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.	)	

PLAINTIFFS MEMORANDUM IN OPPOSITION TO
THE DEFENDANTS' MOTION TO DISMISS OR,
IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

INTRODUCTION

This is a case of first impression and of historic proportions. While all the elements of the law are clearly established, this is the first time that a constitutional challenge to the interstate apportionment of Congress has been made on the basis that it violates the Constitution's command of one-person, one-vote found in Art. I, § 2 and Amend.14, § 2.

> The rights advanced by the plaintiffs are substantial.
>
> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And 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 (1963).

The plaintiffs are citizens and registered voters from the states of Mississippi, Montana, Delaware, South Dakota, and Utah. These are the five states most severely

impacted by the current interstate malapportionment of the United States House of Representatives. Voters from Montana are "worth" only 54.7% of the voters in Wyoming. Compared to votes for Congress in Wyoming, voters from Mississippi have only 69.4% of a vote, Utah voters have 66.3% of a vote, South Dakota voters have 65.4% of a vote, and Delaware voters have only 63.0% of a vote.

The government has moved to dismiss, or in the alternative, for summary judgment, raising three arguments. First, that this case is barred by the general six-year statute of limitations for all lawsuits brought against the federal government. Second, that even if this case is not so barred, this Court should dismiss the claim under the equitable doctrine of laches because the 2010 census is in progress and a new apportionment is coming soon. Third, the government's only argument on the merits is that Congress has total discretion in choosing a size of the House of Representatives. The defendants contend that there are no constitutional limitations but for the requirement that no district shall have less than 30,000 persons and that every state shall have at least one representative.

The statute of limitations claim is without merit for two independent reasons. First, case law clearly establishes that every election held in violation of the constitutional requirement of one-person, one-vote is a separate violation. Plaintiffs' claims are prospective, not retrospective and thus are not possibly time-barred. Second, seven of the plaintiffs are young voters. They were not 18 years of age in 2001 when the current apportionment plan was adopted. They had no right to sue until they were old enough to vote. This case was filed within six years of the date that their claims "accrued."

The argument advanced by the government concerning laches all are directed toward a secondary claim for relief in the plaintiffs' amended complaint—a request for an injunction concerning the 2010 elections. Plaintiffs expressly waive this secondary, alternative claim. Instead, the plaintiffs ask this Court to order only their primary request for relief—that is, to rule the current apportionment statute to be unconstitutional in violation of the standard of one-person, one-vote and to allow Congress an opportunity to remedy the matter in the first instance. This request is standard and preferred practice in apportionment cases. Plaintiffs demonstrate that the only way to avoid two re-apportionments within the same decade is to decide this case prior to the 2011 Congressional apportionment.

On the merits, the government has raised a surprising argument. By claiming that there are no constitutional requirements other than the rule of 30,000 and one representative per state, the government has clearly staked out the position that the federal government does not have to comply with the principle of one-person, one-vote in the context of interstate apportionment.

Plaintiffs demonstrate that this contention is without merit. The text of the Constitution, the relevant history of both Art. I, § 2 and the 14th Amendment, and the settled Supreme Court case precedent leaves no room for doubt. Congress is obligated to apportion the House in a manner so "that as 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).

In this brief, plaintiffs answer the three arguments raised by the government's motion. We set forth our affirmative case and demonstrate the unconstitutional level of malapportionment in our brief in support of our own motion for summary judgment.

STANDARD OF REVIEW

Plaintiffs concur with the defendants' statement of the standard of review and do not repeat it here.

Plaintiffs request that this Court consider the documents and brief that plaintiffs are contemporaneously filing in support of their own motion for summary judgment in connection with both parties' pending motion.

ARGUMENT

I

PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

There are two independent reasons that the plaintiffs' complaint is not barred by 28 U.S.C. § 2401—the general statute of limitations for claims brought against the federal government.

First, case authority makes it clear that every election that is held in violation of the principal of one-person, one-vote is a separate constitutional violation. Accordingly, the claims of all Voters are timely because the date for calculating any time limit runs from the *election* in question, and not from the initial date of the current 2001 apportionment. These Voters are challenging the constitutionality of 2 U.S.C. § 2a because it will unconstitutionally devalue their votes for the 2010 elections and beyond.

Since each improper election is a separate constitutional violation, it is simply impossible for the statute of limitations to have run on this case.

Second, even if this Court determines that the communication by President Clinton on January 4, 2001, started the "ticking of the statute of limitations clock" for persons who were eligible voters on that date, it is beyond question that citizens who were children on that date, and thus ineligible to vote, suffered no constitutional violation at that time. According to the plain language of § 2401, the statute of limitations begins to run when any constitutional violation has "accrued." Children have no accrued right of action for one-person, one-vote violations until they are eligible to vote.

Four of the plaintiffs are currently between the ages of 18 and 21 years old. Three more plaintiffs were 21 years-old when the complaint was filed. There is no doubt that the claims of these young voters are timely under the language of 28 U.S.C. § 2401.

A.

EVERY ELECTION HELD IN VIOLATION OF THE ONE-PERSON, ONE-VOTE MANDATE IS A SEPARATE CONSTITUTIONAL VIOLATION

Another three-judge federal panel was confronted with a case in Arkansas that is virtually indistinguishable from this case for the purpose of both statute of limitations and laches.[1] *Jeffers v. Clinton*, 730 F.Supp. 196, 201-202 (E.D. Ark. 1989),[2] presented the following facts and issues:

> The apportionment plan challenged was adopted in 1981, but suit was not filed until January 22, 1989. Only one election, that of 1990, remains to be run before the State must be reapportioned anyway, because of the 1990 Census. So this case, defendants say, should be dismissed. If plaintiffs are still unhappy after the 1991 reapportionment, they can file suit then.

[1] *Jeffers* was dealing actions by state government rather than a challenge to an act of Congress.

[2] Appeal dismissed, *Clinton v. Jeffers*, 498 U.S. 1129 (1991).

In an opinion by Circuit Judge Richard Arnold, *Jeffers* held that statute of limitations arguments were simply inapplicable since the action was equitable in nature. Accordingly, the issue of timeliness in *Jeffers* was controlled by the equitable doctrine of laches.[3] However, for the case at bar it is clear that 28 U.S.C. § 2401(a) controls cases against the federal government whether the claim arises from equity or law.

But, the ultimate determination made in *Jeffers* makes it clear that this present case is not time-barred regardless of whether this Court applies statute of limitations or laches analysis. *Jeffers* relied on a prior, three-judge federal panel decision to conclude that "the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held under the [illegal] structure." *Id.* at 202. See also, *Smith v. Clinton*, 687 F. Supp. 1310, 1317 (E.D.Ark. 1988); *aff'd mem.*, 488 U.S. 988 (1988).

Similarly, in another one-person, one-vote case, a federal district judge in South Dakota rejected a government motion for summary judgment which was predicated on a claim that the case was time-barred (both laches and statutes of limitations). *Blackmoon v. Charles Mix County*, 386 F.Supp. 2d 1108 (D.S.D. 2005). One of the court's reasons for denying the government motion for summary judgment was "each time an election occurs with the current boundaries for commissioner districts, Plaintiffs suffer an alleged injury." *Id.* at 1108.

The situation that this Court faces is not unlike the factual pattern in *Baker v. Carr*, 369 U.S. 186 (1962). Tennessee had not changed its state legislative apportionment since 1901 although the population of Tennessee had grown substantially.

[3] The dissenting judge agreed with Judge Arnold on the statute of limitations issue saying, "It is true, as Judge Arnold states, that this is a suit in equity. It is therefore not governed by any statute of limitations." 730 F.Supp. at 224.

There was a stubborn refusal by the state legislature to change the apportionment for over sixty years. It is important to note that the plaintiffs in *Baker* made the claim that the Tennessee apportionment plan had been unconstitutional on the first day it was adopted back in 1901.

> Indeed, the complaint alleges that the 1901 statute, *even as of the time of its passage*, "made no apportionment of Representatives and Senators in accordance with the constitutional formula . . . , but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference . . . to any logical or reasonable formula whatever."

396 U.S. at 192. (Emphasis added).

Thus, the *Baker* plaintiffs proceeded (in part) on the claim that a constitutional violation had occurred several decades earlier in 1901 and yet they were seeking a remedy in 1962.

Even though the ultimate decision of the Court focused on the shifts in population that occurred since 1901, no suggestion was made by the Court that this aspect of the claim was barred by any statute of limitations or laches concerns. As the government points out in its brief, a statute of limitations problem goes to the jurisdiction of the court. A 61 year-old constitutional violation was allowed to proceed without a hint of untimeliness.

The lesson from *Baker* is clear. Every election that violates a voter's right to equal voting strength is a new and distinct violation of the Constitution no matter how long the inequality has persisted.

B.

THE PLAINTIFFS WHO ARE YOUNG VOTERS
CLEARLY HAVE TIMELY CLAIMS

The government argues that the time for counting the six-year statute of limitations began on January 4, 2001, when President Clinton transmitted "a statement to the Speaker of the U.S. House of Representatives" that indicated "the number of Representatives to which each State would be entitled." Gov't Brief at 11. The government only quoted a portion of the relevant statute. In full, 28 U.S.C. § 2401(a) provides:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*. The action of *any person under legal disability* or beyond the seas at the time the claim accrues *may be commenced within three years after the disability ceases*. (Emphasis added).

This statute of limitations does not start to run, in a constitutional case, until the plaintiff in question has suffered a constitutional violation that is cognizable by the courts. A person must have a "right of action" which has "accrue[d]" in order to start the time period. Until a person has standing to sue, the time period does not start because that person has no accrued right of action.

In a one-person, one-vote case, one has to be a voter who has suffered from an unequal apportionment to have standing to sue. The Supreme Court made this clear in *Baker v. Carr*, 369 U.S. at 206. "[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue." The constitutional claim in a one-person, one-vote case relative to congressional apportionments is the failure to provide equal voting strength. In *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), the Supreme Court explained the relevant constitutional principle upon which this case proceeds:

> 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.

Only two plaintiffs (Frank Mylar and Lisa Schea) were eligible voters on January 4, 2001. For the other seven, who were all below 18 years of age at the time,[4] they had no standing to sue on that date. Since they could not sue, their right of action had not "accrued." Accordingly, a plain reading of § 2401(a) demonstrates that these seven plaintiffs had six years to file this case after the time that their own personal action "accrued." The mere fact that other people's rights were violated at an earlier date is of no consequence for these seven young voters. They have independent rights that were not violated until they were eligible to vote. This lawsuit was most certainly filed within six years of the time that these young voters first had an accrued right of action.

Even under the most stringent reading of §2401(a), four of the plaintiffs clearly have timely claims. Even if the rights of all seven young voters were somehow violated on January 4, 2001, since they were children at that time, they were under a legal disability and could not file a lawsuit on their own behalf. The plain language of § 2401(a) gives such persons three additional years to file a lawsuit after their disability ceases. It is absolutely clear that the four plaintiffs, Jacob Clemons, Jenna Watts, Isaac Schea, and Kelcy Brunner, all of whom are currently either 18 or 19 years old[5] filed this action within three years of the time their legal disability ceased.

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[4] See, the affidavits of John Tyler Clemons, Jacob Clemons, Jessica Wagner, Jenna Watts, Isaac Schea, Krystal Brunner, and Kelcy Brunner, filed herein.

[5] See each of their respective affidavits.

As to these seven plaintiffs, there is no doubt that this case is timely even if the case is focused on the apportionment of January 4, 2001 (as the government contends) rather than upon future elections (as plaintiffs contend).

II

THE PRINCIPLES OF EQUITY, INCLUDING LACHES,
CLEARLY FAVOR A DECISION ON MERITS
PRIOR TO THE 2011 CONGRESSIONAL APPORTIONMENT

The government argues, in the alternative, that even if this case is not barred by the statute of limitations it should be dismissed under the equitable doctrine of laches. Plaintiffs will show that the principles of equity clearly favor proceeding at this time in light of the principal form of relief requested by their complaint.

A.

PLAINTIFFS' FIRST (AND NOW EXCLUSIVE) CLAIM
IS THAT CONGRESS BE GIVEN THE FIRST OPPORTUNITY TO
CURE THE CURRENT CONSTITUTIONAL VIOLATIONS

The Plaintiffs' amended complaint asks for alternative forms of relief. First, as their preferred relief, the Plaintiffs seek a declaratory judgment that 2 U.S.C. § 2a is unconstitutional under the principle of one-person, one-vote. The voting inequality suffered by plaintiffs is 9100% greater than the disparity ruled unconstitutional in *Karcher v. Daggett*, 462 U.S. 725 (1983).

The amended complaint requests that Congress be given the first opportunity to reapportion itself in light of the Court's decision affirming that the principle of one-person, one-vote in fact applies to interstate apportionment. See, Amended Complaint Para. 45. The Plaintiffs believe and expect that any such reapportionment would be subsequent to and in reliance upon the 2010 Census. The government's laches argument

makes no mention of this request for relief—choosing, instead to focus solely on the second, alternative request for relief. No explanation is offered for this approach.

Plaintiffs' approach has been sanctioned by the Supreme Court as the preferred method of resolution in apportionment cases.

> [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).

Plaintiffs' complaint also requests, as a secondary alternative, injunctive relief relative to the 2010 elections. The government's laches argument was focused exclusively on this secondary alternative. Plaintiffs acknowledge the logistical problems that would arise if the 2010 elections were enjoined at this time. Accordingly, *plaintiffs hereby abandon and waive their request for this secondary, alternative form of relief* and rely exclusively on their other requests. Plaintiffs expressly retain their claim for a declaratory judgment that the 2010 elections are being conducted under an unconstitutionally unequal apportionment plan. It is only the request for injunctive relief vis-à-vis the 2010 elections that is waived.

Accordingly, Plaintiffs respond to the issue of laches under the premise that they have sought the following rulings and remedies:

a. A declaratory judgment that 2 U.S.C. § 2a is unconstitutional in that it freezes the number of representatives at 435 which inherently results in an

unconstitutional inequality of voting strength (suffered by plaintiffs among others) that presently exists and will continue to exist even after the 2010 Census results.

b. That Congress should be given an opportunity to reapportion itself in light of the Court's ruling on the constitutionally mandated level of equality for interstate apportionment.

c. That the Court retain jurisdiction of this matter to ensure that the Congress' action complies with the ruling of this Court.

Accordingly, the laches issue boils down to a simple dispute between the parties as to whether it is more consistent with the principles of equity to reach a decision on the merits before or after the 2010 Census. If the Court decides this case on the merits now, that is prior to the 2011 apportionment, then there only needs to be one reapportionment following the 2010 Census. However, if the Court dismisses this case now based on the doctrine of laches—forcing this case to be refiled after the 2011 reapportionment—it is certain, should plaintiffs ultimately prevail on the merits, that there would be two reapportionments within a period of a few years.

In addition to *McDaniel v. Sanchez, supra,* the approach we ask this Court to follow is precisely the same as affirmed by the Supreme Court in *Ely v. Klahr*, 403 U.S. 108 (1971). That case involved a one-person, one-vote challenge to the apportionment of the Arizona legislature. In that case, the 1970 state legislative elections were challenged, and held by the district court, to be unconstitutional under the principle of one-person, one-vote. However, the district court held that intervening in the 1970 elections would be more disruptive than would be warranted even to cure the obvious constitutional

violation. Accordingly, the district court declared the current apportionment law to be unconstitutional, but nonetheless allowed the 1970 elections to proceed. This approach was based on the stated presupposition that the Arizona legislature would adopt a valid apportionment scheme after the results of the 1970 Census were available. The district court retained jurisdiction to ensure that a constitutional result emerged from the new redistricting plan.

The Supreme Court affirmed the district court's handling of this matter. It did not dismiss the case under the doctrine of laches even though the case was before the district court during the last year of the apportionment cycle and even though the election that gave rise to the lawsuit had already taken place. Rather, it recognized that the problem of unequal apportionment was longstanding and was likely to continue.

In their brief in support of their own motion for summary judgment, filed contemporaneously herewith, plaintiffs' demonstrate that the one-person, one-vote violations present in interstate apportionment are:

- Exceedingly greater than the Supreme Court's standards for congressional apportionment under Art. I, § 2 and the 14th Amendment.
- Virtually certain to continue to exist after the 2011 apportionment and that those plaintiffs from the states of Mississippi, Montana, Delaware, and South Dakota (but not Utah), will be among the voters whose votes will continue to be diluted in an unconstitutional manner.

Accordingly, plaintiffs' claims cannot be distinguished from those in *Ely v. Klahr*, insofar as the doctrine of laches is concerned. See also, *Kilgarlin v. Hill*, 386 U.S. 120 (1967). If this Court should rule in favor of the plaintiffs on the merits, then the proper

remedial plan is to give Congress the first opportunity to remedy the constitutional violation. Not only is there abundant Supreme Court precedent for this approach, it is clearly the approach most consistent with the principles of equity and plain logic.

B

THE DEFENDANTS SUFFER NO HARM OR PREJUDICE
IF THIS CASE IS DECIDED PRIOR TO THE 2011 APPORTIONMENT

The basic rule for a laches defense is that a plaintiff is barred "from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant. This defense requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 121-122 (2002). (Internal citations and quotation marks omitted.)

One form of "harm" recognized by the doctrine of laches is if defendant suffers prejudice in conducting a proper defense because of the lapse of time. The Supreme Court has clarified this concern.

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349 (1944).

There is no hint of any prejudice of this sort in this case. All of the evidence proffered by both sides consists of statistical data flowing out of readily-available reports from the United States Census. No one's memory is taxed. No evidence has been lost.

The essence of the government's claim is that the apportionment now in question is eight years old, there is going to be another census in place very soon, and it makes no sense in going forward prior to another census.[6] We previously discussed *Jeffers v. Clinton*, *supra,* which rejected this exact laches argument.

This argument would make more sense if the practice of the House of Representatives was to start from scratch after every census. For over 120 years, the Congress adjusted the size of the House according to the growth of the population. But, that system has been completely abandoned. There is now a permanent system in place which operates by command of the statute under challenge here—2 U.S.C. § 2a. Congress makes no decision at all. The census comes back from the Department of the Commerce. The mathematical formula dictated by statute is applied to the results of the census and a new apportionment is announced.

If the new census had any reasonable chance of curing the constitutional violation that is present, then equitable considerations might warrant a delay in proceedings—even though it might result in two reapportionments within a few years. But, there is absolutely no chance that the constitutional violation will be remedied—and the government makes no suggestion to the contrary.

As we detail in full in our Brief in Support of Plaintiffs' Motion for Summary Judgment, scientifically reliable projections of results of the 2010 census demonstrate

[6] The government also argued that it is too close to the 2010 elections to require a new apportionment plan prior to that date. Plaintiffs have acknowledged this argument and withdrawn this request—which was a secondary, alternative claim.

that the current levels of disparity will not change significantly after the 2010 census is completed. Montana, Mississippi, South Dakota, and Delaware will continue to suffer significant under-representation after the 2010 census. And the inequity in voter strength for the nation as a whole is going to be no better. The government has not and cannot make a credible claim that the current constitutional violations will be remedied or significantly improved after the 2010 census.

The Supreme Court has relied on such scientific projections in this very context. In *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 330 (1999), the Court relied on expert projections about impact of the use of sampling techniques in the 2000 census and the impact upon interstate congressional apportionment.

> In support of their motion for summary judgment, appellees submitted the affidavit of Dr. Ronald F. Weber, a professor of government at the University of Wisconsin, which demonstrates that Indiana resident Gary A. Hofmeister has standing to challenge the proposed census 2000 plan. Affidavit of Dr. Ronald F. Weber, App. in No. 98-564, pp. 56-79 (hereinafter Weber Affidavit). Utilizing data published by the Bureau, Dr. Weber projected year 2000 populations and net undercount rates for all States under the 1990 method of enumeration and under the Department's proposed plan for the 2000 census. See *id.*, at 62-63. He then determined on the basis of these projections how many Representatives would be apportioned to each State under each method and concluded that "it is a virtual certainty that Indiana will lose a seat . . . under the Department's Plan." *Id*. at 65.

Plaintiffs' projections of the results of the 2010 census are at least equally reliable as those used in the *Department of Commerce*. And the government cannot credibly claim that any change of constitutional significance will occur after the 2010 Census.

Absent such a showing, there is really only one equitable consideration—and it is an argument that the government itself raises. This Court should manage this proceeding so as to avoid the possibility of two reapportionments within a few years' time. "Two

reapportionments within a short period of two years would greatly prejudice the [nation] and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens." *White v. Daniel,* 909 F.2d 99, 104 (4th Cir. 1990). See, Gov't. Brief at 15.

All of the cases cited by the government to support its claim of laches would only be applicable if this Court were to enjoin the conduct of the 2010 elections—a claim plaintiffs' have waived.

White v. Daniel, 909 F.2d 99 (4th Cir. 1990), dismissed a Voting Rights Act challenge to a county apportionment scheme because all elections to be held under the system had passed. Three reasons were given by the 4th Circuit for dismissal: (1) the Court desired to avoid back-to-back reapportionments; (909 F.2d at 104); (2) if the Court were to order an immediate reapportionment it would have to rely on 10 year-old population figures; (*Id.*) and (3) that "[a] court-ordered reapportionment at this date would be completely gratuitous" because no elections remained under the old apportionment. (*Id.*). The first of the *White* factors favors plaintiffs' position. Plaintiffs in *White* made no showing that the improper apportionment would continue after the upcoming census. Thus, the second and third factors in *White* are inapposite.

Simkins v. Gressette, 631 F.2d. 287 (4th Cir. 1980), dismissed a case which requested an injunction stopping a soon-to-be-held election to be just prior to an upcoming census and reapportionment. Again, there was no suggestion in that case that any constitutional violation would persist after the upcoming census.

Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970), also sought an immediate injunction regarding an

election that was imminent. One of the factors the court weighed in making its equitable ruling on the laches claim was that, in general, the preferred method is to allow the legislative body an opportunity to cure any defect in the apportionment system. 429 F.2d at 609. Implicit in the decision was a desire to avoid back-to-back reapportionments—the very position on which the current plaintiffs' rely.

All of the district court cases cited by the government are to the same effect. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n,* 366 F.Supp. 2d 887 (D. Ariz. 2005) (request for an injunction for an impending election); *Fouts v. Harris*, 88 F.Supp. 2d 1351, 1354 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); (plaintiffs' requested injunction would "result in two restricting within a two year period"); *Maxwell v. Foster,* (unpublished) 1999 WL 33507675, 1999 U.S. Dist LEXIS 23447 (W.D. La 1999) (two back-to-back apportionments are to be avoided); *MacGovern v. Connolly*, 637 F.Supp. 111, 115 (D. Mass. 1986) ("there is no reason to doubt that reapportionment will happen, and happen constitutionally").

If plaintiffs are successful in this litigation, Congress will need as much time as is possible to implement the resulting decision. If the government's timeline is followed, the plaintiffs would have to refile this case in January 2011. The Illinois election filing deadlines would once again be looming in December 2011. Under this scenario, this Court would have to reach a decision on the merits, an appeal to the Supreme Court would have to be resolved, and then Congress should be given time to consider how best to implement the constitutional standard of voter equality. The issues presented by this case are simply too important to suggest that such a truncated schedule is the best choice under the doctrines of equity. This case should be decided prior to the 2010 Census

results to give both the courts and Congress the time to implement any decision in a rational and thoughtful manner.

III

The Constitutional Requirement of One-Person, One-Vote
Is Clearly Applicable to Interstate Apportionment

On the merits of this case, the plaintiffs' core contention was announced by the Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964):

> 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.

Plaintiffs anticipated that the government's response to this litigation would have focused on the term "as nearly as is practicable" and that the litigation would have proceeded with a philosophical agreement on the applicability of the principle of one-person, one-vote. We were wrong. The government has asserted the most radical position possible. One-person, one-vote is something that the states must obey, the federal government contends. The United States government asserts that it has no duty whatsoever to adhere to this principle despite the fact that the primary meaning and application of Art. I, § 2 is to specify the rules for interstate apportionment.

The government's position is all the more radical when considering the role of the United States Justice Department in the process mandated by the Voting Rights Act. Several states, including Mississippi, are required to obtain preclearance from the Justice Department before any changes can be made to any apportionment plan. One of the criteria for review is compliance with the one-person, one-vote mandate of the Constitution. *See, e.g., City of Mobile, Alabama v. Bolden,* 446 U.S. 55 (1980). Unless

the Justice Department is satisfied that Mississippi's plans comply with one-person, one-vote (among other criteria) preclearance will be denied. Yet, in this litigation the United States Justice Department contends that the federal government has no duty whatsoever to comply with the constitutional standard of one-person, one-vote. This is a classic case of "do as I say not as I do." Plaintiffs stand firmly on the proposition that the Constitution binds all levels of government—not just the states.

The government contends that there are *only two* constitutional requirements for interstate apportionment. The government argues that the Constitution "does not dictate a precise solution but instead sets a minimum (each State must have one Representative) and a maximum (no state may have more than one Representative per 30,000 inhabitants) and grants Congress the discretion to fix a number within that range." Gov't Brief at 22. (Internal quotation marks omitted.)[7]

If the government's theory is correct, then the following hypothetical "plan" would be constitutional. *"No State shall be represented in Congress by less than two, nor more than seven members. The precise number to be employed would be chosen by Congress, with every state having an equal number of Representatives to guarantee equal representation for the states in the House of Representatives."* Under this "plan" every state has at least one Representative. No district is smaller than 30,000 persons. This plan would fall within the range of constitutionally acceptable congressional discretion, according to the government.

[7] The government's brief acknowledges on at least one occasion, via a quotation from the Supreme Court, that there is an additional implied requirement—that districts should not cross state lines. Gov't Brief at 19. The majority of the government's argument focuses on the other two requirements—one Representative per state and districts no smaller than 30,000 persons. Plaintiffs respond accordingly. The focus on this case is not on the state line question—but whether or not proportional representation (one-person, one-vote) is an additional constitutional requirement.

By rejecting any constitutional requirement for proportional representation according to population alone, the government contends that the Constitution of the United States allows Congress to allocate the House according to any theory it wishes—so long as every state gets one Representative and no district is smaller than 30,000.

This hypothetical example is not without precedent. It is almost exactly the plan for representation in Congress from the Articles of Confederation. According to the government, the Constitution allows the Congress to revert to this prior form of representation if it wishes to do so. The government's view is that Congress is free to reject the "Great Compromise" that broke the deadlock between large and small states at the Constitutional Convention. If the government is right then Congress could make equality of states, rather than equality of voters the measure of representation in the House—provided, of course, that the districts were greater than 30,000 and every state has one representative.

A.

THE RELEVANT HISTORY DEMONSTRATES THAT
INTERSTATE VOTER EQUALITY IS THE MANDATE OF ART. I, § 2

The position of the government simply cannot be squared with relevant American history. Joseph Story noted that theory of equality of the states was "negatived in the convention at an early period, seven states voting against it, three being in its favor, and one being divided." 2 J. Story, *Commentaries on the Constitution,* p. 236. (1833 ed.) Moreover, the Supreme Court's review of the Constitutional Convention in *Wesberry v. Sanders* leaves no room for doubt.

> The sharpest objection arose out of the fear on the part of small States like Delaware that if population were to be the only basis of representation the populous States like Virginia would elect a large enough number of

> representatives to wield overwhelming power in the National Government. Arguing that the Convention had no authority to depart from the plan of the Articles of Confederation which gave each State an equal vote in the National Congress, William Paterson of New Jersey said, "If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty." To this end he proposed a single legislative chamber in which each State, as in the Confederation, was to have an equal vote. A number of delegates supported this plan.
>
> The delegates who wanted every man's vote to count alike were sharp in their criticism of giving each State, regardless of population, the same voice in the National Legislature. Madison entreated the Convention "to renounce a principle wch. was confessedly unjust," and Rufus King of Massachusetts "was prepared for every event, rather than sit down under a Govt. founded in a vicious principle of representation and which must be as short lived as it would be unjust."

376 U.S. at 11-12. (Internal citations and footnotes omitted.)

This controversy nearly blew the Constitutional Convention apart. But, a compromised was reached. The Senate would be based on equality of the states.

> 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."

376 U.S. at 13.

> 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.

376 U.S. at 18.

Despite the government's current claims, the Congress is not free to do as it wishes relative to the apportionment of the House. It may not give each state an equal

number of representatives without doing violence to the language and history of the Constitution.

In addition to the two constitutional requirements identified by the government, it is self-evident that the Constitution has enacted a third criterion for the interstate apportionment of the House of Representatives: As nearly as is practicable, the districts must be of equal size—that is, they must be proportional based on population. The plain language of the relevant provisions leaves no room for doubt.

The original language of Art. I § 2 provides:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, *according to their respective Numbers*, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.) The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative….
> (Emphasis added.)

The first sentence of this provision was replaced by Section 2 of the 14th Amendment.

> 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.)

The controlling phrase is that the House must be "apportioned among the several States according to their respective numbers." The method of counting the population changed between the original text and the 14th Amendment—but counting is required because the Constitution demands that representation must be proportional to population. The words could not be more certain. This command controls apportionment "***among*** the several states." This constitutional mandate is in addition to the "minimum" (one representative per state) and "maximum" (districts must be larger than 30,000). These

latter two commands are found in an entirely separate sentence—and, subsequent to the 14th Amendment in a completely different portion of the Constitution.

The government offers no explanation for entirely ignoring the constitutional command that interstate apportionment *must* be done according to the "respective numbers" of the populations of the several states.

The principal purpose for this language was not to guarantee equality of congressional districts within a state. Rather, it was to establish the method for *interstate* apportionment. The requirement of intrastate equality is a fair implication from the principal command—but the command itself is directed to Congress to control the method of *interstate* apportionment.

To establish the meaning of this phrase ("according to their respective numbers"), the Supreme Court quotes, with approval, the statements of one of the early justices of the Court, James Wilson.

> Soon after the Constitution was adopted, James Wilson of Pennsylvania, by then an Associate Justice of this Court, gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, he said:
>
> "All elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same."

376 U.S. at 17.

Even though Justice Wilson indicated that the principle of voter equality should apply to "all elections", the government will undoubtedly contend that his comments indicate nothing more than a requirement of *intrastate* voter equality. However, Wilson

proclaimed the necessity of *interstate* voter equality in an even more significant venue—the Constitutional Convention:

> He considered numbers as the best criterion to determine representation. Every citizen of one State possesses the same rights with the citizen of another. Let us see how this rule will apply to the present question. Pennsylvania, from its numbers, has a right to 12 votes, when on the same principle New Jersey is entitled to 5 votes. Shall New Jersey have the same right or influence in the councils of the nation with Pennsylvania? I say no. It is unjust—I never will confederate on this plan.[8]

Madison's notes on the Constitutional Convention records this same speech from Wilson, saying: "Are not the Citizens of Pena. equal to those of N. Jersey? does it require 150 of the former to balance 50 of the latter?" [9]

The 1803 American edition of *Blackstone's Commentaries* written by Judge St. George Tucker gives the following commentary on the meaning of this portion of Article I § 2. The context leaves no doubt that the author's remarks were directed to the issue of *interstate* apportionment.

> This mode of ascertaining the number of representatives, and the inseparable connection thereby established between the benefits and burdens of the state, seems to be more consonant with the true principles of representation than any other which has hitherto been suggested. *For every man, in his individual capacity, has an equal right to vote in matters which concern the whole community:* no just reason therefore can be assigned why ten men in one part of the community should have greater weight in it's councils, than one hundred in a different place, as is the case in England, where a borough composed of half a dozen freeholders, sends perhaps as many representatives to parliament, as a county which contains as many thousands; *this unreasonable disparity appears to be happily guarded against by our constitution.* (Emphasis added).

1 *Blackstone's Commentaries* App. p. 189. (1803, *Tucker's Blackstone*.)

In 1832, in arguing for a new formula for apportionment (which parallels the modern method), Daniel Webster set forth a standard that is indistinguishable from the

[8] 1 *Elliot's Debates* (Yate's Minutes) 404.
[9] 1 *Records of the Federal Convention of 1787*, p. 180 (M. Farrand ed. 1911).

Supreme Court's command that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[10] Webster said:

> The Constitution, therefore, must be understood, not as enjoining an absolute relative equality—because that would be demanding and impossibility, — but as requiring of Congress to make the apportionment among the several states according to their respective numbers, *as near as may be.* That which cannot be done perfectly must be done in a manner as near perfection as can be.[11] (Emphasis in original.)

The government suggests that unless perfect equality can be achieved, there is nothing to be gained from an attempt at equality for voters. Gov't Brief at 22-23. This is a classic example of "letting perfect be the enemy of good." Perfect equality has never been the expectation, nor is it the constitutional standard. We find the same idea expressed in a variety of phrases. Webster said that equality was required "as near as may be." *Wesberry* says, 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.

Webster makes it clear that the term "among the states according to their respective numbers" refers to *interstate* apportionment. The duty to achieve interstate equality, according to Webster, does not lie within the sole discretion of Congress.

> Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case, approximation becomes a rule; it takes the place of that other rule, which would be preferable, but which is found inapplicable, and becomes, itself, an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot itself be reached, prevails in other cases, *not as matter of discretion, but as an intelligible and definite rule, dictated by justice*, and conforming to the common-sense of mankind; a rule of no less binding force in cases to which it applicable, and no more to be departed from, than any other rule or obligation. (Emphasis added).[12]

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[10] *Wesberry*, 376 U.S. at 7-8.
[11] 3 *Story*, *supra*, at 160. (see www.constitution.org/js/js_309.htm).
[12] *Id.* at 159.

Webster's view of the Constitution's demands is very similar to the standards that were ultimately adopted by the Supreme Court in *Wesberry* and its progeny.

> If, therefore, a particular process of apportionment be adopted, and objection be made to the injustice or inequality of its result, it is, surely, no answer to such objection to say that the inequality necessarily results from the nature of the process. Before such answer could avail, it would be necessary to show, either that the Constitution prescribes such process, and makes it necessary, or that there is no other mode of proceeding which would produce less inequality and less injustice.[13]

The 1832 apportionment bill, being opposed by Webster, gave the seven largest states 123 representatives, just over half of the total of 240. These seven states *combined* had only 53,000 residents in the category of "fractional remainder." But, New Jersey and Vermont, with a combined total of just 11 representatives, had a "fractional remainder" of 75,000 persons.[14] Webster contended that this degree of voter inequality was in violation of the command of the Constitution. He argued for rounding the fractional remainders of representatives to the nearest whole number to materially improve the equality of representation. His method was ultimately adopted in 1842.[15]

Even the legal treatise cited by the Justice Department's brief rejects the government's core contention on the merits. After quoting Article I § 2, the treatise offers these comments: "The essential intent of the article seems clear—at first blush. It is to share representation—and taxation—fairly among the states. … Representatives and

[13] *Id.* at 160.
[14] Id at 502.
[15] *Montana v. Dept. of Commerce* at 450-451.

direct taxes shall be *apportioned* according to the respective populations of the states. *Proportionality* is the ideal."[16]

The relevant history, the Supreme Court's own statements, and, most significantly, the text of the Constitution itself make it absolutely clear—the command that the House be "apportioned *among* the several States *according to their respective numbers*" means: (1) that interstate apportionment must be proportional to population; and (2) that one person's vote must be as equal to another's as nearly as is practicable.

B.

THE SUPREME COURT HAS NEVER DOUBTED THE APPLICABILITY OF ONE-PERSON, ONE-VOTE TO THE FEDERAL GOVERNMENT

This case seeks the equal treatment not for states as juridical bodies—that form of equality is guaranteed in the United States Senate. The claim of the plaintiffs is that their votes must have equal weight. Devaluing their vote based on their state of residence erodes their protected fundamental right to vote. In *Bush v. Gore*, 531 U.S. 98, 105 (2000), the Supreme Court recognized a constitutional offense in vote debasement in the context of the election for President.

> 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).

There is no logical basis for believing that debasement of voting strength is acceptable in federal elections for Congress if it is unacceptable in federal elections for President.

[16] Michael Balinski and H. Peyton Young, *Fair Representation: Meeting the Ideal of One Man, One Vote*, Yale Univ. Press (New Haven 1982) p. 5.

Indeed, the Supreme Court has plainly stated that just as states are required to adhere to the principle of one-person, one-vote, the federal government must also guarantee that all of its citizens have equal strength in voting.

> 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.

Avery v. Midland County, 390 U.S. 474, 481, n.6 (1968).

The logic and language of the Court in *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) does not admit of an exception that excludes the federal government from a duty to guarantee equality among the voters. "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."

Neither the Supreme Court nor any other federal court has ever before been asked to rule that 2 U.S.C. § 2a—which fixes the size of the House at 435 seats violates the one-person, one-vote requirement of proportional representation found in Art. I § 2 and section two of the 14th Amendment.

The government claims that there has been one prior case raising and rejecting the same claims which are presently before this Court. *Wendelken v. Bureau of the Census*, 582 F. Supp. 342 (S.D.N.Y. 1983). However, *Wendelken* is easily distinguished.

Wendelken, a resident of New Jersey, filed a pro se complaint in the Southern District of New York. His principal claim was "that Article I, section 2, clause 3 of the Constitution mandates allocation of a representative in Congress to every 30,000 residents of a state, so long as no state is unrepresented." *Id.* Alternatively, he argued that

"even if Congress has discretion by virtue of Article I to limit the number of representatives as it has, that discretion is constrained by the fifth amendment's guarantee of equal protection of the laws." *Id.*

The case at bar is not based on either of these constitutional claims. Wendelken's claim that all congressional districts must be exactly 30,000 in size is a plainly obvious misreading of the constitutional text. Similarly, Wendelksen's claim based on the Fifth Amendment's Due Process Clause was not credible. No congressional apportionment case has ever been based on this provision of the Constitution. It is Art. I, § 2 and section two of the 14th Amendment's that control interstate apportionment.[17] Moreover, there was nothing in the decision in *Wendelken* which indicates any allegation that he personally had standing as a New Jersey voter to raise a legitimate claim of vote disparity. Accordingly, *Wendelken* did not raise the same constitutional claims as these plaintiffs and the Southern District of New York was not obliged to reconfigure the *pro se* litigant's arguments into a correct constitutional posture. Even if these substantial differences are overlooked, the decision of a federal district court in New York is obviously not binding on this Court.

A far more significant case that both sides of this case must reckon with is *United States Dept. of Commerce v. Montana*, 503 U.S. 442 (1992). The state of Montana challenged the constitutionality of the mathematical calculation employed by Congress to determine fractional remainders from congressional apportionment. The Court upheld

[17] In *Karcher v. Daggett*, 462 U.S. 725 (1983), Justice Stevens concurred in the result arguing that intrastate variances in congressional districts should be adjudicated under the 14th Amendment's Equal Protection Clause. Stevens said: "The constitutional mandate contained in Art. I, § 2, concerns the number of Representatives that shall be 'apportioned among the several States.' The section says nothing about the composition of congressional districts within a State." *Id.* at 745.

the discretion of Congress to determine which mathematical calculation should be used for this purpose.

After reviewing the history of the different methods of calculation that Congress has used over two hundred years, the Court concluded that there was no constitutional basis for the Court to prefer one method over another. It is of the utmost significance, however, to note that the Court unanimously rejected the notion that the issue was a non-justiciable political question. 503 U.S. at 459. This necessarily means that there are constitutional limitations on the process and that the judiciary may intervene and override the discretion of Congress on the very issue in question—interstate apportionment.

The most significant issue is whether or not proportional representation (one-person, one-vote) is one of those constitutional mandates which limits the discretion of Congress. The government quotes the following language from *Montana*.

> The general admonition in Article I, § 2, that Representatives shall be apportioned among the several States "according to their respective Numbers" is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines.

503 U.S. at 447-48.

The plaintiffs contend that *Montana* stands for the proposition that these three standards are constraints on the rule of proportional representation. The government contends that these three standards are the only constitutional requirements and that there is no rule requiring proportional representation. The grammatical structure of the above-quoted paragraph—not the mention the text of the Constitution—strongly supports the current plaintiffs' reading. The requirement "that Representatives shall be apportioned among the several states according to their respective numbers" is described as "the

general admonition in Article I, § 2." This general admonition is constrained, the Court says, by three subordinate requirements. In other words, there are three basic limitations on the general rule of proportional representation.

The following quotation from *Montana* decisively demonstrates that the Court viewed the requirement of proportional representation as the "prime directive" for interstate apportionment decisions. Moreover, it demonstrated that the United States government—at least in 1992—agreed with the very proposition that it has denied in its pleadings before this Court.

> Significantly, however, the Government does not suggest that all congressional decisions relating to apportionment are beyond judicial review. The Government does not, for instance, dispute that a court could set aside an apportionment plan that violated the constitutional requirement that "the number of Representatives shall not exceed one for every thirty Thousand." Further, with 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.** (Emphasis added).

503 U.S. at 457.

The Court expressly acknowledged that there might be a viable challenge to Congressional decisions regarding interstate apportionment.

> 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. (Emphasis added).

503 U.S. at 461.

The very first question posed by the Supreme Court in the oral argument of the *Montana* case raises the very issue now pending in this Court.

> QUESTION: Well, there's another factor that enters in, isn't there, the fact that the House of Representatives has a limited number of members?
> GENERAL STARR: That's exactly right.
> QUESTION: And that is not in the Constitution, is it?
> GENERAL STARR: That is not. It has always been thought, as has this question, to be a matter entrusted to the judgment of the Congress of the United States. In fact in federalist '55 Madison said quite plainly that no political problem admits of a less precise solution than the size of the House of Representatives. And the issue before the Court today flows quite naturally from that, because until 1911 Congress always had the option, which it exercised from time to time, of increasing the size of the House of Representatives. But again, that is not a textually committed power. Nonetheless it is one that has, from the founding of the republic been one that is viewed as falling to Congress and not admitting the --
> QUESTION: Well, this problem in Massachusetts and Montana certainly could be cured by increasing the size.
> GENERAL STARR: Yes, it could. The problem of fractional remainders would not, there would still have to be a method for dealing with fractional remainders. But Montana could eventually get an additional representative were Congress willing to increase the size of the House.

Montana (oral argument transcript) 1992 WL 687852, at 4-5.

The Court also discusses the *Montana* decision in *Wisconsin v. City of New York*, 517 U.S. 1 (1996). The Court held that the principal purpose of the Census is found in the Constitution. "The Constitution provides that the results of the census shall be used to apportion the Members of the House of Representatives among the States." 517 U.S. at 5. The Court also held that "the Constitution vests Congress with wide discretion over apportionment decisions and the conduct of the census." 517 U.S. at 15. But the Court's view of "wide discretion" was not the version of unfettered discretion advanced by the government here. Specifically, the Court singled out the issues of proportional representation and voter equality as constitutional limitations over which Congress did

not have discretion. "Hence, so 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." 517 U.S. at 20. (Emphasis added. Internal citations omitted.)

Montana means that Congress has the discretion to choose the mathematical formula for determining fractional remainders in interstate apportionment. *Wisconsin* holds that the Secretary of Commerce has wide discretion in determining not to do statistical adjustments to the actual enumeration. Both of these decisions, however, presuppose that the census matters and that apportionment "among the states according to their respective numbers" is a constitutional mandate. The idea that Congress has no duty to adhere to the standard of one-person, one-vote is neither endorsed nor implied in either decision. In fact, in the absence of the need to achieve proportional representation, neither *Montana* or *Wisconsin* nor the decision of the Framers to require a census makes any sense. Why was a count necessary if it was not to be used for apportionment?

The government's radical contention that Congress has absolute to discretion to apportion the House as it wishes subject only to the rules of "one Representative per state" and "30,000 per district" should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss or, in the alternative, for summary judgment should be denied.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument in this matter.

Respectfully submitted this 19th day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 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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