace provided the primary evidence concerning the predicted results of the 2010 census.

The government filed its Reply Brief on April 23, 2010. In this brief it conceded that the Plaintiffs had standing and waived its claims regarding the statute of limitations because of the age of the younger Plaintiffs. Moreover, since the Plaintiffs had waived all claims relative to the 2010 elections, the government conceded that the issue of laches was no longer applicable. However, for the first

time, the government claimed that the political question doctrine barred a decision on the merits in this case.

Plaintiffs filed their Reply Brief on May 13, 2010. The Court granted Plaintiffs' request for oral argument which was held on May 28, 2010, in Oxford, Mississippi.

The District Court entered an opinion, authored by Circuit Judge Southwick, on July 8, 2010. The District Court denied the government's motion to dismiss, holding that the case was fully justiciable and did not present a political question. But the District Court held for the government on the merits ruling that Plaintiffs did not have the right to the remedy of a change in the size of the House of Representatives.

Summary of Argument

This Court should determine whether the principle of one-person, one-vote applies to the interstate apportionment of the House. In the District Court, the government staked out a surprising position denying that proportional representation is required for the House.

The District Court side-stepped the government's contention, ruling that one-person, one-vote might have applicability in the interstate context but not when the remedy sought is an adjustment of the size of the House of Representatives.

The undisputed testimony of Plaintiffs' expert witnesses was that adjusting the size of the House is the only available method to improve the level of inequality. The present inequality is 9100% greater than the disparity ruled unconstitutional by this Court in *Karcher v. Daggett*, 462 U.S. 725 (1983). Under the current apportionment, one congressional district has 410,012 more residents than another. This is not a problem peculiar to states with a single district. Rhode Island, a state with two districts, will be the most over-represented after the 2010 census. The disparity between Rhode Island and Montana will be at least 453,747.

If the House was increased to a size comparable to the British House of Commons, the disparity of voting strength would dramatically decrease. In Britain, the House of Commons with 646 members serves a population roughly one-fifth that of the United States. Based on the 2000 census, a House of 658 members would cut the maximum disparity from 410,012 to 190,359 persons—a reduction of 53.5%. This would be the lowest maximum disparity of the House since the 1910 census, when the number 435 was first adopted.

The District Court correctly concluded that the Plaintiffs were not asking for the court to impose a particular size of the House but to declare that the current level of voter inequality violates the Constitution. Congress would be required to remedy the disparity by creating an apportionment plan that is as nearly equal "as is practicable." This would require the size of the House to be modified. Plaintiffs concede that the level of precision required

of the states is impossible to achieve for the nation, but the decisions of this Court hold that the impossibility of perfection is no excuse for failing to make best efforts.

The plaintiffs certainly do not seek 9,000 representatives, which is the approximate maximum number possible under the Constitution. But when significant improvements are possible with a far more modest adjustment—658 seats, for example—the failure of Congress to attempt to lower the disparity results in glaring hypocrisy. If the states are required to strain gnats, there is no justification for allowing Congress to swallow camels.

The controlling constitutional text requires the House to be fashioned according to the principle of proportional representation. The District Court got this much correct. However, when it posed the question of "how proportionate the representation must be?" it took upon itself to interpret the language of the Constitution as if the question was one of first impression. This Court has already answered this question. Representation must be equal "as nearly as is practicable." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). The District Court erred by failing to employ this standard and the burdens of proof that flow therefrom.

The District Court placed significant reliance on the levels of disparity that arose from the first reapportionment in 1792. While this is appropriate in the abstract, the District Court failed to distinguish between disparity in 1792 that arose from the Constitution's rule of 30,000 and the

inequality of today which arises from a statute of Congress.

The Constitution's language and this Court's unbroken line of decisions make it clear that equal representation is required for all levels of government. This Court should note probable jurisdiction to ensure that Congress is not given a blanket exemption from adherence to the principle of one-person, one-vote.

Argument

I

The District Court Failed to Follow This Court's Precedent Requiring the Federal Government to Adhere to the Principle of Equal Representation in the House

In the District Court, the government of the United States never acknowledged that American citizens have the right to equal voting strength in the interstate context. Instead, it attempted to convince the District Court that one-person, one-vote is a constitutional mandate for the states alone.

The controlling constitutional text is Article I, § 2, which was slightly modified by Section 2 of the 14th Amendment. The latter provides that

> Representatives shall be apportioned among the several States *according to their respective numbers*, counting the whole number of

> persons in each State, excluding Indians not taxed.

(Emphasis added.)

Like the government briefs, the District Court opinion is entirely silent on the rights of voters. However, this Court has not been silent. It has repeatedly held that the right to vote is "fundamental." *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S.___, 174 L. Ed. 2d 140, 149, 129 S. Ct. 2504 (2009); *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)"); *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) ([Citizens have a] "strong interest in exercising the 'fundamental political right' to vote. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)").

This Court has repeatedly echoed the theme of the importance of the right to vote saying that "one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000). "It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ." *Id.* at 105.

The principle that "each person's vote [should] be given equal weight" has been applied by this

Court in elections for President (*Bush v. Gore*); Congress (*Wesberry v. Sanders*); state legislatures (*Reynolds v. Sims*); and local governments (*Avery v. Midland County*, 390 U.S. 474 (1968)).

In *Avery*, this Court made it plain that every level of government has a duty to guarantee equal voting strength for every voter.

> Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment.

390 U.S. at 481, n.6.

The Justice Department contended below that this statement from *Avery* was non-binding *dicta.* However, the government never offered a textual, logical, or moral reason why the national government was exempt from the constitutional duty to treat its voters equally. The logic of *Wesberry* leaves little doubt that votes cast for Congress in Mississippi and Montana need to be of equal weight to those cast in Wyoming and Rhode Island.

> We hold that, construed in its historical context, the command of Art. I § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is

> practicable one man's vote in a congressional election is to be worth as much as another's.

376 U.S. at 7-8.

Moreover, in *Wesberry*, this Court said that "equal representation for equal numbers of people [is] *the fundamental goal for the House of Representatives*." *Id.* at 18. (Emphasis added.) How is the fundamental goal for the House served if the only requirement is intrastate equality? Mississippi, the 31st most populous state, must divide each of its four districts with exacting precision to contain 721,482 persons. Iowa, the 30th most populous state, is divided into five precise districts containing 586,385 persons. The "fundamental goal for the House" is clearly undermined by the current method of apportionment that leaves massive inequality between voters in all four of Mississippi's districts compared to the five districts of Iowa. It takes 183 voters in Montana to equal 100 voters in Wyoming.

The Plaintiffs in this case possess the following percentages of a vote compared to Wyoming voters: Jessica Wagner and Jenna Watts from Montana (54.7%); John Tyler Clemons and his brother Jacob Clemons from Mississippi (69.4%); Lisa Schea and her son, Issac Shea, from Delaware (63.0%); sisters Krystal and Kelcy Brunner from South Dakota (65.4%); and Frank Mylar from Utah (66.3%). This case is not about equal treatment for *states* but equal treatment for *individual voters*, no matter where they live.

This Court would never tolerate districts with this degree of inequality if the lines were drawn by state legislatures. It is utterly inconsistent with "the fundamental goal of the House" to allow Congress to create wildly unequal districts while prohibiting the states from creating districts with variances as small as 0.69%. *Karcher*, 462 U.S. at 728.

A.

This Court Has Affirmed the Requirement of Equal Representation In Five Cases Touching on Interstate Apportionment

This Court has not retreated from its commitment to upholding this fundamental goal of equal representation in the House in recent cases involving *interstate* apportionment. This Court has decided five cases since 1990 touching on the issue of interstate apportionment which affirm the principle of the national government's duty to pursue equality in the House.

We start with the case upon which the District Court placed the greatest reliance. In *Department of Commerce v. Montana*, 503 U.S. 442 (1992), this Court showed some openness to the kind of challenge these Plaintiffs have brought.

> There is some force to the argument that the same historical insights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by

> the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States "according to their respective Numbers" would also embody the same principle of equality. Yet it is by no means clear that the facts here establish a violation of the *Wesberry* standard.

Id. at 461.

This Court's holding in *Montana* was not—as was contended by the Justice Department—a repudiation of the theory that *Wesberry* applies to interstate apportionment. Rather, this Court found that the *Wesberry* standard was not violated by the use of the "method of equal proportions."

The mathematical model advanced by Montana produced less absolute disparity but created greater relative disparity. This Court clearly implied that if Montana would have presented a mathematical model that increased both measures of equality, it would have been a different case. *Montana* strongly suggests that *Wesberry* could apply in the interstate context in the right factual setting. While the Court noted that "precise mathematical equality" is an "illusory" goal for the nation as a whole,[2] this statement in *Montana* does not remove the government's duty to use good faith efforts to improve equality as nearly as may be practicable.

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[2] *Id.* at 463.

In this the next case in this line, this Court explicitly proclaimed the principle that had been implied in *Montana.* In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), this Court addressed a challenge to the Census Bureau's treatment of overseas employees of the federal government. The lower court decision clearly impacted interstate apportionment requiring "the Secretary to eliminate the overseas federal employees from the apportionment counts" and mandating a recalculation of the number of Representatives among the states. *Id.* at 791. This Court reversed.

This Court began its review of the merits saying, "We review the dispute to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation. See *Department of Commerce v. Montana*, 503 U. S. at 459." 505 U.S. at 804. Thus, *Franklin* expressly employs *Montana* as the source for the rule that the Constitution mandates a "goal of equal representation" in interstate apportionment.

In *Wisconsin v. City of New York*, 517 U.S. 1 (1996), this Court upheld the level of discretion granted to the Secretary of Commerce in the conduct of the census. This Court held that the Secretary had even more discretion in the context of taking the census than in the actual process of apportionment. But this Court said that his discretion will only be upheld "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation.'" *Id.* at 19-20.

Likewise, in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999), this Court found that a voter from Indiana had standing under Article III to challenge the use of sampling in the census. Expert testimony established that Indiana would lose a congressional seat if sampling was implemented. This Court found that the act of Congress permitting sampling touched the same rights recognized in the original one-person, one-vote case, *Baker v. Carr*, 369 U.S. at 208: "[V]oters have standing to challenge an apportionment statute because '[t]hey are asserting a plain, direct and adequate interest maintaining the effectiveness of their votes.'" 525 U.S. at 331-332. "Indiana residents' votes will be diluted." *Id.* at 332.

Department of Commerce v. United States House of Representatives was an interstate apportionment case. Moreover, this Court took action which stopped the federal government from transferring a seat from Indiana to another state. It is beyond doubt that this Court used one-person, one-vote interests as the basis for standing. Accordingly, it is fair to conclude that this case directly recognizes that voters have the right to demand that the federal government refrain from diluting their votes in the interstate apportionment context.

The final case in this sequence of interstate apportionment decisions is *Utah v. Evans*, 536 U.S. 452 (2002). Utah challenged the "hot deck imputation" methodology employed in the census asking for a recalculation of the interstate

apportionment. It sought to obtain a seat that had been given to North Carolina. This Court affirmed that the Census Clause supports "several important constitutional determinations" including the determination that "comparative state political power in the House would reflect comparative population." *Id.* at 478.

It is impossible to ignore the weight of all these rulings. *Wesberry* held that the Constitution requires one person's vote to be as equal as is practicable to any other person's vote. This Court has broadly declared that all levels of government—including the national government—must guarantee equal voting strength to citizens. This Court has decided no less than five cases in the last twenty years involving interstate apportionment challenges, embracing in each of them the principle that Congress is bound by the Constitution's goal of equality for voters. This Court has also declared that equal voting strength for an equal number of voters is the "fundamental goal for the House of Representatives."

The Plaintiffs have the right to equal voting strength in interstate apportionment. And it is evident that their rights are seriously impaired by the current levels of disparity. All of this should be clear—even though the rights of voters were essentially ignored by the District Court.

Affirming the notion that the federal government has the duty to guarantee an appropriate level of equal representation in the House is not difficult. What *is* difficult is the

remedy. Does the right of equal representation entitle Plaintiffs to demand that Congress change the size of the House of Representatives to achieve equality as near as may be practicable? We address the issue of the remedy in the latter portion of the next section.

II

The District Court Erred by Ignoring the Process Established by this Court for the Evaluation of One-Person, One-Vote Cases

In the District Court, the Justice Department contended that there were only three constitutional limitations on the size of the House: every state must receive at least one representative, no district can be smaller than 30,000 persons, and districts may not cross state lines. Importantly, the government argued that the size of the House need not be proportional to population. Any size of House between 50 seats and 9,000 seats would satisfy the Constitution, according to the government view.

In oral argument, the District Court asked the Justice Department whether it stood by the view that a House of 50 seats would be constitutional. The elaborate non-answer given by counsel was a

tacit admission that a House of 50 would be constitutionally permissible.[3]

The District Court sided with the Plaintiffs' view on the broad question of proportional representation in the House. Based on the constitutional text which requires that "Representatives shall be apportioned among the several states according to their respective numbers," the District Court opined that

> This at least means that apportionment of the House must reflect population differences to some degree. That seems to us the answer to the hypothetical question asked at oral argument as to whether having just fifty Representatives, *i.e.,* one per State, would be constitutional. Fifty members would satisfy the bare constitutional minimum of one Representative per State, nor more than one per 30,000 population, and no crossing of

[3] In its reply brief the government contended that the requirement that "representatives shall be apportioned according to their respective numbers" only required that all seats over 50 be allocated in some manner that relates to population. This is wholly satisfied, it was argued, by the use of the method of equal proportions. Thus, if the House had 51 seats, as long as the 51st seat was allocated by the method of equal proportions, the Constitution would be satisfied. Or, if the House was frozen at 105 seats, the size adopted in 1792, as long as the last 55 seats were assigned according to the method of equal proportions the Constitution poses no barrier. In other words, the government steadfastly rejected the view that a proportional result was required at the end of the process. The gross inequality that would arise with a House of 51 seats or 105 seats would not violate the Constitution, the government contended.

> State boundaries, but it would not have satisfied the obligation to apportion Representatives by population. The House cannot be apportioned as is the Senate, which is without regard to the "respective numbers of people."
>
> Therefore, the Constitution rather self-evidently requires allocation of House districts by population. It is from this Constitutional imperative of apportionment by population that the Plaintiffs would have us impose on the Congress a duty that approaches, even if it does not quite meet, the obligation of each State to assure that all of its own congressional districts have nearly equivalent population. The Constitution requires proportional representation, but it does not express how proportionate the representation must be.

App. 11.

At this juncture the District Court launched into a historical analysis of the size of the House of Representatives in a quest to determine whether or not 435 seats was a reasonable number. The District Court appeared to believe that this Court had never interpreted the relevant constitutional text. The District Court was right in saying that no case had ever reached this Court regarding the size of the House of Representatives. But the district court was not asked to answer the question "What is a reasonable size for the House?" Rather, the issue was: "Does the current level of inequality require

that the House be enlarged to protect the rights of voters?"

The District Court focused on the wrong question. Assessing the size of the House for reasonableness is indeed a political question. We contend that the correct process for judicial resolution follows from recognizing the appropriate legal standard. This Court has already established the required level of equality. "[A]s nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 7-8.

"Practicability" sounds similar to "reasonableness," but these different terms suggest fundamentally different inquiries. The latter approach poses the question: Is the size of the House reasonable? The former approach asks: Is it practicable to have a House that is more equal? Plaintiffs recognize that the level of equality that is practicable within a state is quite different from the level that is practicable for the nation. Nonetheless, "as equal as is practicable" is still the governing standard. The reasonableness of the size of the House is not the relevant legal issue. Rather, the Plaintiffs ask this Court to hold that it is practicable to improve equality in the House by increasing its size.

This Court's standards for the evaluation of Congressional apportionment challenges are most thoroughly described in *Karcher*, 462 U.S. at 730-731. Concerning the burden on plaintiffs, this Court said:

> Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

The *Karcher* opinion also describes the burdens that the government bears once a plaintiff has satisfied his initial burdens. The Court reiterated the *Wesberry* language that a "high standard of justice and common sense" requires "equal representation for equal numbers of people." *Id.* at 790. Even though "precise mathematical equality" may be impossible, the standard requires "population equality as nearly as is practicable." This latter standard requires that the "State make a good-faith effort to achieve precise mathematical equality." Only "minimal" deviations that are "unavoidable" are to be permitted. *Id.*

The Plaintiffs produced evidence proving both elements. First, the level of disparity is egregious. Second, there are a great number of alternate plans to improve the disparity—all of which require some increase in the size of the House of Representatives.

The burden of proof then shifts to the government. We respectfully suggest that in this case the burden on the government may be consolidated into one standard: the government must prove that interstate apportionment is as equal as is practicable. The government must prove that even though an increase in the size of the House may be necessary to improve equality, any increase in size would so hinder the functions of the House as to be impracticable. The government has offered nothing but silence on this issue.

The District Court accurately summarized the Plaintiffs' request for relief. "[W]e are not asked to set by court order any particular number of seats. Rather, Plaintiffs seek invalidation of the relevant part of 2 U.S.C. § 2a, which would require Congress to consider anew the size of the House." App. 5. The approach sought by Plaintiffs reflects the practice of this Court.

> [E]ven after a federal court has found a districting plan unconstitutional, redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt. Our prior decisions in the apportionment area indicate that, in the normal case, a court that has invalidated a State's existing

> apportionment plan should enjoin implementation of that plan and give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment. [Judicial] relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

McDaniel v. Sanchez, 452 U.S. 130, 150, n.30 (1981). (Internal citations and quotation marks omitted.)

The record below is absolutely devoid of evidence suggesting it is impracticable or unwieldy to increase the size of the House. The federal government made no effort to sustain this burden of proof; it simply rejected the premise that proportional representation (one-person, one-vote) was a relevant obligation. The government may not sustain its burden of proof by a naked assertion that a larger House would be unwieldy. And it was inappropriate for the District Court to echo this assertion since there was a total absence of evidence.

No evidence is needed to suggest that a House of 9,000 would be unwieldy. However, the last time the House seriously considered a change in its size, after the 1920 census, it voted to increase the number of representatives to 483. However, the Senate killed this proposal out of a blatantly improper motive. Senators from rural states did not want the industrial states to gain in relative power. Thus, no reapportionment was made after the 1920

census in direct violation of the Constitution's command for decennial adjustment. Rural states used their power in the Senate to block the change in the size of the House—not because they disagreed with the judgment of the House relative to its own size—but because they wanted to protect their states' power in the lower chamber. This explanation of the events of the 1920 census is confirmed by the scholarly treatise cited by the Justice Department below. Michael Balinski & H. Peyton Young, *Fair Representation: Meeting the Ideal of One Man, One Vote*, p. 51 (Yale Univ. Press, New Haven, CT 1982).

Five other western democracies, all of which have populations significantly smaller than that of the United States, operate a lower house that is larger than our House of Representatives.[4] Plaintiffs do not suggest that these numbers are binding on the United States through some theory of international law. Rather, Plaintiffs merely suggest that this is credible factual evidence which demonstrates that a legislative chamber for a modern democracy can successfully operate with a size greater than 435 seats.

Plaintiffs have no burden to prove that increasing the House is practicable. But they were the only party that has even attempted to establish evidence on this issue by judicially noticeable facts or otherwise.

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[4] The legislatures of the following countries have lower houses of the indicated size: the United Kingdom (646); Germany (622); France (577); Turkey (550); and Mexico (500). Affidavit of Jeffrey Ladewig at 15.

The House is grossly unequal. Its inequality can be decreased significantly by an increase in the size of the House. There was no showing by the government that it is impracticable to do so. Congress should be ordered to reconsider the size of the House in light of these findings.

The perception that the remedy requested by the Plaintiffs is "too radical" is the only aspect of this case that is difficult. Plaintiffs recognize the historic magnitude of their request, but respectfully suggest that the proposed remedy is not as radical as it may appear on the surface.

A truly radical request would be to ask this Court to order a specific size of the House based on a rigid mathematical formula. In the District Court, particularly in oral argument, Plaintiffs "hinted" as loudly as they dared that the size of the House of Commons in Great Britain might be a very good model. But this decision would be for Congress. Our effort now is simply to point out a practicable alternative.

This request is clearly historic, but it is not radical. It is nothing more than a request to bind Congress to same constitutional duty imposed upon the states. There is no reason that Congress should be exempted from the requirement that it must use best efforts to protect the fundamental right of voters to an equally-weighted vote.

III

The District Court's Use of History Was Fundamentally Flawed

The District Court used historical analysis for two purposes: (1) to conclude that the current level of inequality is similar to levels of inequality that resulted from the very first reapportionment after the census of 1790; and (2) to conclude that the current size of the House is reasonable.[5] The court's goal was to use history as a guide to correct interpretation of the Constitution's relevant text.

While the District Court's historical research was thorough, well-written and factually accurate, it was nonetheless seriously flawed for the two reasons described below.

A.

The District Court did not Acknowledge this Court's Prior Examination of the Relevant History

As noted earlier, the District Court's review of history began without even acknowledging that this Court had travelled the same ground. In *Wesberry v. Sanders*, this Court undertook a comprehensive review of the history of the Great Compromise. This review led to the conclusion that the Constitution's text requires apportionment to be as nearly equal as is practicable. It is simply erroneous for the government to suggest that *Wesberry* dealt only with

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[5] We address this second component of the District Court opinion in Section IV.

the first sentence of Art. I § 2 (the House must be chosen "by the People of the several States"). This Court also addressed the meaning of the second phrase from Art. I § 2 ("representatives shall be apportioned among the several states according to their respective numbers.")

> The other side of the compromise was that, as provided in Art. I, § 2, members of the House of Representatives should be chosen "by the People of the several States," and should be "apportioned among the several States . . . according to their respective Numbers." While those who wanted both houses to represent the people had yielded on the Senate, they had not yielded on the House of Representatives. William Samuel Johnson of Connecticut had summed it up well: "in *one* branch, the *people* ought to be represented; in the *other*, the *States*."
>
> The debates at the Convention make at least one fact abundantly clear: that, when the delegates agreed that the House should represent "people," they intended that, in allocating Congressmen, the number assigned to each State should be determined solely by the number of the State's inhabitants.

376 U.S. at 13-14.

The chain of logic from *Wesberry* is unmistakable: (1) the phrase requiring representatives to be "apportioned among the several states according to their respective numbers"

controls the interstate apportionment of the House; (2) this phrase was part of the embodiment of the Great Compromise; (3) the Great Compromise was construed to ensure that each voter should have voting strength that is as equal as is practicable; (4) thus, this phrase requires that the interstate apportionment of the House must follow the principle of one-person, one-vote.

The District Court erred by failing to follow this Court's prior interpretation and application of the meaning of the Great Compromise from *Wesberry*, and by its failure to adhere to the commitment to interstate equality affirmed in the five interstate apportionment cases decided since 1990. But, even if the District Court was entitled to take a fresh look at history, it erred in both conclusions it reached.

B.

The District Court Misunderstood the Lessons From the 1792 Reapportionment

The District Court placed significant emphasis on the fact that the level of inequality that followed the 1790 census was very high when measured as a percentage. This is true. However, the District Court failed to explain that the cause of the inequality in 1792 was significantly different than the cause of the inequality today. In 1792, the text of the Constitution was responsible for the inequality, whereas the cause of current inequality is a discretionary decision of Congress. The rule of

30,000 cannot violate the Constitution; the rule of 435 can.

After the 1790 census, Congress initially voted to increase the size of the House to 120 representatives. The average district size for 120 seats was 30,133, with some districts with fewer than 30,000 persons. However, President Washington was convinced that the rule of 30,000 meant that no district could be smaller than 30,000. His cabinet was split on which interpretation was correct. Based on this view, Washington vetoed the apportionment bill establishing 120 seats because several states, notably Delaware, had districts with less than 30,000 persons. App. 31-33.

Delaware's population in the 1790 census was 55,539. Based on Washington's interpretation of the text—which is entitled to great weight since it was the only issue about which he spoke during the Constitutional Convention—Delaware was precluded by the Constitution from having more than one representative.

After Washington's veto, Congress reapportioned the House with 105 representatives. The ideal district size was 34,437. The smallest average district size was 33,187 for Virginia's nineteen districts. It was over-represented by 3.36% per district. The largest district was Delaware's single district with 55,539. It was under-represented by 61.28%. The maximum percentage deviation was 64.99%. The maximum gross deviation was 22,380 persons—an incredibly small deviation by today's standards. If Delaware was removed

from consideration, the maximum percentage deviation would have been 27.82% (comparing Vermont to Virginia). The maximum gross deviation would have been 9,579 persons. The vetoed plan for 120 seats would have yielded a maximum percentage deviation of 25.39%. Delaware would have had a second seat under this approach.

Congress did not decide, as the District Court suggested, that a variance of over 60% was an acceptable approach under the theory of proportional representation. Rather, Congress simply acceded to Washington's view of the rule of 30,000 and accepted the fact that Delaware did not have 60,000 people.

Congress could not have fixed the problem of inequality in 1792 by increasing the size of the House since any increase that would solve the Delaware problem would violate the rule of 30,000. Today, Congress can achieve greater equality if it increases the size of the House. Despite its longstanding use, 435 seats is not a constitutional mandate or barrier. The House is permitted to grow as it has in the past. And while this Court would have no jurisdiction to order an increase of the size of the House to advance some political objective, this Court is well within its constitutional authority to rule that Congress must use every practicable means of achieving greater equality for voters. A larger House is the only method of achieving greater equality today. This was simply not true in 1792.

The District Court noted that some of the speakers in the 1792 apportionment debates claimed that equality for Delaware in Congress was

guaranteed by its two senators even though it was substantially under-represented in the House. The District Court seemed to imply that the same is true today—the Senate protects the rights of small states.

This is an obvious fallacy. Wyoming (population 495,304) has one representative and two senators. Montana (905,316 residents) has one representative and two senators. How are Montana's voters made whole by this arrangement? Iowa has 2,931,923 residents with five representatives and two senators. Mississippi has 2,852,927 residents with four representatives and two senators. How is the devaluation of the voting strength in the House for Tyler Clemons from Mississippi cured by the fact that both Iowa and Mississippi have two senators? This whole argument ignores the most basic premise of the Great Compromise. The Senate guarantees equality for *states*. The House guarantees equality for *voters*.

In *Wesberry*, this Court placed significant reliance on James Wilson who was a delegate to both the Constitutional Convention and the Pennsylvania ratification convention, and, ultimately became an Associate Justice of this Court. Wilson's view that voters *within* a state were entitled to equal voting strength was adopted by this Court. 376 U.S. at 17. However, in an earlier statement at the Constitutional Convention, Wilson also endorsed the right of voters to *interstate* equality as well. Wilson argued that "equal numbers of people ought to have an equal [number] of representatives" and that "[e]very citizen of one State possesses the same rights with the citizens of another." 1 RECORDS OF

THE FEDERAL CONVENTION OF 1787 179, 183 (June 9, 1787) (Max Farrand ed., 1911) [Hereinafter, "CONVENTION RECORDS"].

Both Wilson and Madison embraced the view that the Constitution requires the House to grow in order to protect the right to proportional representation. In the Pennsylvania ratification convention, Wilson predicted that the House of Representatives would grow to "consist of more than six hundred members" within "a single century." A House of this size would flow from the Convention's effort to "steer a middle course" between a House that is too small and one that would be unworkably large. 3 CONVENTION RECORDS 159.

The *Federalist* Papers reveal Madison's similar understanding that the House would be required to grow as the nation grew. After projecting that fifty years after ratification the House would grow to four hundred members, Madison said, "I take for granted here what I shall in answering the fourth objection hereafter shew, that the number of representatives will be augmented from time to time in the manner provided by the constitution. On a contrary supposition, I should admit the objection to have very great weight indeed." THE FEDERALIST NO. 55, at 372-378 (James Madison)(Jacob E. Cooke ed. 1961).

History shows that the Framers understood the text of the Constitution requiring proportional representation to also require growth of the House as it was necessary to guarantee proportionality.

The request of these Plaintiffs is in full accord with the historical understanding of the relevant text.

IV

This Court Should Note Probable Jurisdiction to Resolve The Sharp Conflict Between Congress's Practice of Inequality and This Court's Numerous Decisions Requiring Voter Equality

The District Court rejected the view of the government and adopted the view of the Plaintiffs on one critical point. "The Constitution requires proportionate representation. . . ." App. 11. With its next phrase, the District Court acknowledged that equality is required, but expressed uncertainty as to the correct measure of equality. "[The Constitution] does not express how proportionate the representation must be." *Id.*

The District Court did not accept Plaintiffs' argument that the *Wesberry* standard ("as equal as is practicable") is the correct approach. In fact, it never squarely answered the question of how proportionate the House must be. Rather, it focused on the discretion of Congress to fix the size of the House. It concluded that Congress has treated decisions regarding the size of the House "as a practical political question, even if not legally such a question." App. 46.

There is little doubt that every time Congress has established a new size for the House of Representatives, it has decided the matter "as a practical political question." After all, Congress was

ultimately addressing the question: "What is a wise and good size for the House?" This is an obvious political question inappropriate for any court to address. However, this case poses a strictly legal question: "Does the current inequality require an increase in the size of the House to satisfy the Constitution's demand for proportional representation?"

If Plaintiffs win, Congress will still have wide discretion to determine the size of the House. Practicability is a key component of the relevant standard. Congress will then have to follow all four of the Constitution's commands relative to apportionment: (1) no districts smaller than 30,000; (2) every state receives at least one representative; (3) districts may not cross state lines; and (4) representation must be as equal as is practicable.

All apportionment questions—state and federal—were left to practical politics prior to *Baker v. Carr* and *Wesberry*. But starting with these cases in 1962 up through this Court's 2002 decision of *Utah v. Evans*, this Court has continuously embraced the rule that the Constitution demands that all levels of government respect the right of voters to equality.

This Court is often asked to grant review of a case on the basis of conflict between the Circuits. Here the conflict is between long-standing congressional practice, on the one side, and this Court's long line of one-person, one-vote decisions, on the other. Congress's history of apportionment is a story of ever-escalating inequality. It will surpass

450,000 persons in 2010 and will exceed 600,000 by 2030. Today the level of inequality is nearly two-to-one and rising.

If the Constitution demands that all levels of government adhere to the principle of equality for voters—as this Court has so often proclaimed over the past fifty years—then why is Congress exempt from this requirement?

There is no textual justification for such a result. There is no reason grounded in common sense that would justify such a result. There is only a long history of inequality. Even though history is a significant guide for understanding the meaning of constitutional text, at the end of the day it is the text and not the historical practices of Congress that must control.

The interstate apportionment of the House of Representatives is a glaring anomaly that sharply conflicts with this Court's precedent. Granting Congress an exemption one-person, one-vote marks a material change in the thrust of this Court's jurisprudence. Such a change should come from this Court and no other.

This case is fully prepared for resolution of the most significant unanswered question in this sector of constitutional law. This Court should note probable jurisdiction to determine whether Congress must obey one-person, one-vote and adhere to equality as nearly as is practicable in the apportionment of the House.

Conclusion

For the foregoing reasons, this Court should note probable jurisdiction, and, upon plenary review, reverse the decision of the District Court.

The President is required by statute to deliver the apportionment results from the 2010 census within one week of the opening of the next session of Congress. Plaintiffs respectfully request expedited briefing and hearing in light of this statutory deadline.

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Dated: August 26, 2010

Appendix

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[ENTERED JULY 8, 2010]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

No. 3:09-cv-00104

JOHN TYLER CLEMONS, JESSICA WAGNER, KRYSTAL BRUNNER, LISA SCHEA, FRANK MYLAR, JACOB CLEMONS, JENNA WATTS, ISSAC SCHEA, and KELCY BRUNNER,

Plaintiffs

v.

UNITED STATES DEPARTMENT OF COMMERCE, GARY LOCK, Secretary of the United States Department of Commerce, BUREAU OF THE CENSUS, and ROBERT GROVES, Director of the Bureau of the Census,

Defendants

Before SOUTHWICK, Circuit Judge, MILLS, Chief District Judge, and PEPPER, District Judge.

Leslie H. Southwick, Circuit Judge.

The number of seats in the United States House of Representatives is 435. That has been true

for nearly one hundred years. Plaintiffs argue the Constitution requires an increase in the number in order to reduce the disparity in population among the districts in different States. Because the suit questions the constitutionality of the apportionment of Congressional seats, this three-judge district court panel was formed. 28 U.S.C. § 2284.

The parties have filed cross-motions for summary judgment. Arguments were heard on these motions. The government's motion for summary judgment is GRANTED, and the Plaintiffs' motion for summary judgment is DENIED.

BACKGROUND

The Plaintiffs are voters from Mississippi, Delaware, Montana, South Dakota, and Utah. They identify significant disparities in the populations of the congressional districts in their States compared to the populations of districts in other States. The Plaintiffs insist there must be substantially more districts in order to reduce the population discrepancies.

The Defendants are official participants in the taking of the decennial national census. There is no argument that necessary parties are absent. We will refer to the Defendants simply as the government.

For the first six decades of our history, the number of seats in the House of Representatives increased after each decennial census and as new States joined the union. Following the 1850 Census, Congress began determining the number of seats in

the House prior to apportioning the seats to the States. In 1911, Congress set the number of seats at 433 and provided that when New Mexico and Arizona became States, the number would become 435. Pub. L. No. 62-5, §§1 & 2, 37 Stat. 13-14 (1911). There it has remained other than for a brief increase to 437 when Alaska and Hawaii became States in 1959. *See* 2 U.S.C. § 2a(a) (refers to "the then existing number" of members, which was 435 when the statute was adopted). Not remaining static has been the population – 92 million in 1911 and over 300 million today.

The Constitution requires that each State be apportioned at least one Representative. U.S. CONST. art. I, § 2, cl. 3. After that fifty-seat allocation, 385 seats remain for apportioning based on population. This is done through a congressional Apportionment Plan which follows the national census conducted each decade since 1790. Due to the constitutional requirement that each State have at least one Representative, the statutory requirement that there be 435 districts, and the fact that districts do not cross State lines, the population of the smallest congressional district is only 55 percent of that in the largest.

The current apportionment is based on the 2000 Census. According to the Plaintiffs, the ideal district population, meaning one that is exactly 1/435 of the national population, was 646,952

persons after the 2000 Census.[1] The Plaintiffs have identified the five States in which the average district size falls the farthest below the ideal district size and are considered overrepresented, and the opposite five States which are underrepresented:

Most Overrepresented:
- Wyoming - 1 district of 495,304 persons
- Rhode Island - 2 districts averaging 524,831 persons
- Nebraska - 3 districts averaging 571,790 persons
- Iowa - 5 districts averaging 586,385 persons
- West Virginia - 3 districts averaging 604,359 persons

Most Underrepresented:
- Montana - 1 district of 905,316 persons
- Delaware - 1 district of 785,068 persons
- South Dakota - 1 district of 756,874 persons
- Utah - 3 districts averaging 745,571 persons
- Mississippi - 4 districts averaging 713,232 persons

There is evidence that the disparities are exacerbated by the statutory cap of 435 on the number of House seats. The Plaintiffs claim that the disparities violate the requirement that Representatives be apportioned to the States

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[1] The population used for apportionment may be different than the census population of a State. However, all population figures that we utilize from the record are of the apportionment population, and we will label them simply as "population" numbers. The government does not dispute any of the statistics in the Plaintiffs' briefs.

"according to their respective numbers." U.S. CONST. art. I, § 2, cl. 3.

The Plaintiffs provide examples of how the disparities could be significantly reduced by increasing the size ofthe House either to 932 or to 1,761 seats. However, we are not asked to set by court order any particular number of seats. Rather, Plaintiffs seek invalidation of the relevant part of 2 U.S.C. § 2a, which would require Congress to consider anew the size of the House.

DISCUSSION

A. Political Question Doctrine

The government initially raised four threshold points: (1) a statute of limitations; (2) the Plaintiffs' lack of standing; (3) the equitable doctrine of laches, and (4) the political question doctrine. By the time of oral argument, all had been abandoned except for the last, which we now discuss.

"Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). Under our Constitution, certain questions cannot be answered by the judiciary. Among the reasons are the respect this branch needs to have for the coordinate branches and the lack of institutional competence to resolve certain matters. *See Baker v. Carr*, 369 U.S. 186, 198 (1962). A political question is one that is inappropriate for judicial resolution once we have explored the merits enough to know how intrusive or

how incompetent a judicial decision would be. *See id.* We must make a "discriminating inquiry into the precise facts and posture ofthe particular case" when deciding whether to proceed. *Id.* at 217.

We start by examining how the Supreme Court has analyzed justiciability in other apportionment cases. The political question doctrine does not block review of challenges to intrastate congressional district apportionment plans. *Wesberry v. Sanders*, 376 U.S. 1, 4-7 (1964). The Plaintiffs argue that the obligation of equality among intrastate districts is constitutionally translatable to a requirement that the current substantial disparity be reduced among House districts in different States.

The specific complaint here, that Congress's limit on the number of Representatives creates unconstitutional disparities, has not been the subject of much litigation.[2] In a related dispute, though, the Supreme Court held that it was a justiciable issue to review the mathematical formula Congress chose in assigning the 435 seats.

> The case before us today is "political" in the same sense that *Baker v. Carr* was a "political case." 369 U.S., at 217, 82 S.Ct., at 710. It raises an

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[2] The only other challenge to the limit of 435 seats was *Wendelken u. Bureau of the Census* N.*Y., N.Y.*, 582 F. Supp. 342 (S.D.N.Y. 1983). The court did not address justiciability. Rather, the court found no merit to the claims that the Constitution mandates one Representative per 30,000 persons in a State, or that limiting the number of Representatives violates the Fifth Amendment right to equal protection under the law. *ld.* at 342.

issue of great importance to the political branches. The issue has motivated partisan and sectional debate during important portions of our history. Nevertheless, the reasons that supported the justiciability of challenges to state legislative districts, as in *Baker v. Carr*, as well as state districting decisions relating to the election of Members of Congress, see, *e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), apply with equal force to the issues presented by this litigation. The controversy between Montana and the Government turns on the proper interpretation of the relevant constitutional provisions. As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary. *See Davis v. Bandemer*, 478 U.S. 109, 123, 106 S.Ct. 2797, 2805, 92 L.Ed.2d 85 (1986); *Baker v. Carr*, 369 U.S., at 234-237, 82 S.Ct., at 719-721; cf. *Gilligan v. Morgan*, 413 U.S., at 11, 93 S.Ct., at 2446. The political question doctrine presents no bar to our reaching the merits of this dispute and deciding whether the District Court correctly construed the constitutional provisions at Issue.

Dep't of Commerce v. Montana, 503 U.S. 442, 458-59 (1992) (footnote omitted).

One of the cases relied upon for these conclusions concerned political gerrymandering. *Davis*, 478 U.S. 109. Unlike the relatively simple mathematical issues that arise from one-person, one-vote analysis, *Davis* involved a more nuanced look at districts that were numerically sound but intentionally misshaped for political benefit. Still, none of the *Baker* formulations blocked review. The *Davis* Court concluded that justiciability need not turn on whether the dispute could be resolved by easy mathematical comparisons. *Id.* at 123. The *Baker* claims had earlier been found justiciable even though "[t]he one person, one vote principle had not yet been developed when *Baker* was decided." *Id.* *Baker* "contemplated simply that legislative line drawing in the districting context would be susceptible of adjudication under the applicable constitutional criteria." *Id.*

We next turn to the specific factors that *Baker* said we should consider. First, we are to determine if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department .... " *Baker*, 369 U.S. at 217. Certainly, Congress has explicit authority to set the number of Representatives under Article I, section 2, and the Fourteenth Amendment, Section 2. These same provisions, though, did not bar judicial review in *Montana*, 503 U.S. at 457. The Court concluded that the Constitution puts some limits on Congress's power regarding apportionment, and violations of

those limits create legally enforceable rights; the issue was the definition of those limits. *Id.* This *Baker* formulation does not block review.

We also are to consider whether there are "judicially discoverable and manageable standards for resolving" the issues, and whether an initial policy determination would be required in evaluating the claims. *Baker*, 369 U.S. at 217. We conclude that whether having disproportionate districts among the different States violates a constitutional right is very much within the competence of courts because it involves determining what the Constitution means in this arena. At this point in the analysis, no policy decision arises.

The remaining formulations raise no more substantial problems for our review than they did in other apportionment cases. If we disagree with Congress's constitutional interpretation, that would be fulfilling our judicial role and would not be "expressing lack of the respect due coordinate branches of government." *Id.* There is no "unusual need for unquestioning adherence to a political decision already made," nor is there "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* There is entirely too much water under the electoral equality bridge for courts to reject having a role.

The issue is one for the courts.

B. Language and Original Meaning of Relevant Constitutional Provisions

Before us are dueling motions for summary judgment. The only questions are legal ones, not factual. There being no disputed issues of material fact, summary judgment for someone is proper. FED. R. CIV. P. 56(c)(2). The central question is whether there is a constitutional dimension to the decision Congress has made concerning the number of districts. The dimension alleged by Plaintiffs is that the congressional decision creates a barrier to reaching a goal of minimal population disparities in districts of different States.

The Constitution has two explicit controls and an implied one on the decision that Congress made in adopting Section 2a. Each State is to have at least one Representative, and the number of Representatives is not to exceed "one for every thirty Thousand." U.S. CONST., art. I., § 2, cl. 3. In addition, a "requirement that districts not cross state borders appears to be implicit in the text and has been recognized by continuous historical practice." *Montana*, 503 U.S. at 448 n.14 (citing *Montana v. Dep't of Commerce,* 775 F. Supp. 1358, 1365 n.4, 1368 (D. Mont. 1991) (O'Scannlain, J., dissenting)). There is no argument that Section 2a violates any of these requirements.

The Fourteenth Amendment updated certain language in Article I by requiring that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

excluding Indians not taxed." U.S. CONST., amend. XIV, § 2. Grammatically, "their respective numbers" must be referring to the "whole number of persons in each State," the antecedent for "their" being "the several States." This at least means that apportionment of the House must reflect population differences to some degree. That seems to us the answer to the hypothetical question asked at oral argument as to whether having just fifty Representatives, *i.e.,* one per State, would be constitutional. Fifty members would satisfy the bare constitutional minimum of one Representative per State, no more than one per 30,000 population, and no crossing of State boundaries, but it would not have satisfied the obligation to apportion Representatives by population. The House cannot be apportioned as is the Senate, which is without regard to the "respective numbers" of people.

Therefore, the Constitution, rather self-evidently, requires allocation of House districts by population. It is from this Constitutional imperative of apportionment by population that the Plaintiffs would have us impose on Congress a duty that approaches, even if it does not quite meet, the obligation of each State to assure that all of its own congressional districts have nearly equivalent population. The Constitution requires proportionate representation, but it does not express how proportionate the representation must be. Determining what else to read into the constitutional language requires us to turn to the usual sources for meaning.

The usual sources include the debates at the Constitutional Convention, the *Federalist Papers*, and the actions of the First Congress. *See United States v. Locke*, 529 U.S. 89, 99 (2000); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004); *see also Gonzales v. Raich*, 545 U.S. 1, 58 (Thomas, J., dissenting). Some justices are more restrained in their reliance. Justice Scalia posits that the writers of the *Federalist Papers* and similar sources tell us no more than would the writings of other learned and well-informed writers of the day about how the text was understood. ANTONIN SCALIA, MATTER OF INTERPRETATION 38 (1997). They do tell us at least that.

Consequently, we examine what occurred at the Constitutional Convention that led to the clause we are interpreting, turn to the discussions about the provision during the ratification debate, then conclude with the actions of the First Congress and, necessarily, the Second Congress as well.

1. Debate Over the Size of the House of Representatives During Constitutional Drafting and Ratification.

The debate over representation in Congress was among the most contentious in the Constitutional Convention. "More than once any satisfactory solution ofthe difficulty seemed impossible, and the convention was on the point of breaking up." MAX FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITE STATES 94 (1913) (hereinafter FARRAND). An early proposal, the Virginia Plan, called for a two-house legislature

whose members would be chosen based on population. *Id.* at 68-69. On June 11, 1787, the Convention narrowly adopted proportional representation for both houses. *Id.* at 84. Delegates from small States were aghast. On June 15, the New Jersey Plan was offered as a reaction to the Virginia proposals. *Id.* This plan left the single-house Congress of the Confederation in place, in which each State had one vote. *Id.* at 84-85.

At least once, a delegate used words similar to "one person, one vote" terminology. Pennsylvanian James Wilson argued that "equal numbers of people ought to have an equal [number] of representatives ...." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 179 (June 9, 1787) (Max Farrand ed., 1911) (hereinafter CONVENTION RECORDS). Wilson argued that "[e]very citizen of one State possesses the same rights with the citizen of another." *Id.* at 183. The degree of precision with which Wilson was using the word "equal" is unclear. He was explaining his opposition to the position that each State ought to have the same representation. Wilson was not so clearly endorsing one Man, one vote, as he was rejecting one State, one vote.[3]

Fortunately, on July 16, 1787, the Great Compromise was reached. It created a bicameral Congress with States having equal power in the Senate and power based on population in the House of Representatives. FARRAND 99-105. Each State's power in the Senate would be perfect in its equality.

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[3] Counting of slaves also was contentious. The sad compromise finally made was to count a slave as three-fifths of a person for apportionment purposes. U.S. CONST. art. I, § 2.

Quite imperfect, though, was a State's proportionate power in the House. Representatives - whole persons - would be sent from each State, with each member to have one vote. Only weighted votes could have made the proportions in the House as perfect as the equality in the Senate.

The devil remained in the details. The number of House members was a significant concern. For example, Elbridge Gerry,[4] a Massachusetts delegate, criticized having only sixty-five members in the First Congress. "The larger the number the less the danger from being corrupted .... The danger of excess in the number may be guarded [against] by fixing a point within which the number shall always be kept." 1 CONVENTION RECORDS 569.

James Madison had the opposite concern - the number would become too large. Should the number of members invariably grow proportionally with population or should Congress be able to make adjustments in the ratio of members to population? There was a thrust and parry dynamic to the debate:

> The original draft would have prescribed flatly one representative for each forty thousand persons. When

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[4] Gerry's name became half of a portmanteau for the act of deforming House districts for partisan reasons - a "gerrymander." The word was created when the shape of a district proposed by then-Governor Gerry in 1812 was said to resemble a salamander. KLYDE YOUNG & LAMAR MIDDLETON, HEIRS APPARENT 68 (1969). As noted above, the political question doctrine does not prevent consideration of the handiwork of Gerry's political descendants. *Davis*, 478 U.S. at 123.

> Madison objected that as the population increased this ratio would produce an oversized and unwieldy House, it was amended to require no more than one for each forty thousand. When Williamson and others objected that at the outset one to forty thousand would produce too few members, it was revised to require no more than one to thirty thousand. When critics protested that Congress might be reluctant to increase the number of seats as permitted by this provision, Congress proposed a constitutional amendment that would have assured an increase in the size of the House by requiring one representative for each thirty thousand, until the total number reached one hundred members.

David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 614 (1996) (hereinafter Currie) (footnotes and citations omitted). The final language of the Constitution left Congressional discretion.

The only time the President of the Convention, George Washington, entered into any debate was on this issue. On September 17, 1787, the day the Constitution was to be signed, a delegate moved that the provision for no more than one Representative to every forty thousand population be amended to no more than one to every thirty thousand. Washington rose, said that he perhaps should continue to forbear expressing his views, but

he found the "smallness of the proportion of Representatives had been considered by many members of the Convention an insufficient security for the right and interest of the people." ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 178 (Ralph Ketcham ed., 1986) (hereinafter PAPERS & DEBATES). Washington having spoken, the amendment was unanimously adopted. The final document, already prepared for the affixing of signatures that day, shows the alteration.

The debate continued once the completed Constitution was sent to State conventions for possible ratification. Justifying providing flexibility to Congress, Madison, writing as *Publius*, started with the premise "that no political problem is less susceptible of a precise solution than that which relates to the number most convenient for a representative legislature ...." *The Federalist* No. 55, at 287 (Gideon ed., 2001). Having too few Representatives would pose problems for consultation and discussion, leading to possible corruption or foreign influence. However, he also believed too many Representatives would lead to confusion and "intemperance of a multitude." *Id.* at 288.

As Madison colorfully noted: "In all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." *Id.* He argued that the initial House size and method for increasing that size in the

proposed Constitution - sixty-five initial members followed by an increase of one for every thirty thousand inhabitants after the first census - would result in a sufficient number of Representatives to protect Americans from "treachery" and "tyranny." *Id.* at 288-89.

One of the active debaters on the subject at the Convention had been James Wilson of Pennsylvania. At his State's ratification convention, he urged the need for balance. "The convention endeavored to steer a middle course, and when we consider the scale on which they formed their calculation, there are strong reasons why the representation should not have been larger." 3 CONVENTION RECORDS 159.

We also examine writings of other learned contemporaries. A minimum House size was important to the Anti-Federalists, as they feared rule by the elites. Patrick Henry believed that Congress had the right to allocate only one representative per State and feared it would actually do so. Speech of Patrick Henry in Virginia Ratifying Convention (June 1788), in 5 THE COMPLETE ANTI-FEDERALIST 207, 213-14 (Herbert J. Storing ed., 1981).

Seeking to reduce the influence of elites, the Anti-Federalist Melancton Smith spoke at length at the New York ratification convention on the need for broader citizen membership: "the number of representatives should be so large, as that while it embraces men of the first class, it should admit those of the middling class of life." Speech of

Melancton Smith in New York Ratifying Convention (June 20, 1788), in 6 COMPLETE ANTI-FEDERALIST 148, 157. "We may be sure that ten is too small and a thousand too large a number" for the House. *Id.* "A thousand would be too numerous to be capable of deliberating." *Id.* A small membership would create "a great danger from corruption and combination." *Id.* at 159. Smith argued that we "ought to fix in the Constitution those things which are essential to liberty. If anything falls under this description, it is the number of the legislature." *Id.* at 160. He believed Congress had too much discretion in setting the number of Representatives.

One Anti-Federalist sounded like Federalist James Wilson when writing that "representation in government should be in exact proportion to the numbers" of persons represented. Essays of Brutus, (Nov. 15, 1787), in 2 COMPLETE ANTI-FEDERALIST 377, 379. He was, though, countering the one State, two vote structure of the Senate. *Id.* He found the initial number of sixty-five House members to be "merely nominal- a mere burlesque" - and favored a very large House greater in size than the British Parliament of 558. *Id.* at 381.

The Anti-Federalist reservations were that they wanted individuals as well as States better protected within the Constitution from the tyranny of the few. The Anti-Federalists have been called "men of little faith." Cecilia Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, XII WILLIAM & MARY Q. 3 (1955). They worried that liberties so recently and narrowly won in war could be lost in peacetime to a

powerful national government. 2 COMPLETE ANTI-FEDERALIST 136-138. Having just a comparative handful of Representatives was a significant concern. Too few Representatives, not too many, seemed the far greater worry to them.

The Constitution was ratified, despite the doubts about its efficacy and postponed desires for amendments. On April 6, 1789, the House of Representatives achieved its first quorum. 1 Annals of Cong. 96 (1789) (Gales ed., 1834). Barely two months later, on June 8, 1789, James Madison, now as a Representative from Virginia, submitted a package of twelve proposed amendments to assuage concerns about the Constitution. *Id.* at 434-36. The first of the twelve in 1789 was an amendment addressing some of the doubts raised again by these Plaintiffs 220 years later. It is the only one of the twelve Madison proposals not eventually ratified by the States.[5]

The approval of an amendment by Congress followed by its failure in the States are not the usual materials of constitutional interpretation. We find, though, that the debate on the proposal sheds light on how the First Congress understood the operation of the original apportionment rules and whether it was concerned either about an overly large or small House or about the disparities of population between districts. The initial Madison proposal was this:

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[5] The third through twelfth proposals were ratified together as the Bill of Rights and became part of the Constitution in 1791. The second proposed amendment was eventually ratified by enough States and became the Twenty-Seventh Amendment in 1992.

> That in article 1st, section 2, clause 3, these words be struck out to wit: "The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative until such enumeration shall be made;" and that in place thereof be inserted these words, to wit: "After the first actual enumeration, there shall be one Representative for every thirty thousand, until the number amounts to ___ , after which the proportion shall be so regulated by Congress, that the number shall never be less than ___, nor more than ___, but each State shall, after the first enumeration, have at least two Representatives; and prior thereto."

1 Annals of Cong. 434 (1789) (blanks in original). This amendment would have set a minimum and maximum number of Representatives once a threshold number was met and would give each State at least two Representatives.

Madison explained that the State ratification conventions had expressed concern about the current language,

> and even in the opinion of the friends to the constitution, an alteration here is proper. It is the sense of the people of America, that the number of Representatives ought to be increased, but particularly that it should not be

> left in the discretion of the Government to diminish them, below that proportion which certainly is in the power of the Legislature as the constitution now stands; and they may, as the population of the country increases, increase the House of Representatives to a very unwieldy degree. I confess I always thought this part of the constitution defective, though not dangerous; and that it ought to be particularly attended to whenever Congress should go into the consideration of amendments.

Id. at 440. In summary, Madison accepted the need for an increase in the number of members, but wanted to avoid "an unwieldy" size. His statements that "alteration here is proper," and the language in the Constitution was "defective, though not dangerous," suggest that Madison found Congress to have an unnecessary right to set the number of members at an undesirably high or low figure, but there was no substantial or uncorrectable danger of its exercise.

A lengthy debate on the amendment occurred on August 14, 1789. Madison argued that going beyond a certain number "may become inconvenient; that is proposed to be guarded against [by the Amendment]; but it is necessary to go to a certain number in order to secure the great objects of representation." *Id.* at 722. Elbridge Gerry, now a Congressman, said he did not "insist upon a burthensome representation, but upon an adequate one." *Id.* Among the debated concerns was whether a

permanent cap of 175 members or instead of 200 members was appropriate. *Id.* at 725-28.

The House and the Senate each passed different versions of an apportionment amendment. *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 287, 291 (1999) (text of both versions). Both had thresholds of 100 and 200 Representatives. At the second threshold, the House required that there be not "less than one Representative for every fifty thousand persons." The Senate provided that once the second threshold was met, "one Representative shall be added for every subsequent increase of sixty thousand people."

Thus, both versions of the proposed apportionment amendment *required* the number of Representatives to increase in direct proportion with increases in the population. This would have undone Madison's work at the Constitutional Convention to eliminate similarly inexorable increases. Either proposal would have provided, without litigation, the relief Plaintiffs seek in this suit. At a population of 300 million, one proposal would have required at least 6,000 House members while the other would have demanded only 5,000. A significant change was made, though, just before submission to the States for ratification.

On September 24, 1789, it was resolved in the House "that the first article be amended, by striking out the word 'less' in the last place of said article, and inserting, in lieu thereof, 'more.'" 1 Annals of Cong. 913 (1789). The Senate concurred the next

day. *Id.* at 87-88. The reason for the change was not explained, but it reflected Madisonian concerns.

The amendment as sent to the States was this:

> *Article the first.* After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

1 Stat. 97 (1789). Thus, the final version did not require the number of Representatives to increase inevitably and proportionally with the population once the second threshold was met. Instead, it would be for Congress to decide what number of districts above 200 was needed.

All but one of the States that ratified ten of the proposed amendments, *i.e.*, the Bill of Rights, also ratified Article the First. RICHARD B.

BERNSTEIN, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 44-45 (1993). Delaware was the exception. *Id.* at 45. Delaware was the State most shortchanged by the one to 30,000 ratio, as it had a population of 55,539. 3 Annals of Cong. 248 (1791) (Gales ed., 1849). It had nothing to gain or lose from the amendment because that was the current ratio. With ratification by only ten of fourteen States, Article the First failed.

We find in this history much useful information. Starting with the Constitutional Convention itself, there were twin concerns that the House would be either too small or too large. Just right was the goal. The ratification debate often focused on the need for a sufficiently numerous House. In Federalist No. 55, Madison was equally concerned about too large a body that would become unwieldy, though we might doubt his image that a mass of Socrates equivalents could ever be a mob. *The Federalist* at 288. We find no consideration that everincreasing numbers of members were also needed to reduce disparity in the size of districts among the States. We also find many speakers admitting, and then bemoaning, that Congress had unfettered discretion in setting the size.

Finally, the development of what Congress sent to the States as the first of the proposed amendments indicated an initial willingness to require an ever-increasing size to the House, then a last-minute reversal that left it to Congress's discretion to set a maximum number. The failed amendment reflected a desire to assure a larger

House than the initial Constitution's much more flexible provision. It did so by adopting two numerical requirements once the country's population increased to certain levels. Thereafter, Congress could set the number on a range between two hundred members and whatever number no more than one for every fifty thousand population would be. No debater indicated a belief that the Constitution as ratified *required* too large or too small a number, but only that it gave undue discretion.

We realize from the history of the Bill of Rights that the proposals were considered by some to be surplusage to rights and concepts inherent in the Constitution. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787540 (1969). They were offered at least in part to mollify those who had been reluctant to adopt the Constitution. David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1705 (1991). Therefore, even though Congress in drafting its Article the First considered and then rejected requiring limitless growth and also rejected imposing a numerical limit on size, those decisions do not answer whether the Constitution as originally written required or permitted either. At least it is obvious that the Constitutional Convention delegates, the debaters during ratification, and the drafters of the ungratified Article the First were all aware of these issues and failed ultimately to give explicit directions. Flexibility was the result, subject to whatever implicit requirements of equality can be found.

On the other hand, we find no suggestion that there was a concern similar to that of the Plaintiffs, that increasing size was needed to reduce interstate disparities among district populations.

2. Initial Congressional Apportionment

The actions of the First Congress are noteworthy in constitutional analysis because twenty of its members had been delegates to the Constitutional Convention from just two years earlier. *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986). We find that we need to consider the first Congress that adopted an apportionment plan, which was the Second Congress. The echoes from what was said by those at the Constitutional Convention were fading, but we cannot conclude that Congressmen in 1791-93 were completely deaf to those voices.[6]

The initial number of sixty-five Representatives set out in the Constitution would last until the first census could be taken and Congress could pass an apportionment bill. *See* U.S. CONST. art. I, § 2, cl. 3. Following the 1790 Census, the Second Congress decided how to apportion Representatives within the framework of the Constitution - at least one Representative per State and no more than one Representative per thirty-

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[6] Eighteen of the fifty-five delegates to the Philadelphia Convention also served in the Second Congress, including James Madison. As mentioned in *Bowsher*, twenty served in the First Congress. So the Second was almost as representative of the Convention delegates.

thousand people.[7] The concern of the Second Congress "was not first to determine the total number of seats or *house size* and then to distribute them, but rather to fix upon some 'ratio of representation,' ... and then allow the house size to fall where it may." MICHAEL L. BALINSKI & PEYTON YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONCE MAN, ONE VOTE 11 (1982).

Debate in the House centered on whether the ratio of Representative to persons should be set at one to thirty thousand or at something higher. Currie, 607-08. Opponents argued that using thirty thousand would result in "a House too large for deliberation and too costly to maintain." *Id.* at 607. Supporters argued that a smaller House "would make it impossible for members to know the views of their constituents and would reduce the influence of the people." *Id.* at 608. Whichever ratio of population to districts was used, no State would contain an exact multiple of the population figure. Minimizing unfairness was a goal. Hugh Williamson of Pennsylvania stated that a "ratio should be adopted as would leave the fewest fractions, and at the same time do as much justice as possible to those States." 3 Annals of Cong. 154 (1791). John Steele of North Carolina agreed, saying that a vital consideration in setting the number of congressmen was to decide "what ratio will leave the fewest fractions in the

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[7] When debate over an apportionment bill began in November 1791, it was still unclear whether the proposed apportionment amendment would receive sufficient ratification to become part of the Constitution. Therefore, at least one Representative, Benjamin Bourne of Rhode Island, argued that Congress was wasting its time attempting to pass a law which would need to be repealed. 3 Annals of Cong. 200 (1791).

respective States?" *Id.* at 170. He calculated that having one member for every 30,000 population would leave 369,000 persons "unrepresented," while using 35,000 population "would leave the fewest fractions." *Id.* at 170-71. On November 15, a ratio of one member to every thirty thousand population was adopted. *Id.* at 192.

When the smallest State had a population of 55,539, common sense makes obvious that to divide each State's population by thirty thousand would give a whole number and then a fraction. Currie, 609-10 n.19 (chart). To reduce the number of States with large fractional remainders, the Senate amended the House bill by substituting the ratio of one to thirty-three thousand. *Id.* at 609- 10. As a result, six of the larger States lost seats, but thirteen of the fifteen States had smaller fractional remainders. *Id.* at 610 (compare charts at n.19 and n.20).

Much of the ensuing House debate over the Senate's amendment focused on the inequalities that would arise due to fractional remainders regardless of the ratio chosen. 3 Annals of Cong. 243-50 (1791). William Giles of Virginia argued "that the apparent inequality in the representation of the smaller States, was rendered equal by their representation in the Senate." *Id.* at 247.

The concerns by some members and the acceptance by others of the inequality of representation was in full display during a December 13, 1791 debate. The motion being debated was to give a second member to Delaware.

It was further observed, that the Constitution itself did not seem to exact so rigid an observance of the ratio as to require that any State should be deprived of Representation merely on account of a trifling deficiency in the number of inhabitants. It appeared visibly to contemplate such a deficiency ....

In opposition to the proposed amendment, it was said that the Constitution never contemplated a minute attention to fractions; that the weight given to the smaller States in the Senate was a concession, to compensate for any inequality that they might be subject to in the other branch of the Legislature; that the Constitution points out the apportionment according to their respective numbers ofthe several States ....

[Giving even the smallest States two Senators] operates to the disadvantage of the largest State, and in favor of the smaller ones, which have, therefore, no reason to complain of an inequality [resulting from fractional remainders] that exists but in idea; or if it does exist at all, bears heavier on the larger State, to which a smaller advantage in the House of Representatives can hardly be deemed a sufficient compensation for

> the loss it must necessarily suffer in the Senate.

Id. at 248-50. The motion was rejected. *Id.* at 250.

At least some ofthe 1791 debaters, then, would answer the Plaintiffs that the Senate is the Constitution's answer to the disparities among different State's House districts.

Fisher Ames of Massachusetts supported giving seven States an extra member. He presented a chart showing the result of first assigning members based on a ratio of one to thirty thousand, then giving one more member to each of the seven States with the largest fractions remaining. The average population of each district in those States was then slightly below 30,000 - the lowest being 27,769. It also showed the average population of the districts that did not get the extra member, and each ofthem was slightly more than 30,000 - the highest being 35,421. *Id.* at 259-60.

Madison argued that the plan was unconstitutional. He did not believe the fractional remainders were a significant concern and ridiculed the proposal of giving extra members to a few States: "Why not proceed to erect the whole of the United States into one district, without any division, in order to prevent the inequality they conceive to exist in respect to individual States?" *Id.* at 265. As Madison may have been implying, a key reason for fractional remainders is that districts must be completely within a State's borders, almost inevitably leading to sizeable fractional remainders.

Elias Boudinot of New Jersey said "equal representation appears to have been the desirable object of the framers of the Constitution - it is the very spirit of our Government." *Id.* at 266. After noting that there can be no more than one member for every thirty thousand, he said that if that limit is "applied to the numbers in the individual States, it will always produce . . . very great inequality, by large fractions being unavoidable" such as Delaware's remainder of 25,539 persons. *Id.* His answer was to pick the ratio that created the greatest equality. One for every thirty-three thousand population would result in "reducing the fractions made by the bill nearly two-thirds." *Id.*

Another cogent observation was from John Laurance of New York. He rejected the relevance of the argument that choosing any particular ratio would not completely remove inequality. "He said, this was in effect saying, that because we could not do complete justice, we would not do it to any degree whatever." *Id.* at 273. He thought the Senate proposal provided for a "superior degree of equality" over the House plan, and he favored it. *Id.* However, by a 27 to 33 vote, the House refused to accept the Senate version. *Id.*

The Senate adopted a new proposal which the House accepted. It took the total population shown in the 1790 Census, divided that by 30,000, and concluded that the resulting 120 should be the total number of members. Then, dividing each individual State's population by 30,000, and using the whole number that resulted, a preliminary assignment of members was made to each State. One more

Representative was then assigned to the eight States with the highest remainders. *Montana*, 503 U.S. at 448-49; Currie, 611.

The bill was vetoed by President Washington for two reasons:

> First. The Constitution has prescribed that Representatives shall be apportioned among the several States according to their respective numbers; and there is no one proportion or divisor which, applied to the respective numbers of the States, will yield the number and allotment of Representatives proposed by the bill.
>
> Second. The Constitution has also provided that the number of Representatives shall not exceed one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the States; and the bill has allotted to eight of the States more than one for every thirty thousand.

3 Annals of Cong. 539 (1792). The veto was sustained. *Id.* at 541.

Washington's legal interpretation, which two in his Cabinet supported and two opposed, was that no single State could have more than one Representative per thirty thousand population; the

counter-argument was that the ratio was simply for determining how many members there could be in the entire House based on the national population. Currie, 612 n.32. This difference of view is now academic due to the dramatically greater population in each district.

Thereafter, each house passed a bill allocating one seat for every thirty-three thousand population, ignoring fractional remainders entirely, and forming a House with 105 members. *Id.* at 615. An example ofthe effect of the change can be seen with Delaware. The vetoed plan assigned Delaware two House members for its population of 55,539. The final plan gave it only one.

The next four decennial plans also assigned just the whole numbers to each State and disregarded fractional remainders. *Montana*, 503 U.S. at 449-50.

It is of some moment, then, that even in the first implemented plan, approved in a chamber containing a third of the delegates to the Constitutional Convention, signed by the man who had presided over the Convention, large disparities between the comparative representation of States in the House were permitted. In the plan adopted, the deviation between the most and least populous districts was comparable to that challenged in this suit. Moreover, the original plan with less deviation was vetoed as being unconstitutional. The original plan had a population difference between the average district size in the most overrepresented and most underrepresented State of only 7,647 people.

See Currie, 612 n.30 (chart). In contrast, the apportionment plan signed by President Washington permitted a difference of over 22,000 between Delaware's single district and the average size of New York's ten districts. *Id.*

It is also significant that the Second Congress accepted fractional remainders as an inevitable outcome of apportionment. Congressman Williamson stated the obvious: "No ratio could be adopted that would not leave fractions .... " 3 Annals of Cong. 333 (1792). Vermonter Nathaniel Niles agreed that "perfect equality is not attainable .... " *Id.* at 407. It is also true that many saw reducing the discrepancies as a goal. To restate Congressman Laurance's words, seeking a "superior degree of equality" was desirable. *Id.* at 273.

We have reviewed the Constitution's language, how early commentators interpreted it, and how the first Congress that dealt with apportionment exercised its discretion. Assuredly, the Plaintiffs' challenge today is one that could have been made even to the first apportionment plan adopted by the Second Congress. To use the Plaintiffs' own figures, the 1790 Apportionment Plan gave a vote in Delaware the worth of only 60% of a vote in New York.

Further, the statistics provided by the Plaintiffs reveal that equivalent disparities have been the norm each decade since 1790. Under the 1800 apportionment, a vote in Delaware was worth only 54% of a vote in Tennessee. The 1810 apportionment was an improvement, as a vote in

Tennessee was worth 86% of a vote in Massachusetts. The 1820 apportionment was a regression, as a vote in Delaware was worth only 52% of a vote in Alabama. Thus, disparities in the worth of votes among the States, *i.e.*, under- and overrepresentation, is not a new phenomenon. The submissions to the court also indicate that despite different apportionment methods that have been adopted by Congress – basically different methods to address the fractional remainders - disparities between interstate districts have always been significant.

We see no reason to believe that the Constitution as originally understood or long applied imposes the requirements of close equality among districts in different States that the Plaintiffs seek here.

Nonetheless, these early views of acceptance of such deviations are not a complete answer. The Supreme Court's interpretations of the Constitution's mandates in the area of population variations among political districts have reflected evolving standards of equality. In 1962-64, the Court made dramatic, perhaps revolutionary, decisions about the demands of equality for intrastate representative districts. It rejected the political question doctrine as a bar to claims that a State legislature's apportionment scheme denied Equal Protection in *Baker v. Carr*, 369 U.S. 186; it required for the first time that "a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable" in *Reynolds v Sims*, 377 U.S. 533, 577

(1964); it also held for first time that Congressional districts within a State must be substantially equal in population in *Wesberry v. Sanders*, 376 U.S. 1 (1964). That too requires "a good-faith effort to achieve precise mathematical equality." *Kilpatrick v. Preisler,* 394 U.S. 526, 530-31 (1969).

What we still must consider, then, is whether Supreme Court precedents have given us direction to require more in apportionment than what we have found to be the limits of necessity under the early understandings.

C. *Judicial Consideration of Constitutionality of Interstate Disparities*

Before turning to the law, we summarize the facts ofthe inequality as the Plaintiffs present it. They calculate the comparative worth of their vote by dividing the number of persons in the most overrepresented State – Wyoming with one district - by the average number of persons per district in each of the Plaintiffs' States. Based on these calculations, voters in the Plaintiffs' underrepresented States have the following worth per vote as compared to voters in Wyoming, the most overrepresented State: Montana (55%), Delaware (63%), South Dakota (65%), Utah (66%), and Mississippi (69%).

The claim is that these large disparities in the comparative worth of votes between States violates the principle of "one person, one vote" announced by the Supreme Court in its intrastate redistricting cases. The Plaintiffs argue that the Supreme Court

has held that even small disparities between intrastate congressional districts are unconstitutional, so much larger disparities among *interstate* congressional districts are likewise unconstitutional.

We examine the case most insistently urged upon us. In the early 1960s, voters challenged a 1931 Georgia statute that set the boundaries for ten congressional districts. *Wesberry*, 376 U.S. at 2. The boundaries had not been changed despite changes in population. *Id.* According to the 1960 Census, the Fifth District surrounding Atlanta had a population of 823,680 persons; the average population of the other nine districts was less than half that. *Id.* The Supreme Court held that the significant population disparities devalued the comparative worth of a vote in the Fifth District and made the 1931 statute unconstitutional.

> We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. . . . To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established

> at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

Id. at 7-9 (footnotes and citations omitted).

The Supreme Court examined the historical record. As late as in 1842, seven States were electing their Representatives at large. *Id.* at 8 n.l1. Other, less dramatic disparities in voting power also were clearly accepted. Justice Black reviewed the debate in the Constitutional Convention that led to the Great Compromise, *i.e.,* each State having equal power in the Senate but having power based on population in the House. The Court quoted James Wilson, one of the few to use terms such as "equal numbers of people ought to have an equal [number] of representatives," and representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other." *Id.* at 10-11 (quoting CONVENTION RECORDS at 180).

The Court summarized this way: "for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others" would "defeat the

principle solemnly embodied in the Great Compromise – equal representation in the House for equal numbers of people." *Id.* at 14. This language, explicitly referring to what States must do within their own boundaries, certainly *could* be extended to support the Plaintiffs' position.

The Supreme Court in *Wesberry* relied on the clause that Representatives were to be chosen "by the People of the several States" and apportioned "according to their respective numbers" for the requirement of rough equality in population of districts within a State. *Id.* at 17 (quoting U.S. CONST. art. I, § 2, altered by amend. XIV, § 2). Plaintiffs here rely on the same.

The *Wesberry* Court accepted that it might not be possible to draw perfectly equal congressional districts. However, not being able to achieve perfect equality "is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18. We do not survey later decisions implementing the *Wesberry* command. The Plaintiffs now ask this court to extrapolate the reasoning and apply it to this case, which involves population disparities among interstate districts.

In deciding whether, and if so, how far to extend the intrastate district requirements of equality into interstate apportionment, we find particular guidance from the Supreme Court's decision in a suit that contested the 1991 Apportionment Plan. *Montana*, 503 U.S. 442. Under

the previous Apportionment Plan adopted in 1981, Montana was the most overrepresented State. It had two House districts with an average population of 393, 345. Though Montana had a slight population increase during the 1980s, the faster growth in some other States caused Montana to lose its second district after the 1990 Census. Montana now had only one Representative for its population of 803,655, moving it from being the most overrepresented to being the most underrepresented State.

Montana brought suit challenging the constitutionality of the same statute with which we contend, 2 U.S.C. § 2a, and making the same argument of a violation of Article I, section 2 of the Constitution. The complaint was about an apportionment calculation called the "method of equal proportions," a phrase used in Section 2a(a) to refer to the method that Congress adopted to apportion seats among the States. *Montana*, 503 U.S. at 452-53. The Supreme Court detailed at some length the five mathematical methods that were considered and how they operated, mechanics of no import in the present case. *Id.* at 452 n.26. Montana argued that a different methodology would provide greater equality in the number of individuals per representative. *Id.* at 446. Not incidentally, the preferred method would also give Montana another member of Congress. *Id.* at 460-61. The Court noted that Massachusetts had brought suit in a different district court, claiming yet another method was fairer. *Id.* at 447 n.13. That preference undoubtedly benefitted Massachusetts.

The Supreme Court reviewed the decision by a three-judge district court panel which had accepted the State's argument. *Montana*, 775 F. Supp. 1358. The panel majority had held the principles of equality set out in *Wesberry* also applied to apportionment of Representatives among States. Section 2a was unconstitutional, the panel concluded, because the population disparity between Montana's single district and the ideal district was not unavoidable despite a good-faith effort to achieve population equality. *Id.* at 1366. In dissent, Circuit Judge O'Scannlain highlighted how many different methods Congress had used before settling on the method of equal proportions in 1941. He argued that equality among the 435 interstate districts was impossible. *Id.* at 1368-69 (O'Scannlain, J., dissenting).

A unanimous Supreme Court reversed. *Montana*, 503 U.S. at 465-66. Because each State must have one representative, in "Alaska, Vermont, and Wyoming, where the statewide districts are less populous than the ideal district, every vote is more valuable than the national average." *Id.* at 463. Not questioning the constraint that creates the Plaintiffs' concern in our case, the Court found a "need to allocate a *fixed number* of indivisible Representatives among 50 States of varying populations," making equality "virtually impossible" in the different States. *Id.* (emphasis added). The Court reaffirmed the need for a "'good-faith effort to achieve precise mathematical equality' *within* each State," but it found "the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole." *Id.* (citations omitted). As we will

explain, the Court found no need to decide if the *Wesberry* principles applied.

The change Montana sought would have affected only Washington State by giving one of its seats to Montana. *Id.* at 460-61. One mathematical method might seem better from one perspective, but not from another:

> What is the better measure of inequality - absolute difference in district size, absolute difference in share of a Representative, or relative difference in district size or share? Neither mathematical analysis nor constitutional interpretation provides a conclusive answer. In none of these alternative measures of inequality do we find a substantive principle of commanding constitutional significance. The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course.

Montana, 503 U.S. at 463.

The Plaintiffs find *Montana* to be little guidance, because the validity of having a fixed number of Representatives was not addressed in *Montana.* That is certainly true. Also certain is that limits to the factual focus in *Montana* do not limit its analytical reach. The *Montana* Court analyzed the method of equal proportions as if the Court were open to setting it aside if it failed to meet some

fundamental level of reasonableness or good faith. The Court found "some force to the argument that the same historicalinsights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well." *Id.* at 461. The mandate for intrastate equality found by *Wesberry* came from the phrase that members of the House would be chosen "by the People of the several States"; "we might well find that the requirement that Representatives be apportioned among the several States 'according to their respective Numbers' would also embody the same principle of equality." *Id.*

If *Wesberry* applied, the Court said that Congress's decisions would be reviewed with deference. "The constitutional framework that generated the need for compromise in the apportionment process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders." *Id.* at 464. Congress had apparently made a "good-faith choice of a method of apportionment of Representatives among the several States," and the choice "commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Id.* The Court was satisfied that Congress's choice would be valid under *Wesberry*. No holding as to *Wesberry's* applicability was needed. *Id.* at 461-66.

From all this, Plaintiffs argue that Congress must make a good-faith effort towards the goal of equivalence. There is "some force" to this argument.

It is less forceful as to our issue, though, than it was in the *Montana* case.

In *Montana*, if the method of equal proportions had caused much greater disparities than some other method, then a challenge would have had facts to support judicial adjustments at the margins of apportionment. Quite differently, Plaintiffs here seek judicial entry into the exact area of decision-making that was reserved for Congress. The Constitution allows Congress to set the number of House members. Mathematics do not control. The Convention and the early Congresses rejected all proposals that would have made increases inexorable with increases in population. Though some Convention delegates and early Congressmen sought ever-increasing numbers of members, the more foresighted ones (so it seems in hindsight) always reined in those impulses.

All that said, Plaintiffs still assert that practical solutions exist to these seemingly intractable disparities. Adding ten more districts will have some impact, they say, which suggests that continually reduced disparities follow from ever-increasing numbers of districts. We do not see that as evidence Congress ignores, perhaps in bad faith, various reasonable solutions. Plaintiffs accept that anything short of an astronomical increase in the number of House members would still leave the population disparities among interstate districts strikingly greater than those held unconstitutional for intrastate districts. Congress's failure, then, to make the inequality slightly less is within its discretion to balance many factors, including

Madisonian unwieldiness, that cannot then be reviewed by elementary arithmetic.

We return the issue of *Wesberry's* applicability to the place the Supreme Court in its *Montana* opinion left it. If those principles apply, it is not evident that Congress has failed properly to exercise its broad discretion.

In effect, Plaintiffs seek to perfect the balance struck by the Great Compromise. The Framers mandated perfect equality in the Senate and allowed practical proportions in the House. From the beginning, those practicalities allowed disparities as severe as those that form the factual basis ofthis lawsuit. The spirit of this Great Compromise, the Supreme Court observed, "must also have motivated the original allocation of Representatives specified in Article I, § 2, itself." *Id.* at 464. That original allocation, written into the Constitution as a temporary measure despite significant variations among the States, was as "constitutional" as anything could be. Continuing even today, "compromise between the interests of larger and smaller States must be made to achieve a fair apportionment for the entire country." *Id.*

Appropriate as we conclude is to restate the Supreme Court's concluding analysis in *Montana.* It focuses us on the very practical compromise embedded in Section 2a, as was also embedded in the Constitution itself:

> The decision to adopt the method of equal proportions was made by

> Congress after decades of experience, experimentation, and debate about the substance of the constitutional requirement. Independent scholars supported both the basic decision to adopt a regular procedure to be followed after each census, and the particular decision to use the method of equal proportions. For a half century the results of that method have been accepted by the States and the Nation. That history supports our conclusion that Congress had ample power to enact the statutory procedure in 1941 and to apply the method of equal proportions after the 1990 census.

Id. at 465-66 (footnote omitted). Congress has continued to resolve through Section 2a a practical political question, even if not legally such a question, on how to balance all the considerations affecting the size of the House. We do not put a finger on the scale to alter the balance reached.

Congress's decision to limit the number of Representatives to 435 is valid.

The government's motion to dismiss is DENIED, and its motion for summary judgment is GRANTED. The Plaintiffs' motion for summary judgment is DENIED.

[ENTERED JULY 9, 2010]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI

JOHN TYLER CLEMONS, *et al.*	)
	)
Plaintiffs,	)
	)
-v- Case No.	)
3:09-CV-00104-WAP-SAA	)
	)
UNITED STATES DEPARTMENT	)
OF COMMERCE; *et al.*,	)
	)
Defendants.	)

NOTICE OF APPEAL

COME NOW PLAINTIFFS, John Tyler Clemons, Jessica Wagner, Krystal Brunner, Lisa Schea, Frank Mylar, Jacob Clemons, Jenna Watts, Isaac Schea, and Kelcy Brunner, and give notice that they hereby appeal the decision and order of the three-judge District Court issued in this matter on July 8, 2010 to the Supreme Court of the United States.

This decision granted the government's motion for summary judgment and denied plaintiffs' motion for summary judgment in this matter which sought a permanent injunction against the reapportionment of the United States House of Representatives pursuant to 2 U.S.C. § 2a which was alleged to be unconstitutional.

This direct appeal is authorized by 28 U.S.C. § 1253 and Rule 18.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

/s/Michael Farris

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CERTIFICATE OF SERVICE

Pursuant to Rule 29 of the Rules of the Supreme Court of the United States, the undersigned counsel, a member of the Bar of the Supreme Court of the United States, hereby certifies that he served a copy of this Notice of Appeal on July 9, 2010, upon the defendants by mailing a copy of the Notice by First Class Mail, postage prepaid to:

The Honorable Elena Kagan
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Additionally, I hereby certify that on July 9 2010, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following counsel of record:

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July 9, 2010

/s/Michael Farris