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-MPM
	)	
UNITED STATES DEPARTMENT OF	)	
COMMERCE; *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS REPLY MEMORANDUM IN SUPPORT OF
THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I

THE CONSTITUTION REQUIRES A TRULY PROPORTIONAL HOUSE OF REPRESENTATIVES

The plaintiffs contend that the Constitution requires that the House of Representatives shall be apportioned according to population and prohibits any apportionment plan which creates gross inequalities between the voters of the several states. The government contends that there is no general duty to apportion the House according to population. The only requirements, the government contends, are that districts must exceed 30,000 persons and each state must have at least one representative. In short, the plaintiffs claim that the Constitution requires equal treatment for voters at the end of the entire process. The government argues that as long as a valid mathematical formula is used in one phase of the process, the end result does not matter.

It is important to fully understand how extreme a position the government has chosen to pursue in this litigation. The first page of the government's reply brief (hereinafter "GRB") contains the following passage.

> Plaintiffs' argument depends upon the application of the standard of review set forth in *Wesberry v. Sanders,* 376 U.S. 1 (1964) and its progeny. The *Wesberry* standard is based on a separate constitutional provision, applies to intrastate redistricting decisions

> by the States, and has already been rejected by the Supreme Court as the applicable standard of review for Congressional apportionment determinations. The *Wesberry* standard therefore does not apply here. Instead, the Constitution expressly sets forth the minimum and maximum number of Representatives. No additional requirement of population equality among interstate Congressional districts constrains Congress's discretion to select a number within that range.

The last sentence of the above passage clearly reveals the radical nature of the government's position: "No additional requirement of population equality among interstate Congressional districts constrains Congress's discretion to select a number within that range." Accordingly, Congress could create a House of just 50 seats—giving one to each state. Or Congress could have just decided to keep the number of seats chosen in 1792—105 Representatives—on a permanent basis.

Later in this same brief, the government makes what would seem to be a completely inconsistent admission: "Congress does not have unfettered discretion to determine the apportionment method…. Instead, the Constitution requires an apportionment method that relates to population." GRB at 22. The key to understanding the government's argument is to unravel the mystery that it does not view the selection of the size of the House as a part of the "apportionment method."

In sum, the government argues that Congress is absolutely free to pick any size of House of Representatives from 50 to some 9000 members.[1] Having settled on any number anywhere within this range, Congress is only required to dole out those seats in a manner that relates to population. In other words, so long as Congress uses some mathematical methodology like the Method of Equal Proportions approved in *Department of Commerce v. Montana,* 503 U.S. 442 (1992), it does not matter how unequal the representation turns out at the end of the process.

[1] A House of 50 would be the "minimum" based on the one per-state requirement. If, based on the Census of 2000, the House was apportioned on the basis of districts of 30,000, the size of the House would exceed 9,000. This would be the "maximum."

This approach bifurcates the apportionment process in a way that the Constitution simply does not permit. If a House of 50 is chosen and then the Method of Equal Proportions is consulted, the result is that every state gets one seat. If a House of 51 seats is chosen, using the Method of Equal Proportions, California gets two seats and all other states receive one seat.

Would a House of 50 or 51 satisfy the constitutional criteria of proportional representation? According to the formulistic approach of the government, it would. Congress could choose 51 seats; all that would be required to be constitutional is to use the Method of Equal Proportions to hand out the 51st seat to California. Huge disparities would result. New York and Wyoming would have the same number of seats. Would this be constitutional just because the Method of Equal Proportions had been employed to dole out one last seat? What if Congress had never changed the size of the House from the 105-seat size adopted in 1792?

If the House was reapportioned in 2000 using the Method of Equal Proportions for a House of 105 seats, twenty-six states would receive a single representative.[2] These states would range in size from Wyoming with 495,304 residents to Kentucky with 4,049,431 residents—a ratio of 8.7 to 1. Would this be a reasonable ratio? Obviously not. Yet, the government contends a House of 105 seats would be constitutional since there is absolutely no limitation on the size of the House so long as the number falls anywhere between 50 and 9,000, provided that the Method of Equal Proportions is used to hand out the last 55 seats.

The Constitution obviously demands more than the correct mathematical formula for the distribution of seats. It requires a proportional *result*. But how precise does the proportionality have to be? How equal do congressional districts have to be? The government has identified the appropriate standard—reasonableness. GRB at 22 *et seq.* But it is not the size of the House that must be reasonable—it is the ratio of representation to population that must be reasonable.

[2] See Chart in Appendix A.

In 1921 an advisory committee of expert mathematicians was asked by the Chairman of the Senate Census committee to review the methods for distributing fractional remainders. This was the group that originally recommended the use of the Method of Equal Proportions approximately 80 years ago. The Department of Commerce refers to the work of this committee in its brief submitted to the Supreme Court in *Montana.* [3] This committee of the American Scientific Association[4] correctly concluded that its choice of formulas had to be guided by the text of the Constitution.

> [R]epresentatives are to be apportioned among the states *according to their respective numbers.* Here we have a plain stipulation that the allocation of representatives among the states is to be determined on the basis of *proportions* or *ratios*. The ratio between the representation assigned any one state and the representation assigned any other state is to accord with the ratio between the population of the one and the population of the other.[5]

It is obvious that a House of 50 or 51 seats would result in staggering population disparities. At the end of the day, a House of this size would be far too imbalanced to claim that the "representation assigned any one state and the representation assigned any other state" was "in accord with the ratio" of their relative populations. An unconstitutional ratio would also result if Congress had decided to freeze the House at 105 seats—the number established under George Washington.

The size chosen for the House is not an isolated matter. It is an integral part in the overall plan for representation. A House of 105 seats was reasonable for a national population of 3 million, but it would not be reasonable for a national population of 300 million. Why not? It is not because houses of 105 seats are inherently improper or intrinsically unreasonable. A House

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[3] *Department of Commerce v. Montana*, 1991 U.S. Briefs 860, 1992 U.S. S. Ct. Briefs LEXIS 107, at p. 23.

[4] The "Report Upon the Apportionment of Representatives" in *Quarterly Publications of the American Statistical Association*, Vol. 17, No. 136 (Dec. 1921), pp. 1004-1013.

[5] *Id.* at 1007-1008.

of 105 seats would be unreasonable for a nation of 300 million people in 50 states because it is impossible to create a ratio of representation that fairly equates the population of the state to its share of the representation in the House of Representatives. Voting strength would be radically unequal.

Yet, inequality of voting strength is of no concern to the federal government in this litigation. The government does not view equal voting strength as a constitutional requirement that Congress must follow. In fact, it is quite revealing that the government never once affirms the right of voters to equal representation—a right that the Supreme Court has repeatedly recognized as a "fundamental right."[6] The government views the Method of Equal Proportions as a magical amulet that wards off all claims under the principle of one-person, one vote. This cannot be right. It is the *net result* of the entire apportionment process—not just the *mathematical formula* employed in one phase of the process—which must be reasonably related to population. The Constitution requires that *representation* be as equal as is practicable.

Before the adoption of the 16th Amendment that changed the rules on the apportionment of direct taxes, there was a structural requirement that ensured equality of representation.[7] The original rule in Article I, § 2 tied the apportionment of direct taxes to the apportionment of seats in the House. Under this original rule, if Congress chose a House of 50 seats, then total amount of direct taxes paid by each state would have to be exactly equal.[8] James Madison made it clear that the ratio of direct taxation was expressly correlated to the ratio of representation.

[6] See, Memorandum in Support of Plaintiff's Motion for Summary Judgment at 13-14.

[7] It is interesting to note that the size of the House has not been changed (except temporarily) since the ratification of the 16th Amendment which eliminated the required correlation between the apportionment of direct taxes and seats in the House of Representatives.

[8] 3 J. Story, *Commentaries on the Constitution* § 427 (1833) explains the operation of the principle with unmistakable clarity.

> In one respect, the establishment of a common measure for representation and taxation will have a very salutary effect. As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not on the co-operation, of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.[9]

What is a reasonable ratio of representation? What does the Constitution require? How equal does representation have to be? Asking these questions in this manner leads to the correct answer. Once it is established that the goal required by the text of the Constitution is the reasonableness of the result—that is, a reasonable ratio of representation to population—then the Supreme Court has already answered the question: How equal does representation have to be? "[A]s nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

It is important to note that the government has taken an "all or nothing" approach to this litigation. By claiming that, after 50 seats, Congress has absolute discretion on the size of the House, the government feels no obligation to address the inequalities suffered by the voters. In

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> Thus, suppose ten dollars were contemplated as a tax on each coach or post-chaise in the United States, and the, number of such carriages in the United States were one hundred and five, and the number of representatives in congress the same. This would produce ten hundred and fifty dollars. The share of Virginia would be 19/100 parts, or $190; the share of Connecticut would be 7/100 parts, or $70. Suppose, then, in Virginia, there are fifty carriages, the sum of $190 must be collected from the owners of these carriages, and apportioned among them, which would make each owner pay $3.80. And suppose, in Connecticut, there are but two carriages, the share of that state ($70) must be paid by the owners of those two carriages, viz. $35 each.

Virginia had 19 representatives. Therefore, its share of the direct taxes to be paid directly related to its number of representatives.

[9] J. Madison, *The Federalist No. 54*, *in The Federalist*, Vol. II, 140-141 (J. and A. McLean Publishers, New York 1788).

other words, the government contends that the ultimate ratios do not matter—voters do not matter—nothing matters so long as the magical Method of Equal Proportions is employed.

The plain facts are that the present disparities are massive (410,012 individuals, Census of 2000) and are only going to get worse (457,336 individuals, Census of 2010). As we demonstrate below, there is no reason to deviate from the normal progress of one-person, one-vote litigation. First, the plaintiffs must prove that there is a significant level of disparity and demonstrate that remediation is possible. Then the burden of proof shifts to the government. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983), describes the government's burden of proof: "Article I, § 2 …permits only the limited populations variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." (Internal quotation marks omitted.) The net result must be equal "as nearly as is practicable."

The government reads Article I, § 2 to require nothing more than a 50 seat House and the Method of Equal Proportions. The plaintiffs read this constitutional text to require a House that treats voters as close to equality as is practicable. If the principle of one-person, one-vote applies to interstate apportionment, then the plaintiffs must prevail in this litigation.

II

THE SUPREME COURT HAS EXPLICITLY ENDORSED THE DUTY OF CONGRESS TO APPORTION THE HOUSE ACCORDING TO THE PRINCIPLE OF EQUALITY

The lynchpin of the government's argument is that *Wesberry v. Sanders*, 376 U.S. 1 (1964) explicitly decided that there is a constitutional distinction between intrastate and interstate apportionment. Intrastate apportionment must be performed in a manner to protect the right of voters to equal strength. According to the government in this case, however, the Supreme Court

has made it clear that interstate apportionment is not constrained at all by the requirement of one-person, one-vote.

The government has seriously mischaracterized the Supreme Court's decision in *Wesberry*. Moreover, it is simply false to claim that the Supreme Court has ruled that interstate apportionment is exempt from the command of the Constitution to treat voters equally. The very cases that the government relies upon to buttress this argument reveal the contrary result.

A.
A CLOSER ANALYSIS OF *WESBERRY* REVEALS THAT THE COURT VIEWED INTERSTATE EQUALITY AS THE FOUNDATION FOR THE REQUIREMENT OF INTRASTATE EQUALITY

As previously noted, the government contends that the decision in *Wesberry* was based on a constitutional text that is "separate" from the text that governs this case. GRB at 1. The government never expands upon or explains this argument. Apparently, the government's contention is that Art. I § 2's provision that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States" is completely distinct from the provision that appears two sentences later which says that "Representatives…shall be apportioned among the several States… according to their respective numbers." According to the government, the former phrase requires equal congressional districts within a state but has no meaning or application to the principle of interstate equality. Moreover, the latter phrase does not grant voters any right to equal voting strength. "No additional requirement of population equality among interstate Congressional districts constrains Congress's discretion." *Id.*

It is true that the Supreme Court begins its *Wesberry* analysis by focusing on the first of these two phrases: "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. Nothing in *Wesberry* remotely suggests that this principle applies only to equality within a state. Indeed, the very words of the Constitution suggest that the interstate context was the primary concern. The controlling phrase is "the people *of the several states.*" Justice Harlan, in his *Wesberry* dissent, forcefully argues that interstate apportionment was the only context addressed by either of these sentences. 376 U.S. at 20 *et seq.* Nothing in the majority opinion remotely suggests that it found that the constitutional text was applicable to intrastate apportionment only.

The government's argument that there is no duty to guarantee an equal ratio between population and representation in the House makes a mockery of the Great Compromise—a pivotal event in the creation of the Constitution. The eminent historian Max Farrand describes the significance of this agreement. "This is the great compromise of the convention and of the constitution. None other is to be placed quite in comparison with it."[10] In *Wesberry,* the Supreme Court fully described both the meaning and applicability of the Great Compromise:

> The dispute came near ending the Convention without a Constitution. Both sides seemed for a time to be hopelessly obstinate. Some delegations threatened to withdraw from the Convention if they did not get their way. Seeing the controversy growing sharper and emotions rising, the wise and highly respected Benjamin Franklin arose and pleaded with the delegates on both sides to "part with some of their demands, in order that they may join in some accommodating proposition." At last those who supported representation of the people in both houses and those who supported it in neither were brought together, some expressing the fear that, if they did not reconcile their differences, "some foreign sword will probably do the work for us." The deadlock was finally broken when a majority of the States agreed to what has been called the Great Compromise, based on a proposal which had been repeatedly advanced by Roger Sherman and other delegates from Connecticut. It provided, on the one hand, that each State, including little Delaware and Rhode Island, was to have two Senators. As a further guarantee that these Senators would be considered state emissaries, they were to be elected by the state legislatures, Art. I, § 3, and it was specially provided in Article V that no State should ever be deprived of its equal representation in the Senate. 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

[10] Max Farrand, *The Framing of the Constitution of the United States,* Yale University Press (New Haven, CT) (1913) p. 105.

> 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.*"
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> 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. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives. The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers and to delete any reference to wealth.
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> 376 U. S. at 12-14. (Footnotes omitted).

It is critical to underscore the interrelated nature of the two relevant portions of Art. I, § 2. The Supreme Court said that "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.'" *Id.* The government's attempt to treat these two provisions as completely separate is demonstrably erroneous.

How could the Court possibly be more explicit about the interstate nature of their reasoning? Concerning the phrase "chosen by the people" the Court said: "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**." *Id.* (Emphasis added). There is no ambiguity here. Interstate apportionment is not "separate" from the requirements of the first sentence of Art. I, § 2. The Court clearly held that this phrase requires proportional representation across state lines.

If this wasn't enough, the Court held that the Constitution "embodied" Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people." Lest anyone doubt that this was chiefly for the purpose of interstate fairness, the Court added an approving reference to George Mason's view that "'numbers of inhabitants' should always be the measure of representation in the House of Representatives." *Id.* Finally, the Court held that the convention overwhelmingly embraced Randolph's resolution "to base future apportionment squarely on numbers." *Id.*

In this discussion, the Court repeatedly referred to both provisions of Art. I, § 2. Together, the two clauses were the embodiment of the House "side" of the Great Compromise. It would be the most grievous violation of American history to spin the Great Compromise as a mere requirement of intrastate equality. Indeed, as Justice Harlan's dissent in *Wesberry* makes clear, the overwhelming practice of the states at the time was to allow for huge disparities in congressional districts within the states. "In all but five of those States, the difference between the populations of the largest and smallest districts exceeded 100,000 persons. . . . Thus, today's decision impugns the validity of the election of 398 Representatives from 37 States, leaving a 'constitutional' House of 37 members now sitting." 376 U.S. at 20-21. In spite of this long-term practice to the contrary, the Court required future apportionments to adhere to the constitutional principle of one-person, one-vote. Long-standing practices relative to apportionment are not exempt from constitutional requirements when a proper challenge finds its way into the federal courts.

If the Supreme Court decides to make the states also conform to a constitutional text that was clearly directed to the federal government in the first instance, it does not mean that the federal government is thereafter exempt from any duty of obedience. For example, the text of

the First Amendment clearly only applies to the federal government. "Congress shall make no law. . . ." Nonetheless, the Supreme Court has found that its provisions are made applicable to the States via the 14th Amendment's Due Process Clause. See e.g., *Gitlow v. People of New York,* 268 U.S. 652 (1925); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The federal government does not become exempt from the First Amendment just because the states are also required to adhere to its provisions. Similarly, holding the states to the standards of Art. I, § 2, does not exempt Congress from its dictates.

If the position offered by the government in this present litigation was presented as the meaning of the Constitution in 1787, the Constitution would not have been adopted. The Great Compromise was nothing less than the lynchpin for the entire process of adopting the Constitution. If the state conventions had been told that equal voting strength was not a requirement in the House, most Federalists would have joined the Anti-Federalists in voting against the Constitution. To abandon the requirement of equal voting strength for the people in the House would be a betrayal of both the text of the Constitution and the very fiber of the American republic. The position of the government is profoundly anti-constitutional.

The government claims that it is impossible to achieve absolute equality in the interstate apportionment of the House. The plaintiffs have left no doubt that their requests are tempered by reason and have never asked this Court to mandate absolute equality. What is required is equality insofar as it is practicable.

> While it may not be possible to draw congressional districts with mathematical precision, that 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. That is the high standard of justice and common sense which the Founders set for us.

Wesberry, 376 U.S. at 18.

However broad and wide the discretion of the Congress may be, it is not so broad as to be able to overturn the rule that the states must have equal representation in the Senate and that the people must have equal representation in the House.

B.
THE SUPREME COURT HAS CLEARLY SUPPORTED THE VIEW THAT THE CONSTITUTION DEMANDS INTERSTATE EQUALITY IN APPORTIONING THE HOUSE

The government asserts that "the *Wesberry* standard … has already been rejected by the Supreme Court as the applicable standard of review for Congressional apportionment determinations." GRB at 1. To support this assertion, the government places primary reliance on *Department of Commerce v. Montana,* 503 U.S. 442 (1992). It is obvious that the federal government prevailed in *Montana* but that does not mean that it rejected the *Wesberry* standard with regard to interstate apportionment. The Court recited the fact that all of its cases up until that time had involved one-person, one-vote challenges to intrastate apportionments. However, the Court noted:

> There is some force to the argument that the same historical insights that informed our construction of Article 1, § 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.
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> 503 U.S. at 461.

It is a serious misuse of *Montana* to suggest that the Supreme Court rejected the *Wesberry* standard in the interstate apportionment context. The Court indicated that there was merit to the general contention of *Wesberry's* potential applicability but held that in any event there was no violation of *Wesberry* on these facts. Since the Constitution did not dictate the precise method for the computation of fractional remainders, Congress had the discretion to

choose any method that was consistent with the principle of equal representation. Rather than rejecting the *Wesberry* standards, the Court employed them to assess Montana's claims. Montana ultimately failed to prevail because it could not prove that its proposed remedy would actually make the apportionment "more equal" for all concerned states. 503 U.S. at 461-462. See also, *Franklin v. Massachusetts,* 505 U.S. 788, 806 (1992). The majority's approach in *Montana* is fully consonant with the Court's discussions in *Wesberry's* which clearly indicated that interstate equality is a constitutional requirement. When a textual standard is violated and there is proof that the proposed remedy would make the apportionment "more equal," the plaintiffs should prevail in a one-person, one-vote challenge.

The Court called the requirement that "Representatives shall be apportioned among the several States according to their respective numbers" a "general admonition" that was subject to three constraining requirements—no district smaller than 30,000, every state shall receive at least one Representative, and districts cannot cross state lines. 503 U.S. at 447-448. The government asserts that these three constraining requirements are all that the Constitution demands. This totally overlooks the fact that the Court said that the "general admonition"—i.e. the primary rule—was that representation must be according to each state's respective population.

At the time that *Montana* was argued, the Department of Commerce admitted what it refuses to admit in this current litigation. The Court said, "[T]he Government acknowledges that Congress has a judicially enforceable obligation to select an apportionment plan that is related to population." 503 U.S. at 457. The government's latest brief contains a similar admission.

> Plaintiffs also spend considerable time arguing the uncontroversial proposition that Article I, Section 2, Clause 3 – and, in particular, the requirement that Representatives be apportioned to the States by population – governs *interstate* apportionment. (Pls.' Opp'n at 23-26.) The government has never said otherwise. Article I, Section 2, Clause 3 plainly governs interstate apportionment but still leaves Congress with broad discretion to select the number of Representatives. [GRB at 17, fn. 3]

A similar understanding of the relevant text has continued to guide the Supreme Court's decisions in cases which have touched upon interstate apportionment subsequent to *Montana.*

Since *Montana*, there have been four additional Supreme Court decisions that have considered constitutional challenges to some action of the federal government that impacted interstate apportionment either directly or indirectly. The first in this sequence was *Franklin v. Massachusetts*, 505 U.S. 788 (1992)[11]. *Franklin* addressed a challenge to the Census Bureau's treatment of overseas employees of the federal government, including military personnel. The lower court decision clearly impacted interstate apportionment. "[T]he District Court directed the Secretary to eliminate the overseas federal employees from the apportionment counts, directed the President to recalculate the number of Representatives per State and transmit the new calculation to Congress, and directed the Clerk of the House of Representatives to inform the States of the change." 505 U.S. at 791. The Supreme Court reversed.

The Court began its review of the merits of the constitutional claims 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. This is no repudiation of *Wesberry's* requirement of equality; just the opposite is true. Even though this case clearly arose in the context of interstate apportionment, the Supreme Court said that the applicable constitutional standard included "the constitutional goal of equal representation." The Court used the standard of equality to make its ruling in favor of the government's action. "The Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their

[11] Justice O'Connor's opinion was a majority opinion with the exception of Part III. We will specially note any citation from the plurality section of the opinion in Part III.

home States, actually promotes equality." 505 U.S. at 806. The Court even cited the more recent one-person, one-vote case of *Karcher v. Daggett*, 462 U.S. 725 (1983) to buttress its ruling that "[A]ppellees have not demonstrated that eliminating overseas employees entirely from the state counts will make representation in Congress more equal." *Id.*

It is readily apparent that the *Franklin* majority employed the requirement of equal representation in a case touching upon interstate apportionment by the federal government. Just because the plaintiffs failed to sustain their burden of proof does not detract from the fact that the Supreme Court found the "constitutional goal of equal representation" to be the controlling legal standard in an interstate apportionment case.

The second case in this series was *Wisconsin v. City of New York*, 517 U.S. 1 (1996). It involved the refusal of the Secretary of Commerce to use a statistical adjustment to correct an undercount in the initial enumeration. Accordingly, the impact on interstate apportionment was indirect. The specific legal issue in *Wisconsin* was the lower court's use of strict judicial scrutiny which had been derived from "equal protection principles." 517 U.S. at 17. The Court held that the standards employed in *Montana* and *Franklin* were the correct standards. Strict scrutiny was not the appropriate approach, but the Court never embraced the present contention of the government that Congress possesses absolute discretion with regard to interstate apportionment. The Court held that the difference was not merely the states versus the federal government—although it is clear that the Court believed that greater deference was owed to acts of Congress in making apportionment decisions. But the key difference was this: "[T]he 'good-faith effort to achieve population equality" required of a State conducting intrastate *redistricting* does not translate into a requirement that the Federal Government *conduct a census* that is as accurate as possible." 517 U.S. at 16-17. The Court emphasized the "out of context" nature of

the use of *Wesberry* in a census challenge. "[I]t is difficult to see why or how *Wesberry* would apply to the Federal Government's conduct of the census—a context even further removed from intrastate districting than is congressional apportionment." *Id.* at 18. The Court concluded that the conduct of the census by Congress was entitled to "more deference" than Congress's "decision concerning apportionment." *Id.*

In the wake of all of its discussion of discretion, the *Wisconsin* majority repeats the constitutional limitation announced in *Franklin.* "[S]o long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation" . . . it is within the limits of the Constitution." *Id.* at 19-20. The Supreme Court did not reject the notion of "the constitutional goal of equal representation"—rather, it affirmed the principle, but merely ruled that no violation of the principle had occurred in this census case where Congress was entitled to even more discretion than in an apportionment case.

In the third post-*Montana* case, *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999), the Supreme Court served notice that its deference to the discretion of Congress is not unlimited in actions that impact interstate apportionment. The Court relied upon the standing rules from *Baker v. Carr*, 369 U.S. 186 (1962) to hold that an Indiana voter who had properly alleged that his state would lose a seat in Congress had standing to raise a constitutional challenge regarding a sampling technique that was employed to complete the census and its related interstate reapportionment. This holding necessarily means that an action of the federal government which "dilutes" the value of a vote in a congressional election is subject to constitutional challenge. A person never has standing to raise a constitutional claim that does not exist. But this Indiana voter had standing to challenge a decision by Congress relative to interstate apportionment and the census that could have violated his constitutional

right to equal voting strength. Although the Court reached the ultimate question on statutory grounds, this voter's standing was firmly rooted in the constitutional principles of one-person, one-vote that was announced in *Baker v. Carr.*

Finally, in the fourth case, the Court rejected a constitutional challenge which pitted the state of North Carolina against Utah in a competition for the final seat in the re-apportionment that followed the 2000 census. *Utah v. Evans*, 536 U.S. 452 (2002). The ultimate decision addressed the meaning of the Census Clause, but the Court found the opportunity to emphasize the importance of the general principle of equal representation in the interstate apportionment of the House.

> Insofar as Justice Thomas proves that the Framers chose to use population, rather than wealth or a combination of the two, as the basis for representation, *post*, at 14—16, we agree with him. What he does not show, however, is that, in order to avoid bias or for other reasons, they prescribed, or meant to prescribe, the precise method by which Congress was to determine the population. And he cannot show the latter because, for the most part, the choice to base representation on population, like the other fundamental choices the Framers made, are matters of general principle that do not directly help determine the issue of detailed methodology before us. Declaration of Jack N. Rakove, in *Department of Commerce* v. *United States House of Representatives,* O. T. 1998, No. 98—404, p. 387 ("What was at issue … were fundamental principles of representation itself … not the secondary matter of exactly how census data was to be compiled").

536 U.S. at 478.

This case involves "fundamental principles of representation itself" and not some secondary matter such as the correct mathematical formula for resolving fractional remainders, or statistical adjustments to the census. While the Constitution provides no guidelines for these "secondary matters," the Constitution is absolutely explicit in rejecting the argument of the government in this litigation. Population does matter. Congress cannot ignore it. Equal representation is a constitutional mandate. These are fundamental principles and they are the only issues at stake in this litigation.

In our earlier briefs, we cite statements by the Supreme Court which affirm the duty of the federal government to adhere to the principle of one-person, one-vote. See, e.g, *Avery v. Midland County,* 390 U.S. 474, 481, n.6 (1968). In its latest submission, the government contends that such statements are non-binding *dicta*. GRB at 20. The government attempts to paint a picture that *Montana* and *Wisconsin* have ruled in a way that repudiates the statements in *Avery* and other cases. As our review of these cases clearly indicates, the Supreme Court has not deviated from its understanding that Congress must adhere to the general principle of equal representation. That command has been affirmed in every one of the five decisions which touch interstate apportionment from *Montana* to *Utah v. Evans.*[12]

The government could have embraced the necessity of applying one-person, one-vote to interstate apportionment while claiming that the current apportionment statute led to results that sufficiently safeguard the rights of voters to equal representation. It is pretty easy to understand why the government did not take this approach. The degree of inequality in the current scheme is so far beyond the pale that the only available defense would be to claim that Congress has total discretion and that proportional representation is not a constitutional requirement.

In the course of this defense, the government is willing to throw the Great Compromise and the constitutional texts that flowed from this most fundamental of all American agreements

[12] Instead of following the precedents of the Supreme Court, the government argues that this Court should follow the "precedent" set in a district court decision from New York. *Wendelken v. Bureau of the Census*, 582 F. Supp. 342, 343 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984). Wendelken, a *pro se* litigant, sought an order for a Congress of 7,000 representatives. He based this first and foremost on an obvious misreading of the rule of 30,000. He then argued that the 5th Amendment guaranteed him the right to equal voting strength. The government seeks to smooth over the fact that his legal theories were entirely differently by focusing on the similarity of subject matter. However, it is clearly important that one employ the correct legal theory in apportionment cases. In *Baker v. Carr,* 369 U.S. 186 (1962), the Court noted that there was a significant difference in outcome in apportionment cases based upon the choice of legal theory by the plaintiffs. Cases brought under the Guaranty Clause were non-justiciable political questions. Cases brought under the 14th Amendment's Equal Protection Clause were justiciable. *Wendelken* failed to argue the correct legal theory—along with his improper request for a direct court order of a specific size of Congress—were more than enough justification to dismiss his pleading. And it is more than sufficient grounds to see that this decision of a New York district court offers little in way of analysis concerning the legal theories and claims raised by these plaintiffs.

"under the bus" of Congressional discretion. The government not only fails to defend the appropriateness of the current apportionment as complying with the constitutional mandate of equal representation, but also utterly ignores the fundamental rights of American citizens to equal representation.

Congress has discretion, but that discretion can be abused and thus has limits. It takes 183 voters in Montana to equal 100 voters in Wyoming. There were 410,012 more people in one congressional district than in another. After the 2010 census, the projected disparity will increase to 457,336 individuals. If the size of the House at 435 was enshrined in the text of the Constitution voters would have to either live with massive inequality or seek to amend the Constitution. But 435 is not in the Constitution. So long as the House is frozen at this level disparity levels will continue to spiral upwards, and clearly reveal an abuse of discretion denying the voter's constitutional right of equal voting strength. But the choice of the federal government to defend these numbers—not on the basis that they are sufficiently equal, but that equality is not required whatsoever—reveals that even greater abuses could follow in the wake of this decision. If the government's argument prevails, proportional representation in the House—the fundamental principle of the Great Compromise—will be jettisoned as unnecessary constitutional baggage.

III

THE POLITICAL QUESTION DOCTRINE POSES NO BARRIER

In its first submission, the government failed to argue that this Court should not reach the merits of the constitutional issues because of the political question doctrine. In its final submission it now raises this claim—although the failure to raise it earlier readily suggests that the argument lacks substance.

As we have just seen, since 1990 there have been five decisions of the United States Supreme Court which addressed and decided on the merits constitutional challenges to various aspects of interstate apportionment. Without exception, claims that these cases were barred by the political question doctrine failed. Not a single justice favored the application of the political question doctrine in any of these cases. The rule is clear and unequivocal. "Constitutional challenges to apportionment are justiciable. See *Department of Commerce v. Montana*, 503 U.S. 442 (1992)." *Franklin v. Massachusetts,* 505 U.S. 788, 801 (1992) (plurality opinion.)[13]

In *Department of Commerce v. Montana*, Montana challenged the constitutionality of the method of allocating seats according to a formula of fractional remainders. An unanimous Court reached the merits—rejecting the Department of Commerce's plea that the Court should decline jurisdiction under the political question doctrine. The Court's plain language regarding the political question doctrine is clearly applicable here.

> The gravamen of the Government's argument is that the District Court erred in concluding that the Constitution imposes the more rigorous requirement of greatest possible equality in the size of congressional districts, as measured by absolute deviation from ideal district size. The Government then does not dispute Montana's contention that the Constitution places substantive limitations on Congress' apportionment power and that violations of those limitations would present a justiciable controversy. Where the parties differ is in their understanding of the content of these limitations. In short, the Government takes issue not with the existence of a judicially enforceable right, but with the definition of such a right.
>
> When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue. See *Gilligan v. Morgan*, 413 U.S. 1, 10-12 (1973); *Baker v. Carr*, 369 U.S. at 197; see also *Colegrove v. Green*, 328 U.S. 549, 552-556 (1946) (plurality opinion). In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution. That determination is a decision

[13] Although only four justices joined the section of Justice O'Connor's opinion from which the above-quotation is taken, it is beyond question that eight of the justices voted to reach the merits of the constitutional claims. Only Justice Scalia voted to refrain from reaching the merits but his reluctance arose from the standing of the plaintiffs and not because of the political question doctrine. A decision of a majority of the Supreme Court later affirmed this reading of *Franklin. Utah v. Evans,* 536 U.S. 452, 463-464 (2002).

> on the merits that reflects the exercise of judicial review, rather than the abstention from judicial review that would be appropriate in the case of a true political question.
>
> The case before us today is "political" in the same sense that *Baker v. Carr* was a "political case." 369 U.S. at 217. It raises an 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 (1964); *Karcher v. Daggett*, 462 U.S. 725 (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 (1986); *Baker v. Carr*, 369 U.S. at 234-237; cf. *Gilligan v. Morgan*, 413 U.S. at 11. 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.

503 U.S. at 457-459.

Likewise, the Court reached the merits in each of the four other constitutional challenges that impacted interstate apportionment which followed the *Montana* decision. *Franklin v. Massachusetts*, 505 U.S. 788 (1992), (reaching the merits of a constitutional claim regarding the allocation of federal overseas employees in the Census which resulted in the loss of House seat for Massachusetts); *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (reaching the merits of a constitutional claim regarding statistical adjustments to the census—"[S]mall changes in adjustment methodology would have a large impact upon apportionment." *Id.* at 12); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999) (reaching the merits and holding unconstitutional the government plan to use sampling techniques in the census which would have the impact of changing the interstate apportionment); and *Utah v. Evans*, 536 U.S. 452 (2002) (reaching the merits of a claim that the use of "hot deck" methodology in the census violated the Constitution in a manner that impacted Utah's share in the seats of the House of Representatives).

In reality, the government's argument regarding the political question issue is nothing more than a restatement of its argument on the merits. Congress has the complete discretion to make the House any size it wants, the defendants contend—subject only to the rule of 30,000 persons and the minimum of one seat per state. This case will decide whether or not equal representation is an additional constitutional limitation on Congressional discretion. If there is no rule of proportional representation, then the plaintiffs should lose—not under the political question doctrine—but on the merits. And if proportional representation is required by the Constitution, then this case is undeniably justiciable.

The government's denial of the existence of a rule of proportional representation is a recent invention. The government previously admitted that the exact kind of case brought by these plaintiffs was justiciable. "[W]ith respect to the provision that Representatives 'shall be apportioned among the several States . . . according to their respective Numbers,' the Government acknowledges that Congress has a judicially enforceable obligation to select an apportionment plan that is related to population." *Department of Commerce v. Montana*, 503 U.S. 442, 457 (1992). The government's current belief that a 50-member House is permissible is in direct conflict with its position regarding both justiciablity and the meaning of the relevant constitutional text as expressed in *Montana.*

There is no doubt that this case presents a justiciable question.

IV

THE REMEDY THAT PLAINTIFFS SEEK APPROPRIATELY BALANCES THE RIGHTS OF CITIZENS WITH THE PREROGATIVES OF CONGRESS

The government asserts that "[a]ccording to Plaintiffs' mathematical formula, the number of Representatives must expand to 932 to effect a 'significant improvement' over the current

number, or to 1,760 to be constitutional." GRB at 1. This assertion reflects a serious misunderstanding of both the amended complaint and the Plaintiffs' arguments.

The only relief that Plaintiffs seek is a declaration that the limitation of 435 seats contained in 2 U.S.C. § 2(a) is unconstitutional because it necessarily results in drastic levels of inequality in violation of the principle of one-person, one-vote. Plaintiffs do not ask this Court to order 932 seats or 1,760 seats or any other particular number. In fact, as our arguments make clear, those calculations are tied to the 2000 census—and our amended complaint looks forward toward the 2010 census and beyond. It is true that if Congress makes no other changes in the methodology of apportionment, then similar numbers of seats in the House would be required after the 2010 census to hit similar targeted levels of equality, but the number of seats would vary at least a little as revealed in our earlier briefs.

Other than ruling the current system to be unconstitutional, plaintiffs seek no other relief until Congress has the opportunity to evaluate its options and make its own decision on how it will seek to comply with the constitutional mandate of one-person, one-vote. Our approach is fully in line with the directions given by the Supreme Court in such matters, and it appropriately balances the respect for the discretion of Congress with the equally important respect for the rights of voters to equal representation.

> [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. (Internal citations and quotation marks omitted.)

McDaniel v. Sanchez, 452 U.S. 130, 150, fn. 30 (1981).

The reason Plaintiffs presented these two plans was to sustain our burden of proving that alternate plans which materially improve the deviation level are indeed possible. See, *Montana,* 503 U.S. at 461-462. The plan of 1,760 seats was not chosen at random by Plaintiffs as the government seems to suggest. Rather, as we have previously explained, the Supreme Court has allowed state legislatures greater latitude in apportioning seats in their own state legislatures—and, on occasion, has allowed a variance of up to 10% between the largest and smallest districts. See, e.g., *Connor v. Finch*, 431 U.S. 407, 418 (1977). While this number is no talisman, it is logical for litigants to use previously-approved methods from the Supreme Court as a basis for suggesting that an alternate appropriate plan exists.

Plaintiffs concede that its plan of 932 seats is not based on a particular Supreme Court precedent. It was chosen because it was the smallest possible House (using the 2000 census) that would have a maximum deviation level lower than 100,000 people and under 30%. If this plan had been employed in 2000, the maximum deviation levels would have been 76,667 and 25.39%.

It turns out that there is actually a very significant historical precedent that supports the appropriateness of a maximum deviation of 25.39%. After the 1790 census, Congress initially adopted an apportionment plan for a House of Representatives of 120 seats—up from the 65 seats that were allocated in the text of the Constitution. The *average* district size for this apportionment was 30,133. However, eight states had average district sizes under 30,000—accordingly, George Washington vetoed the bill. He interpreted the Constitution to prohibit any districts smaller than 30,000. If the constitutional text were interpreted to permit a plan that *averaged* 30,000 persons, then the 120-seat plan would have clearly been constitutional.

The 120-seat plan in 1792 had a maximum deviation that is precisely 25.39%[14]—exactly the same level as the plan of 932 seats proposed by the Plaintiffs. Even though Washington's view of the 30,000 rule ultimately prevailed, the 120-seat plan was based on a plausible reading of the text and demonstrated Congress's preference for a plan that was closer to the standard of one-person, one-vote. As the government noted in its reply brief, "[T]he interpretations of the Constitution by the First Congress are persuasive [.]" *Franklin*, 505 U.S. at 803. GRB at 33.

Today, with a total population of approximately 300 million, Congress can improve its compliance with the constitutional standard of equality by increasing the size of the House. In 1790, with a population just over 3 million, when Congress ran afoul of the 30,000 rule when it tried to increase the size of the House to 120 seats. As Professor Ladewig's supplemental affidavit demonstrates, it was mathematically impossible to improve the maximum deviation by any number larger than 105 seats without violating Washington's interpretation of the 30,000 rule. *Id.*

When Congress thought it was free to interpret the 30,000 rule as an average, it adopted a plan with 25.39% deviation. This was the first effort of Congress to achieve equality in interstate representation in the history of the country. Plaintiffs do not suggest that this number is a magical constitutional mandate and that this level must be matched precisely after every census. However, it is a number with historical significance that provides keen insight into what the Founders thought was an appropriate approach in meeting its duty to fashion a House of Representatives that was allocated among the several states according to their respective numbers. Given this history, Plaintiffs are not unreasonable in suggesting that disparities of this level should be considered.

[14] See, Ladewig, Supplementary Affidavit at 1.

Plaintiffs' opening briefs also demonstrated that if the House had been increased to 441 representatives after the 2000 census, there would have been a material reduction in the maximum deviation both as a percentage and as a raw number. The government responds, *inter alia*, by pointing out that this calculation did not apply to the 2010 census estimates. GRB at 25, fn. 6.

It is true that the 2010 census will not produce precisely the same results as in 2000. However, Professor Ladewig's supplemental affidavit demonstrates that there would be a material change in the maximum deviation starting at just 446 seats. If the House was increased just 11 seats, the maximum deviation would be reduced from a projected 64.46% to 59.18%. If the House was increased to 543 seats, all five states that are included in this lawsuit would receive one additional seat in the House. At this point, the maximum deviation would be reduced by 14.46 percentage points to 51.0% and from 457,336 to 294,798 persons.[15] Reducing the maximum disparity by 162,538 residents is not insignificant. And despite the government's contention that it is only the percentage deviation that is relevant, the Supreme Court has made it clear that it is also important to look at the absolute disparity as well as relative disparity in assessing compliance with one-person, one-vote. See e.g., *Kirkpatrick v. Preisler,* 396 U.S. 526, 528-529 (1969); *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969); *White v. Weiser*, 412 U.S. 783, 792-793 (1973); and *Karcher v. Daggett*, 462 U.S. 725, 738 (1983).

Our purpose in offering these plans should not be misconstrued as an effort to ask this Court to impose a particular plan. All that Plaintiffs hope to do through this discussion is to buttress our contention that legitimate alternative plans exist and that the alternatives improve the level of equality in a way that is both material and relevant. Congress still must have the first opportunity to make improvements. There are multiple choices that Congress could make that

[15] See Ladewig Supplemental Affidavit at 1-2.

would substantially impact the size of the House as it seeks to meet the standard of one-person, one-vote.

It is far from certain that Congress must double or quadruple the size of the House to achieve these levels of improvement. Even though the Method of Equal Proportions employed to resolve fractional remainders is clearly within the discretion of Congress, *Department of Commerce v. Montana, supra*, Congress has the discretion to change that methodology. New methodology could change the degree of deviation experienced by the states as a whole. Moreover, if Congress decided to stop counting illegal aliens in the census for apportionment purposes, this would significantly change the apportionment requirements for the House. Plaintiffs are not asking this Court to decide this issue of illegal aliens one way or the other. Again, we merely seek to describe the range of alternatives available to the House within the confines of discretion as set forth in the text of the Constitution.

A recent Supreme Court case reveals the discretion of Congress concerning the decision to include overseas federal employees in the census. The Court looked at the history of the relevant practice which revealed that Congress had pursued a variety of approaches concerning this issue. "With the one-time exception in 1900 of counting overseas servicemen at their family home, the Census Bureau did not allocate federal personnel stationed overseas to particular States for reapportionment purposes until 1970." *Franklin v. Massachusetts, supra*, 505 U.S. at 792-793. In *Franklin,* the Court held that Congress had the discretion to continue to allocate or not allocate overseas personnel as it saw fit.

If Congress has the discretion to determine whether or not to include military personnel in the census, it seems self-evident that it possesses similar discretion vis-à-vis illegal aliens.

The inclusion of illegal aliens in the census has a significant impact on apportionment.[16] In *Franklin*, the Court discussed the general principles that have been employed to determine whether to include particular persons within the census.

> The appellants respond, on the other hand, that the allocation of employees temporarily stationed overseas to their home States is fully compatible with the standard of "usual residence" used in the early censuses. 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.
>
> "Usual residence" was the gloss given the constitutional phrase "in each State" by the first enumeration Act and has been used by the Census Bureau ever since to allocate persons to their home States. App. 173-174. The term can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place.
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> 505 U.S. at 804.

Plaintiffs do not argue that it is unconstitutional to include illegal aliens in the census. Nothing in this case requires this Court to reach such a decision. Once again, plaintiffs simply seek to illustrate the fact that Congress has a range of options in meeting its duty to apportion the House in a far more equal fashion than is done currently.

It is the Plaintiffs, and not the government, who have advanced the more balanced approach with regard to the discretion of Congress. We contend that Congress may not ignore the duty of allocating seats according to the principle of one-person, one-vote. But we repeatedly defend the prerogatives of Congress to pursue a variety of alternatives provided that the "general admonition" (equality of voting strength) and the three "constraining requirements" (30,000 residents, one representative per state, and no districts may cross state lines) are all met.

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[16] See, John Baker and Elliot Stonecipher, "Our Unconstitutional Census: California could get nine House seats it doesn't deserve because illegal aliens will be counted in 2010." The Wall Street Journal (online), August 9, 2009. http://online.wsj.com/article/SB10001424052970204908604574332950796281832.html

The government has adopted a paradoxical position with regard to the whole issue of apportionment and the power of Congress. When voters—who are by definition citizens of the United States—complain that their rights to equal representation are violated by the method of apportionment, the government argues that Congress has total discretion in this area subject only to the rules of 30,000 per district and one representative per state. But, when the issue turns to the rights of illegal aliens to be included in the Census and the plan of interstate apportionment, the government asserts a constitutional mandate to include them in the count. The plenary discretion of Congress suddenly evaporates. GRB at 9. Apparently, congressional discretion waxes and wanes in the eyes of the government depending on whose ox is being gored.

The government also suggests that the Plaintiffs' position would require the Congress to reapportion itself "every year" and that an automatic reapportionment according to fixed standards would not be possible if Plaintiffs prevail. GRB, p. 25, fn. 6. We assume that the government meant to address the requirements that would arise every ten years rather than "every year." Of course, it is within the discretion of Congress to reapportion itself every ten years with a fresh legislative enactment as was done for the first 120 years of our nation. But, if Plaintiffs prevail it would be clearly possible for Congress to create a self-executing plan that would be automatically triggered by the census results.

The rules for a self-executing plan could, if Congress wished, work as follows. Congress could adopt a rule, for example, that says that the deviation between the smallest district and largest district shall be no more than 30%. The number of seats allocated could then be done, by the Department of the Census, using this rule: *The number of seats in the House shall be the smallest possible number that results in a deviation of no greater than 30% between the largest and smallest districts.* No new legislative enactment would be required. Every ten years, under

current law, some states gain or lose seats in Congress. This would continue. There would be no additional disruption to this process by simply requiring greater adherence to the principle of one-person, one-vote. If Congress wants an automatic method to adjust the size of the House to meet a particular deviation threshold, it is clearly possible to write such a self-executing process into law.

In the course of its argument on the political question doctrine the government says that "there is no constitutional basis upon which a court could determine an acceptable degree of inequality." GRB at 7. This is simply not true. The general principle, set forth in *Wesberry* is that equality of voting strength must be achieved "as nearly as is practicable." 376 U.S. at 8. There must be a "good faith effort" to achieve equality. *Karcher v. Daggett,* 462 U.S. at 730. "Article I, § 2 …permits only the limited populations variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id.* (Internal quotation marks omitted.)

The government has advanced no evidence to suggest that it is not practicable to increase the size of the House of Representatives. As we demonstrated in our earlier brief in support of our motion for summary judgment, the House attempted to increase itself to 483 seats in 1920 only to be shot down by the Senate which was seeking to protect the voting strength of rural states. Moreover, any assessment as to the practicalities of a larger House that was made 100 years ago would have little or no bearing on what is practical today. The means of transportation and communication have so radically changed that a new assessment is clearly appropriate.

The burden of justifying the inequality is on the government. If plaintiffs prevail and this matter is sent to Congress as the case precedent suggests, then Congress can make a full and fair examination of what it can do to remedy the unconstitutional levels of inequality while being

fully cognizant of what is practicable in the 21st century. It would be utterly improper to simply assume, without the benefit of any evidence whatsoever, that it is impracticable for Congress to improve upon the current level of disparity. The maximum deviation here is 9100% greater than the deviation ruled unconstitutional in *Karcher.* One congressional district has 410,012 more people than another. We have shown that this can be improved. Congress can surely find a practicable way to improve these tremendous disparities.

Congress should be mandated to act by virtue of a straightforward ruling that the current system unconstitutionally denies American voters equal strength in voting. Only after Congress responds to this holding and seeks to redress the problem it is even possible to determine whether Congress has sufficiently justified its failure to achieve higher levels of equality. But the proper order of things is clear. First, plaintiffs prove inequality. Second, the government must prove that it has made good faith efforts to achieve equality as nearly as is practicable. There is absolutely no reason in law or logic to deviate from this approach in resolving what is undoubtedly a massively unequal apportionment plan.

This approach, which is clearly mandated by the relevant precedent, is fully in line with James Madison's defense of the Constitution against the charge that the numbers of representatives would be frozen in place despite the growth of the population. After projecting that in fifty years after ratification that the Congress would grow to four hundred, 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." J. Madison, *The Federalist No. 55*, *in The Federalist*, 372-378 (Jacob E. Cooke ed. 1961).

Just as Congress clearly violated the Constitution by refusing to reapportion itself after the 1920 census,[17] the failure of Congress to address the massive and growing inequality of voting strength is an ongoing violation of the commands of the text. One-person, one-vote is the command. Congress has the burden of proving that it has attempted to achieve this objective, and that the system in place today is the best that can be done within the realm of practicability.

In fact, Madison himself demonstrated that he was committed to a formula that would permit the growth of the House to a level that would be far beyond any level that the plaintiffs have suggested in this case. As the chief architect of the Bill of Rights, Madison was the force behind the proposed Amendment (Article the First). This amendment would have had the following effect:

> In response to Anti-Federalist objections, Congress sent twelve amendments to the states for ratification, the first of which changed the method of calculating the number of Representatives. Instead of there being *no more than* one Representative for 30,000 people, the amendment would have required *at least* one Representative for 30,000, or later, 40,000 and 50,000 as the population grew.[18]

If there was a ratio of at least one representative per 50,000 persons, there would be over 6,000 members of Congress today. If this amendment had been ratified, it might well have been modified before now. Nonetheless, it is instructive to see that Madison was interested in finding a permanent ratio that enshrined a policy for the growth of the House to guarantee that the people's relative voting strength would not be sacrificed as the population grew.

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[17] Madison made this clear in Federalist 58:

> Within every successive term of ten years, a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to readjust from time to time the apportionment of representatives to the number of inhabitants; under the single exception that each state shall have one representative at least; Secondly, to augment the number of representatives at the same periods; under the sole limitation, that the whole number shall not exceed one for every thirty thousand inhabitants.

[18] Edwin Meese, III, et. al, *The Heritage Guide to the Constitution*, Regnery Publishing, Washington, D.C., (2005), p. 58.

The government has repeatedly quoted Madison's statements from Federalist 55—written in his defense of the Constitution. It should also be remembered that in Federalist No. 38, Madison opposed the adoption of a bill of rights. But he changed his mind after the Virginia ratification convention. Not only did he support an enumeration of the liberties of the people, he proposed a change in the method of interstate apportionment to more securely protect the right of the people to equal representation. And he convinced two-thirds of both the House and Senate to approve all of these recommended changes to the Constitution.

On June 8, 1789, James Madison, now a member of the First Congress, proposed a list of amendments for the Bill of Rights which came principally from various state conventions. He introduced what would become Article the First as follows:

> In the next place, I wish to see that part of the constitution revised which declares, that the number of Representatives shall not exceed the proportion of one for every thirty thousand persons, and allows one Representative to every State which rates below that proportion. If we attend to the discussion of this subject, which has taken place in the State conventions, and even in the opinion of the friends to the constitution, an alteration here is proper. It is the sense that 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.[19]

In the end, Madison yielded to his concern for both the wishes and rights of the people. To imply that Madison would give away the rights of the people to equal representation because of some fear that the House of Representative might grow too large cannot be sustained if we continue to look at Madison through the period of the adoption of the Bill of Rights. He wanted the House to remain the People's House.

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[19] Annals of Congress, House of Representatives, 1st Congress, 1st Session, June 8, 1789, p. 457

The remedy that Plaintiffs seek is historic, but not radical. As has been done in so many earlier cases, this Court should simply rule that the current scheme is unconstitutional. Congress will then have the opportunity to remediate the inequality with a wide variety of choices that can guide them to the system that is both practicable and protective of the rights of American citizens to equality of representation in the People's House.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant its motion for summary judgment.

Respectfully submitted this 13th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 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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s/ Michael P. Farris
MICHAEL P. FARRIS

Exhibit A

House of Representatives - Analysis of Apportionment Models (Using 2000 Apportionment Census Data)

		Current Apportionment			105 Seat House				
State	**Population**	**House Reps**	**Pop. per Rep**	**Percent Deviation from Avg**	**Unadj. Reps**	**Geometric Mean**	**Reps (Hill)**	**Pop. per Rep**	**Percent Deviation from Avg**
Montana	905,316	1	905,316	-39.94%	0.30	-	1	905,316	66.2%
Delaware	785,068	1	785,068	-21.35%	0.26	-	1	785,068	70.7%
South Dakota	756,874	1	756,874	-16.99%	0.25	-	1	756,874	71.8%
Utah	2,236,714	3	745,571	-15.24%	0.75	-	1	2,236,714	16.5%
Mississippi	2,852,927	4	713,232	-10.24%	0.95	-	1	2,852,927	-6.4%
Oklahoma	3,458,819	5	691,764	-6.93%	1.15	1.41	1	3,458,819	-29.0%
Oregon	3,428,543	5	685,709	-5.99%	1.14	1.41	1	3,428,543	-27.9%
Connecticut	3,409,535	5	681,907	-5.40%	1.14	1.41	1	3,409,535	-27.2%
Indiana	6,090,782	9	676,754	-4.61%	2.03	2.45	2	3,045,391	-13.6%
Kentucky	4,049,431	6	674,905	-4.32%	1.35	1.41	1	4,049,431	-51.1%
Kansas	2,693,824	4	673,456	-4.10%	0.90	-	1	2,693,824	-0.5%
Wisconsin	5,371,210	8	671,401	-3.78%	1.79	1.41	2	2,685,605	-0.2%
South Carolina	4,025,061	6	670,844	-3.69%	1.34	1.41	1	4,025,061	-50.2%
Arkansas	2,679,733	4	669,933	-3.55%	0.89	-	1	2,679,733	0.0%
Nevada	2,002,032	3	667,344	-3.15%	0.67	-	1	2,002,032	25.3%
Michigan	9,955,829	15	663,722	-2.59%	3.32	3.46	3	3,318,610	-23.8%
Maryland	5,307,886	8	663,486	-2.56%	1.77	1.41	2	2,653,943	1.0%
Washington	5,908,684	9	656,520	-1.48%	1.97	1.41	2	2,954,342	-10.2%
New York	19,004,973	29	655,344	-1.30%	6.33	6.48	6	3,167,496	-18.2%
Illinois	12,439,042	19	654,686	-1.20%	4.15	4.47	4	3,109,761	-16.0%
Texas	20,903,994	32	653,250	-0.97%	6.97	6.48	7	2,986,285	-11.4%
Idaho	1,297,274	2	648,637	-0.26%	0.43	-	1	1,297,274	51.6%
New Jersey	8,424,354	13	648,027	-0.17%	2.81	2.45	3	2,808,118	-4.8%
Pennsylvania	12,300,670	19	647,404	-0.07%	4.10	4.47	4	3,075,168	-14.7%
Virginia	7,100,702	11	645,518	0.22%	2.37	2.45	2	3,550,351	-32.5%
North Dakota	643,756	1	643,756	0.49%	0.21	-	1	643,756	76.0%
Arizona	5,140,683	8	642,585	0.67%	1.71	1.41	2	2,570,342	4.1%
Florida	16,028,890	25	641,156	0.90%	5.34	5.48	5	3,205,778	-19.6%
California	33,930,798	53	640,204	1.04%	11.31	11.49	11	3,084,618	-15.1%
Louisiana	4,480,271	7	640,039	1.07%	1.49	1.41	2	2,240,136	16.4%
Maine	1,277,731	2	638,866	1.25%	0.43	-	1	1,277,731	52.3%
Alabama	4,461,130	7	637,304	1.49%	1.49	1.41	2	2,230,565	16.8%
Massachusetts	6,355,568	10	635,557	1.76%	2.12	2.45	2	3,177,784	-18.6%
Tennessee	5,700,037	9	633,337	2.10%	1.90	1.41	2	2,850,019	-6.3%
Ohio	11,374,540	18	631,919	2.32%	3.79	3.46	4	2,843,635	-6.1%
Georgia	8,206,975	13	631,306	2.42%	2.74	2.45	3	2,735,658	-2.1%
Alaska	628,933	1	628,933	2.79%	0.21	-	1	628,933	76.5%
Missouri	5,606,260	9	622,918	3.72%	1.87	1.41	2	2,803,130	-4.6%
North Carolina	8,067,673	13	620,590	4.07%	2.69	2.45	3	2,689,224	-0.3%
New Hampshire	1,238,415	2	619,208	4.29%	0.41	-	1	1,238,415	53.8%
Colorado	4,311,882	7	615,983	4.79%	1.44	1.41	2	2,155,941	19.6%
Minnesota	4,925,670	8	615,709	4.83%	1.64	1.41	2	2,462,835	8.1%
Vermont	609,890	1	609,890	5.73%	0.20	-	1	609,890	77.2%
Hawaii	1,216,642	2	608,321	5.97%	0.41	-	1	1,216,642	54.6%
New Mexico	1,823,821	3	607,940	6.03%	0.61	-	1	1,823,821	32.0%
West Virginia	1,813,077	3	604,359	6.58%	0.60	-	1	1,813,077	32.4%
Iowa	2,931,923	5	586,385	9.36%	0.98	-	1	2,931,923	-9.4%
Nebraska	1,715,369	3	571,790	11.62%	0.57	-	1	1,715,369	36.0%
Rhode Island	1,049,662	2	524,831	18.88%	0.35	-	1	1,049,662	60.8%
Wyoming	495,304	1	495,304	23.44%	0.17	-	1	495,304	81.5%
Subtotals	281,424,177	435	646,952		93.8		105	2,680,230	
D of C	572,059	None							
					One Rep for Every			3,000,000	
TOTALS	281,996,236	435							
		Largest head-to-head variance			Largest head-to-head variance				
		WY	495,304	410,012	Best			495,304	3,554,127
		MT	905,316		Worst			4,049,431	