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

JOHN TYLER CLEMONS *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**Civil Action No. 3:09-cv-104-P-A**
U.S. DEPARTMENT OF COMMERCE *et al.*,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' CONSOLIDATED MEMORANDUM (1) IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND (2) IN REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The issue in this case is whether Congress has discretion to limit the House of Representatives to 435 members. Plaintiffs argue that a requirement of population equality among interstate Congressional districts trumps Congress's judgment as to the appropriate number. According 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.

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. To

the contrary, limitations in the Constitution itself – namely, that every State must receive one Representative regardless of its population – render equality of interstate districts impossible. This constitutional framework, a result of the Framers' compromise between the interests of the large and small States, delegates to Congress broad discretion to apportion the House today. Over two hundred years of Congressional implementation of the apportionment provisions of the Constitution confirm the breadth of Congress's discretion to select an appropriate size for the House of Representatives within the constitutionally-prescribed range.

Indeed, because the Constitution commits to Congress the selection of the number of Representatives between the prescribed minimum and maximum, this lawsuit presents a nonjusticiable political question. It has long been recognized that "no political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature." J. Madison, *The Federalist No. 55*, *in The Federalist*, 372, 373 (Jacob E. Cooke ed. 1961). Plaintiffs ask this Court to apply a mathematical formula, not present in the Constitution, to overturn the Congressional compromise of a highly subjective and multi-faceted problem that has no "precise solution" and, in so doing, to restructure an entire branch of the federal government at its most fundamental level. Courts lack the power to do so.

Another federal district court has already considered the argument that equality of interstate districts requires a massive expansion of the House of Representatives. That court readily dismissed the claim, and that decision was affirmed on appeal. Because Plaintiffs' claims are nonjusticiable, or because Plaintiffs have failed to state a claim for relief on the merits, this action must be dismissed as well.

PROCEDURAL BACKGROUND

On December 21, 2009, the government moved to dismiss this action – or, in the alternative, for summary judgment – on a number of jurisdictional and timing grounds, as well as on the merits. (Memo. in Supp. of Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., Dec. 21, 2009 ("Gov't MTD/MSJ"), at 10-18.) In response to the government's motion, Plaintiffs filed an Amended Complaint purporting to correct the jurisdictional and timing defects the government had identified. (Am. Compl. for Decl. & Inj. Relief, Jan. 7, 2010.)

In light of the Amended Complaint, the government does not further press the jurisdictional and timing arguments it raised in its original motion. First, because Plaintiffs have amended the Complaint to state allegations of harm with respect to the 2011 apportionment plan, the government does not further press the argument, set forth at Part II of its opening brief, that Plaintiffs have failed to allege their standing to challenge the 2011 apportionment plan. Second, because Plaintiffs have amended the Complaint to add Plaintiffs who are eighteen years old, the government does not further press its argument, set forth at Part I.A. of its opening brief, that the statute of limitations bars their challenge to the 2001 apportionment plan. Finally, because Plaintiffs have abandoned their request for injunctive relief regarding the November 2010 elections (Pls.' Memo. in Opp'n to the Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., Feb. 19, 2010 ("Pls.' Opp'n"), at 3), the government does not further press its argument, set forth at Part I.B. of its opening brief, that the doctrine of laches bars their challenge to the 2001 apportionment plan. The government's argument on the merits, set forth at Part III of its opening brief, is unaffected by the Amended Complaint.

The briefing schedule submitted by the parties and approved by this Court contemplates the possible filing by the government of a supplemental motion to dismiss based on new

allegations raised in Plaintiffs' Amended Complaint. (Order, Feb. 4, 2010, at 1-2; Order, Mar. 17, 2010, at 1-2.) The government has determined, however, that the allegations in Plaintiffs' Amended Complaint will have been adequately addressed through the cross-motions that are already pending and, as such, the government does not intend to file a supplemental motion to dismiss. Accordingly, briefing of the parties' cross-motions will be complete on May 14, 2010, when Plaintiffs file a reply, if any, in support of their motion for summary judgment.[1] (*See* Order, Mar. 17, 2010, at 1-2.)

ARGUMENT

The Constitution grants Congress discretion to select the number of Representatives between a minimum and a maximum. The implications of this constitutionally-conferred discretion are two-fold. First, this Court lacks jurisdiction to review this challenge to a number within the constitutional range. Second, even if this Court has jurisdiction to review the action on the merits, a 435-member House of Representatives is consistent with the only limitations the Constitution imposes upon the number of Representatives.

I. THIS CHALLENGE TO THE NUMBER OF REPRESENTATIVES PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). "Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches[.]" *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion); *see also*

[1] Because the merits of Plaintiffs' claims are the same in both the Complaint and the Amended Complaint, the parties asked the Court to construe the government's pending motion to dismiss the Complaint as a motion to dismiss the Amended Complaint. (J. Mot. Regarding Scheduling, Jan. 21, 2010, ¶ 3.) The Court granted that request. (Order, Feb. 4, 2010, at 1.) As such, the pending motion and cross-motion properly relate to the Amended Complaint. (*See id.*)

Marbury, 5 U.S. at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). This "political question" doctrine is "essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217 (1962), deriving from "the relationship between the judiciary and the coordinate Branches of the Federal Government," *id.* at 210. The doctrine excludes from judicial review controversies involving "policy choices" and "value determinations" constitutionally committed for resolution to Congress or the President. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). "A declination of jurisdiction under the doctrine presupposes that another branch of government is both capable of and better suited for resolving the 'political' question." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

The Supreme Court has identified several factors that determine whether a particular case presents a political question. "[T]he inextricable presence of one or more of these factors will render the case non-justiciable under the Article III 'case or controversy' requirement." *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978). Those factors are: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. Although the presence of one factor is sufficient to render an action nonjusticiable, at least four of these

factors require the conclusion that this challenge to the validity of a 435-member House is a nonjusticiable political question.

First, Article I, Section 2, Clause 3 of the Constitution, as amended by the Fourteenth Amendment, states in relevant part that "Representatives shall be apportioned among the several States according to their respective numbers. . . . The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative[.]" Although the Constitution does not expressly provide that the responsibility for apportionment resides in Congress, Congress's power to apportion Representatives "has always been acted upon, as irresistibly flowing from the duty positively enjoined by the constitution." *Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842). Apart from the minimum of one Representative per State and the maximum of one Representative per 30,000 persons, the constitutional text imposes no restrictions upon Congress's selection of the number of Representatives. Instead, "it was left completely in [Congress's] discretion, not only to increase, but to diminish the present number [65]." 2 J. Story, *Commentaries on the Constitution* § 648 (1833) (hereafter "*Commentaries*"). In light of the Constitution's commitment of the number of Representatives to the political process, a judicial decree striking down Congress's selection of the number would constitute an impermissible intrusion into that process.

Second, there exists a profound "lack of judicially discoverable and manageable standards for resolving" this case. *Baker*, 369 U.S. at 217. Plaintiffs argue that the requirement that Representatives be apportioned to the States "according to their respective numbers" not only governs the apportionment method, but also requires the number of Representatives to expand dramatically to ensure population equality among interstate districts. Population disparities among interstate districts, however, inhere in the constitutional structure regardless of

the number of Representatives. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 463 (1992) ("[T]he need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50."). The extent of those disparities is "a matter of degree." *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).

Plaintiffs ask this Court to select 10% as the maximum disparity permissible under the Constitution, or to select 25% in order to effect a "significant improvement" upon the number Congress has chosen. (*See* Am. Compl. ¶¶ 39, 41-42.) Plaintiffs attempt to impart some rationality into these proposals by claiming that they achieve certain "milestones." (*See* Memo. in Supp. of Pls.' Mot. for Summ. J., Feb. 19, 2010 ("Pls.' MSJ") at 11 (suggesting that a maximum percentage deviation of less than 30% is a "milestone").) These alleged "milestones," however, are themselves not supported by any reasoned argument tied to the constitutional provision at issue. Because there is no constitutional basis upon which a court could determine an acceptable degree of inequality among these or other possible options, the issue is nonjusticiable. *See Texas v. United States*, 106 F.3d 661, 665 (5th Cir. 1997) ("We are not aware of and have difficulty conceiving of any judicially discoverable standards for determining whether immigration control efforts by Congress are constitutionally adequate.").

Third, in asking this Court to mandate a maximally-acceptable degree of inequality, Plaintiffs ask the Court to conclude that the 932- or 1,760-member House that would result from the suggested mandate is a reasonable size for a representative body. That "initial policy determination" is "of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. "[N]o political problem is less susceptible of a precise solution, than that which relates to the number

most convenient for a representative legislature." J. Madison, *The Federalist No. 55*, *in The Federalist*, 372, 373 (Jacob E. Cooke ed. 1961) (hereafter "*Federalist No. 55*"). A variety of highly subjective and imprecise policy considerations factor into the solution to this "political problem." *See, e.g.*, J. Madison, *The Federalist No. 58*, *in The Federalist*, 391, 396 (Jacob E. Cooke ed. 1961) (hereafter "*Federalist No. 58*") ("[A]fter securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society, they will counteract their own views by every addition to their representatives.") (emphasis removed); 2 *Commentaries* § 652 ("The question [of the proper number of Representatives] then is, and for ever must be, in every nation, a mixed question of sound policy and discretion, with reference to its size, its population, its institutions, its local and physical condition, and all the other circumstances affecting its own interests and convenience.").

Such a "highly subjective" policy determination is not appropriate for judicial resolution. *See Gilligan v. Morgan*, 413 U.S. 1, 14 (1973) ("The relief sought by respondents . . . is beyond the province of the judiciary. . . . This case relates to prospective relief in the form of judicial surveillance of highly subjective and technical matters[.]") (Blackmun, J., concurring); *Evans v. Stephens*, 387 F.3d 1220, 1227 (11th Cir. 2004) ("This kind of argument presents a political question. . . . These matters are criteria of political wisdom and are highly subjective."). *Cf. Bartlett v. Strickland*, 129 S. Ct. 1231, 1245 (2009) (plurality opinion) (construing Voting Rights Act to avoid court's entry into political thicket: "Though courts are capable of making refined and exacting factual inquiries, they are inherently ill-equipped to make decisions based on highly political judgments[.]") (quotations omitted). Indeed, with respect to the composition of state legislatures, the Supreme Court has explained that "the *size* of its legislative bodies is of course a

matter within the discretion of each individual State." *Reynolds v. Sims*, 377 U.S. 533, 581 n.63 (1964) (emphasis added).

Fourth, few proposals demonstrate a "lack of the respect due coordinate branches of government" more than the one Plaintiffs present here. *Baker*, 369 U.S. at 217. Plaintiffs ask this Court for an order restructuring Congress at its most fundamental level, and also ask this Court to maintain continuing jurisdiction over Congress to ensure its compliance with the Court's directive. (Pls.' Opp'n at 11-12.) Such massive reformulation of a coordinate branch of the federal government "savours too much of the exercise of political power to be within the proper province of the judicial department." *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831); *see also Gilligan*, 413 U.S. at 5 (rejecting "broad call on judicial power to assume continuing regulatory jurisdiction" over the executive).

To convince this Court that a ruling in their favor would still leave Congress with discretion over its composition, Plaintiffs state that they "do not ask this Court to order a particular size of the House." (Pls.' MSJ at 2; *see also id.* at 12.) They then offer several suggestions as to how Congress may achieve "equality" among interstate Congressional districts without increasing the number of members to 932 or 1,760. For example, Plaintiffs suggest that Congress could exclude non-citizens and/or non-voters from the interstate apportionment count, which would result in a lower apportionment count and a fewer number of Representatives necessary to achieve Plaintiffs' standard of population equality. (*Id.* at 12-13 & n.36.) Such exclusions would violate the plain language of the Constitution, which requires apportionment of Representatives to the States to be based on the "whole number of persons in each State," not the number of "citizens" and not the number of "voters." U.S. Const., Art. I, § 2, cl. 3; amend. XIV, § 2. Congress has no discretion to achieve the purported "equality" Plaintiffs seek by excluding

massive numbers of persons from the interstate apportionment count.[2] Plaintiffs' assertions that the relief they seek would still allow Congress substantial discretion to fix the number of Representatives are therefore baseless. An order from this Court that a maximum percentage deviation of 10% is the allowable limit would be an order effectively setting the membership of the House at a number four times greater than the number Congress has selected for its own composition. Such a severe and unprecedented intrusion upon the most basic structure of this coordinate branch would fly in the face of the "respect due coordinate branches of government." *Baker*, 369 U.S. at 217.

The Supreme Court's decision in *United States Department of Commerce v. Montana*, 503 U.S. at 459 – in which the Court held justiciable a challenge to Congress's apportionment method – is not to the contrary. In determining whether a lawsuit presents a nonjusticiable political question, courts must look beyond broad categories and engage in "a discriminating analysis of the particular question posed." *Baker*, 369 U.S. at 211. *Cf. Chen v. City of Houston*, 206 F.3d 502, 522-28 (5th Cir. 2000) (whether city was required to use voting population or total population to apportion city council districts was question left to political process). In *Montana*, the Court held that the challenge was justiciable because the Constitution imposes substantive constraints upon Congress's selection of an apportionment method. 503 U.S. at 457. In particular, "Congress has a judicially enforceable obligation to select an apportionment plan that is related to population." *Id.*

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[2] Citing *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), Plaintiffs suggest that it is an open question whether Congress may exclude non-voters from the interstate apportionment count. (*See* Pls.' MSJ at 12 n.36.) It is not. Article I, Section 2, Clause 3, as amended by the Fourteenth Amendment, requires Congress's apportionment of Representatives to the States to be based on the "whole number of persons in each State." Congress therefore must include non-voters as well as voters in the interstate apportionment count. *Kirkpatrick* addressed *intrastate* redistricting by the States, not *interstate* apportionment by Congress. 394 U.S. at 534.

That is not the case here. Between the minimum and maximum number of Representatives explicitly set forth in the Constitution, there is no standard upon which a Court could base an appropriate size for the House of Representatives. While a court can determine whether an apportionment method reasonably relates to population, *see id.*, a court cannot divine an unarticulated constitutional standard which, according to Plaintiffs, requires greater equality than the current 435-member plan but not so much equality that the House should expand to the constitutional maximum of over 9,000 members. And even if a court could decipher such a standard, it is not the place of a court to decide that the number resulting from that standard appropriately takes account of the numerous other considerations impacting the selection of the number of Representatives. Unlike the apportionment method at issue in *Montana*, the nature of the political problem at issue in this case is unique in its imprecision. *Federalist No. 55* at 373 ("[N]o political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature."); *see also Reynolds*, 377 U.S. at 568, 581 n.63 (although the equal protection clause requires States to draw their legislative districts on a population basis, "the size of its legislative bodies is of course a matter within the discretion of each individual State"). Furthermore, ordering Congress to double or quadruple in size would display a lack of respect for a coordinate branch that is far more significant than ordering Congress to utilize a different method to apportion its existing number. The latter would not substantively alter the workings of Congress but would change only the States from which several of its existing number are elected. The former would overhaul the entire legislative branch.

Accordingly, this action should be dismissed because it presents a nonjusticiable political question.

II. A 435-MEMBER HOUSE IS WELL WITHIN THE BOUNDS OF CONGRESS'S VIRTUALLY UNLIMITED DISCRETION TO SELECT THE NUMBER OF REPRESENTATIVES.

In its opening brief, the government explained that Plaintiffs have failed to state a claim for relief because the Constitution grants Congress discretion to limit the House of Representatives to 435 members. The only other federal court that has considered the breadth of Congress's discretion to select the number of Representatives agrees. Supreme Court decisions addressing other Congressional apportionment decisions support that court's conclusion. The constitutional history, coupled with two hundred years of Congressional apportionment history, confirm the breadth of Congress's discretion to determine the number of Representatives. (*See generally* Gov't MTD/MSJ at 19-30.)

In response, Plaintiffs make four arguments. First, they argue that the text of the Constitution requires Congress to increase the number of Representatives so that the level of inequality among interstate Congressional districts does not exceed a specified percentage. Article I contains no such requirement, nor can such a requirement be implied. Second, Plaintiffs argue that the requirement should be implied under the standard of review set forth in *Wesberry v. Sanders*, 376 U.S. 1 (1964). That standard of review does not govern here. Third, Plaintiffs argue that the requirement should be implied from statements in the historical record confirming that the Framers intended Representatives to be apportioned to the States according to State population, rather than apportioned equally among the States. That the Constitution requires an apportionment method that relates to population is not disputed but is not determinative of the issue presented in this case. Finally, Plaintiffs dismiss two hundred years of apportionment history in which no Congress has ever fixed the number of Representatives at that which would reduce the population variance among interstate Congressional districts to the level

Plaintiffs now claim is constitutionally mandated. Their arguments in opposition to this historical precedent are factually and legally flawed.

A. ARTICLE I CONTAINS NO REQUIREMENT OF POPULATION EQUALITY THAT CONSTRAINS CONGRESS'S DISCRETION TO SELECT THE NUMBER OF REPRESENTATIVES.

Plaintiffs argue that the Constitution sets a minimum number of Representatives, far in excess of that selected by Congress, through its specification that Representatives shall be apportioned to the States "according to their respective numbers." (*See* Pls.' Opp'n at 23.) As one federal court has already held, however, "[t]he decision to limit the size of the House of Representatives to 435 members is expressly committed to the discretion of Congress." *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).

The apportionment provisions of Article I, as amended by the Fourteenth Amendment, require the result reached in *Wendelken*:

> 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. 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[.]

U.S. Const., Art. I, § 2, cl. 3; amend. XIV, § 2. By its plain terms, the first sentence of this clause establishes the limitations on the *method* of apportioning Representatives. The last sentence establishes the limitations on the total *number* of Representatives, setting forth only a minimum and a maximum. Because the current number (435) falls within that range, nothing in the plain language of the Constitution prohibits Congress from selecting that number.

Nor may such a prohibition be implied. First, such a severe restriction upon the fundamental structure and operation of the legislative branch would certainly have been articulated more clearly than in the manner Plaintiffs suggest. After substantial consideration (*see* Gov't MTD/MSJ at 3-6), the Framers established express limitations upon Congress's discretion to select the overall number of Representatives. In the course of their debate, the Framers rejected more significant limitations upon that discretion. In particular, they proposed setting a ratio of representation. *See, e.g.*, 2 *The Records of the Federal Convention of 1787* 178 (Farrand ed. 1911) (hereafter "Farrand") (proposing that "the Legislature shall … regulate the number of representatives by the number of inhabitants . . . at the rate of one for every forty thousand"). If they had adopted such a ratio, they would have ensured a larger House and a greater measure of population equality among interstate districts today. The establishment of a ratio was rejected, however, at least in part because fixing a ratio would eventually have resulted in an "excessive" number of Representatives. *Id.* at 221. Instead of a ratio, the Framers imposed only a minimum district size, conferring much broader discretion upon Congress to select an appropriate number. The proposals the Framers explicitly rejected when drafting the provision governing the total number of Representatives cannot be revived through an implied requirement in the separate provision governing the apportionment method.

Second, as the Supreme Court explained in *United States Department of Commerce v. Montana*, by granting each State one Representative regardless of its population, the Constitution renders equality of interstate districts impossible. 503 U.S. 442, 463 (1992). Plaintiffs dismiss this fundamental characteristic of our Constitution by arguing that the impossibility of precise equality does not excuse Congress from achieving equality "as near as may be." (*See* Pls.' Opp'n at 26; Pls.' MSJ at 29-30.) Plaintiffs have missed the point of the Supreme Court's

discussion. In explaining that the Constitution renders equality among interstate Congressional districts impossible, the Court explained that it was a "spirit of compromise" – not equality to the exclusion of all other considerations – that motivated the interstate apportionment provisions of the Constitution. *Montana*, 503 U.S. at 464. In particular, the Framers had sacrificed maximum possible equality for individuals in order to preserve some measure of equality for the small States in the House of Representatives. 2 *Commentaries* § 671 (explaining that the requirement that each State be apportioned one Representative "was indispensible to preserve the equality of the small states" in the House of Representatives).

That compromise, the Supreme Court held, means that the Constitution cannot be read to allow "rigid mathematical standard[s]" to control Congress's apportionment determinations. *See Montana*, 503 U.S. at 464. Instead, the "spirit of compromise" that motivated the apportionment provisions of the Constitution grants Congress broad discretion to apportion the House today. *See id.*; *see also Wisconsin v. City of New York*, 517 U.S. 1, 16-18 (1996) (strict scrutiny standard did not apply to judicial review of interstate apportionment determination; Court of Appeals had "undervalued the significance of the fact that the Constitution makes it impossible to achieve population equality among interstate districts"). In the absence of any express requirement of equality, a requirement of equality "as near as may be" cannot be implied to override the compromise Congress has reached with respect to the number of Representatives. To the contrary, the "spirit of compromise" that motivated the initial apportionment of 65 Representatives – which resulted in a maximum deviation of approximately 71% according to the Framers' population estimates (Gov't MTD/MSJ, Ex. D at 6) – grants Congress discretion to limit the House of Representatives to 435 members despite the 63.38% maximum deviation that flowed from that limitation following the 2000 decennial census. *See Montana*, 503 U.S. at 464.

Finally, "no political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature."). *Federalist No. 55* at 373. Implying a standard of population equality among interstate districts to determine the number of Representatives would force a "precise solution" to a problem that has none, thereby precluding all Congressional consideration of the policies that must inform the solution to this problem. *See id.* at 374 ("[I]n all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes: As on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude."); *Federalist No. 58* at 396 ("[A]fter securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society, they will counteract their own views by every addition to their representatives."); 2 *Commentaries* § 652 ("The question [of the proper number of Representatives] then is, and for ever must be, in every nation, a mixed question of sound policy and discretion, with reference to its size, its population, its institutions, its local and physical condition, and all the other circumstances affecting its own interests and convenience."). A mathematical formula may not be implied to mandate a number of Representatives that is double or quadruple the number Congress established through the process of deliberation and compromise envisioned by the Framers. *See Federalist No. 55* at 374 ("Nothing can be more fallacious than to found our political calculations on arithmetical principles.").

Plaintiffs attempt to portray the government's position as "radical" (Pls.' Opp'n at 19) by accusing the government of arguing that Congress has no obligation to apportion Representatives by population. (*See id.* at 19-24, 31-32; Pls.' MSJ at 26-27.) The government's explication of

the relevant measure of discretion in its opening brief, however, was made in the context of this challenge to the *number* of Representatives, not a challenge to the apportionment *method*. In consideration of the requirement that Representatives be apportioned to the States "according to their respective numbers," Congress must apply an apportionment method that relates to population. That requirement as to the apportionment method, however, has no bearing on the constitutional validity of Congress's antecedent determination that 435 is an appropriate number of Representatives, which is the only issue presented in this case. Instead, the limitations on the number of Representatives that accompany the provision setting forth the apportionment method – namely, that every State must receive at least one Representative and that no district may be comprised of fewer than 30,000 inhabitants – set forth the only standards against which the number 435 can possibly be measured.[3]

In sum, the plain language of the Constitution grants Congress discretion to select a number of Representatives within a minimum and maximum. The text of the Constitution and the history of its framing demonstrate that the Framers did not intend to imply an additional limitation upon the number of Representatives in the separate constitutional provision governing the apportionment method.

B. PLAINTIFFS' ARGUMENT IS PREMISED UPON AN INAPPLICABLE STANDARD OF REVIEW.

Plaintiffs' "core contention" in this case is that Congress's selection of the number of Representatives must comply with the standard of review set forth in *Wesberry v. Sanders*, 376

[3] 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.

U.S. 1 (1964), and its progeny. (Pls.' Opp'n at 19.) At issue in *Wesberry* was the separate constitutional provision calling for election of Representatives "by the People of the several States," U.S. Const., Art. I, § 2, cl. 2. *Wesberry* held that this constitutional provision requires each State to achieve equality among the Congressional districts within its State "as nearly as practicable." *Wesberry*, 376 U.S. at 7-8. Pursuant to that strict scrutiny standard, a State must make a good-faith effort to achieve "precise mathematical equality" and, if it has not, "must justify each variance, no matter how small." *Kirkpatrick*, 394 U.S. at 530-31. The *Wesberry* standard does not govern here.

1. *The Wesberry Standard Does Not Apply to Congressional Apportionment Determinations.*

In two decisions, the Supreme Court considered and rejected the *Wesberry* standard as applicable to Congress's interstate apportionment determinations.

In *Montana*, the Supreme Court considered a challenge to Congress's method of apportioning Representatives among the States. 503 U.S. at 444-45. The State of Montana argued that the requirement that Congress apportion Representatives to the States "according to their respective numbers" required Congress to use an apportionment method that, in its view, achieved greater equality in the distribution of Representatives among the States. *See id.* at 444-46. Montana's reapportionment challenge was therefore the closest federal analogue to the State redistricting issue in *Wesberry*, and Montana argued that the *Wesberry* standard governed the Court's review of Congress's apportionment method. *Id.* at 459-61. The Supreme Court rejected Montana's argument. Although the Court recognized that there was "some force" to the argument, *id.* at 461, and said that the challenged decision may well pass muster even under the strict *Wesberry* standard, *id.*, the Court rejected the standard as applicable in the interstate apportionment context. *Id.* at 463-64. The Court reasoned that *Wesberry* begins with a

presumption that complete equality is an achievable goal for the States but that such a goal is "illusory" for the nation as a whole. *Id.* at 463. Instead of complete equality, the interstate apportionment provisions of the Constitution had resulted from a compromise between the small and large States that must grant Congress greater discretion to apportion the nation than the States have to draw district lines. *Id.* at 464. The Court also explained that intrastate redistricting is a "much easier task" than interstate reapportionment, *id.* at 464, and that "[r]espect for a coordinate branch of Government raises special concerns not present" in prior cases reviewing state action, *id.* at 459. The Court therefore upheld Congress's apportionment method under a far more deferential standard of review. *See id.* at 464.

Four years later, the Supreme Court reaffirmed the inapplicability of the *Wesberry* standard to Congressional apportionment determinations. In *Wisconsin v. City of New York*, the plaintiffs challenged the Secretary of Commerce's conduct of the census. 517 U.S. at 4. The Court of Appeals had applied the *Wesberry* standard to hold that the Secretary was constitutionally required to conduct a census that was "as accurate as possible." *See id.* at 12, 16-17. The Court of Appeals had reasoned, exactly as Plaintiffs reason here, that the "impossibility of achieving precise mathematical equality is no excuse for the Federal Government not making the mandated good-faith effort." *Id.* at 16 (quotations and alterations omitted). The Supreme Court reversed: "[T]he Court of Appeals erred in holding the 'one person-one vote' standard of *Wesberry* and its progeny applicable to the action at hand." *Id.* "The [C]ourt [of Appeals] . . . undervalued the significance of the fact that the Constitution makes it impossible to achieve population equality among interstate districts." *Id.* at 17. "Rather than the standard adopted by the Court of Appeals, we think that it is the standard established by

this Court in *Montana* and *Franklin* that applies[.]" *Id.* at 18-19. Applying that more deferential standard of review, the Court upheld the Secretary's determination as "reasonable." *Id.* at 24.

Plaintiffs represent that "[t]he Supreme Court has never doubted the applicability of one-person, one-vote to the Federal Government." (Pls.' Opp'n at 28.) Plaintiffs' argument in support of this proposition is based on case law that has nothing to do with a challenge to an action of the federal government, much less an interstate apportionment challenge. (*See* Pls.' Opp'n at 28-29 (citing *Bush v. Gore*, 531 U.S. 98 (2000), *Avery v. Midland County*, 390 U.S. 474 (1968), and *Davis v. Bandemer*, 478 U.S. 109 (1986).) As the Supreme Court has made clear in *Montana* and *Wisconsin* – the two cases that do directly address the applicability of the *Wesberry* standard in the interstate apportionment context – the Supreme Court has more than "doubted" the applicability of the *Wesberry* standard. The Court has unequivocally rejected it.[4]

Not surprisingly, a lower federal court has already declined to apply the *Wesberry* standard – or any other standard of review – in the context of a challenge to the number of Representatives. In *Wendelken v. Bureau of the Census*, the plaintiff had argued that "in setting the size of the House of Representatives, Congress is constitutionally required to ensure that Congressional districts are 'as equal as they can possibly be.'" 582 F. Supp. at 342-43. The

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[4] Plaintiffs also cite the colloquy between the Solicitor General and one member of the Court during the *Montana* argument. (Pls.' Opp'n at 33.) The decision, not the colloquy, sets forth the state of the law. Regardless, no statement by any member of the Court in the *Montana* argument suggests that the *Wesberry* standard is the applicable standard of review. *See U.S. Dep't of Commerce v. Montana*, 1992 WL 687852, at *28 (Mar. 4, 1992) (stating that the interstate apportionment system "has not adopted the one man, one vote principle as an overriding consideration"); *id.* at *29 (stating that "numerical equality is not an overriding thing"). And, contrary to Plaintiffs' suggestion (Pls.' Opp'n at 33), no statement during the *Montana* argument suggests that any member of the Court is eager for an opportunity to mandate an expansion of the House of Representatives. *See Montana*, 1992 WL 687852, at *7 ("I don't think reasonable increases in the size of the House would ever solve the fractional remainder problem."); *id.* at *30 ("I presume that under this Constitution the House could provide for only 50 members. . . . And that would comport with the Constitution.").

district court rejected the plaintiff's argument, holding that "[t]he decision to limit the size of the House of Representatives to 435 members is expressly committed to the discretion of Congress." *Id.* at 343. The Second Circuit affirmed the district court's decision. 742 F.2d 1437 (2d Cir. 1984).

Plaintiffs attempt to distinguish *Wendelken* on the basis that the *Wendelken* plaintiff had relied on the Fifth Amendment's guarantee of equal protection instead of on Article I. (*See* Pls.' Opp'n at 30.) Although the *Wendelken* court did cite equal protection principles, it also cited *Wesberry* as the basis of the plaintiff's claim. *Id.* at 342. The applicability of the *Wesberry* standard, of course, is Plaintiffs' "core contention" in this case. (Pls.' Opp'n at 19.) In addition, like the plaintiff in *Wendelken*, Plaintiffs' argument here cites as support the equal protection standards that have been applied to states and localities. (*See, e.g.*, Pls.' MSJ at 13 (relying on the equal protection standards set forth, *inter alia*, in *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183-84 (1979); *Dunn v. Blumstein*, 405 U.S. 330, 335-36 (1972); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Bush*, 531 U.S. at 104; and *Avery*, 390 U.S. at 478).) The *Wendelken* court rejected the very argument Plaintiffs raise here.[5]

The validity of Plaintiffs' argument that *Wesberry* provides the applicable standard of review is further undermined by the fact that the remedy Plaintiffs seek is itself inconsistent with the *Wesberry* framework. Plaintiffs ask this Court to impose a standard according to which the maximum percentage deviation among interstate districts must be less than either 10% or 25%.

[5] Plaintiffs also argue that *Wendelken* is distinguishable because it may have been decided on the basis of standing. (Pls.' Opp'n at 30.) The *Wendelken* plaintiff's standing to sue was not discussed; the court dismissed the action on the merits. *Wendelken*, 582 F. Supp. at 343. Plaintiffs also attempt to distinguish *Wendelken* on the basis that the *Wendelken* plaintiff had raised the meritless argument that each Congressional district must consist of 30,000 persons. (Pls.' Opp'n at 30.) That argument, however, is irrelevant to this case. It is the *Wendelken* plaintiff's second, and equally meritless, argument that is the one Plaintiffs raise here. *See* *Wendelken*, 582 F. Supp. at 342-43.

(*See* Pls.' MSJ at 11-12; Am. Compl. ¶¶ 38-42.) But the *Wesberry* approach rejects the imposition of such categorical standards:

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimus and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case.

Kirkpatrick, 394 U.S. at 530. That Plaintiffs' remedy is inconsistent with the "whole thrust" of the standard they say applies, *see id.*, further demonstrates the inapplicability of the standard in the first place.

In sum, Plaintiffs' argument that the *Wesberry* standard applies to the review of Congressional apportionment determinations contradicts directly applicable Supreme Court precedent. Because the *Wesberry* standard does not apply, Congress is not required to justify every deviation from maximum possible equality among interstate districts when it determines the number of Representatives. Plaintiffs' "core contention" fails.

2. *Plaintiffs Have Failed to Demonstrate That a 435-Member Limitation Is Unreasonable.*

Despite their insistence that *Wesberry* provides the applicable standard of review, Plaintiffs concede that *Montana* and *Wisconsin* do vest Congress with "wide discretion" over interstate apportionment determinations. (Pls.' Opp'n at 33.) They argue, however, that this discretion was not "the version of unfettered discretion advanced by the government here." (*Id.*) Plaintiffs are correct. Congress does not have unfettered discretion to determine the apportionment method, the issue in *Montana*. Instead, the Constitution requires an apportionment method that relates to population. U.S. Const., Art. I, § 2, cl. 3. Nor does Congress have unfettered discretion to conduct the census, the issue in *Wisconsin*. Instead, the Constitution requires Congress to conduct an "actual Enumeration." *Id.* The Supreme Court in

Montana and *Wisconsin* evaluated the challenged decisions against these constitutionally-prescribed standards. *See Wisconsin*, 517 U.S. at 24; *Montana*, 503 U.S. at 464. As discussed above, however, no constitutional provision constrains Congress's determination of the number of Representatives between the minimum and maximum prescribed by the Constitution. *See* discussion *supra* Section II.A. Accordingly, no comparable standard of review applies to this Court's review of the decision challenged here.

Even if Congress does not have complete discretion to select a number between the constitutional minimum and maximum, however, this Court must review the number selected by Congress under the same deferential standard the Supreme Court has applied to other Congressional apportionment determinations. Pursuant to that standard, so long as the decision "is consistent with the constitutional language and the constitutional goal of equal representation, it is within the limits of the Constitution." *Wisconsin*, 517 U.S. at 19-20. In giving content to that standard of review, the Court has explained that the decision "need bear only a *reasonable relationship* to the accomplishment of an actual enumeration." *Id.* at 20 (emphasis added). This "reasonableness" standard is the same one the Court applied in both *Montana*, 503 U.S. at 464, in which the Court upheld the apportionment method selected by Congress, and in *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992), in which the Court upheld the Secretary's decision to count overseas military personnel in their home State. *See Wisconsin*, 517 U.S. at 18-19.

As set forth in the government's opening brief, the challenged statute was enacted in 1929 in the wake of Congress's inability to agree upon a reapportionment plan following the 1920 decennial census. (*See* Gov't MTD/MSJ at 7-9.) In the several apportionment acts preceding the 1920 census, Congress had increased the number of Representatives to that which would prevent any State from losing a seat following the census. (*See id.* at 7.) According to the

House Committee report, the "real stumbling block" following the 1920 census was that continued expansion of the House to ensure that no State would lose a seat would have resulted in a membership that was, to many members of Congress, "too large and unwieldy." *See* H.R. Rep. No. 70-2010, at 3 (1929). To prevent future conflict between those in favor of continued expansion (*e.g.*, those whose States would lose seats following the next census) and those against continued expansion (*e.g.*, those who believed the House had or would become too large and unwieldy), Congress enacted a self-executing apportionment act that fixed the number of Representatives at 435. *See id.* at 2-4. Congress did so upon the conclusion that "the limitation [435] is sustained by every consideration of effectual parliamentary government." S. Rep. No. 70-1446, at 9 (1929).

Plaintiffs have not demonstrated that this determination was unreasonable. The only evidence they offer in an attempt to do so relates to the size of the lower chambers of twenty-nine international legislatures. (*See* Pls.' MSJ, Aff. of Jeffrey Ladewig ("Ladewig Aff."), Ex. 10.) Far from supporting their argument, however, their evidence supports the reasonableness of a number in the range of the one Congress selected. According to Plaintiffs, the lower chambers in these twenty-nine democracies range from a minimum of 60 members to a maximum of 646 members. (*Id.*) Even granting Plaintiffs' unsupported assumption that what is best for other nations must be best for the United States, a 435-member chamber is well within the range that these twenty-nine other democracies have deemed an appropriate size for their lower chambers. Although Plaintiffs may argue that none of these democracies is as populous as the United States, limiting the membership of the House is a reasonable decision even in the most populous democracies. *See Federalist No. 55* at 373 ("[T]he ratio between the representatives and the people, ought not to be the same where the latter are very numerous, as where they are very

few."). Indeed, Plaintiffs' expert's mathematically-derived view of a proper number of Representatives for the United States (655) is more than eleven hundred Representatives *fewer* than the number Plaintiffs claim is the constitutional minimum (1,760). (*See* Pls.' MSJ, Ladewig Aff., Ex. 2 at 99 & Figure 3.)

With respect to Congress's decision to establish an apportionment formula that would apply in the same manner after every decennial census, the Supreme Court has confirmed that the public is "well served" by the application of "procedural and substantive rules that are consistently applied year after year."[6] *Montana*, 503 U.S. at 465. Furthermore, the need to impose an eventual limit on the number of Representatives has been recognized since the founding era:

> [T]he more numerous any assembly may be, of whatever characters composed, the greater is known to be the ascendency of passion over reason. . . . In the ancient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway as if a sceptre had been placed in his single hands. On the same principle the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning; and passion the slave of sophistry and declamation. The people can never err more than in supposing that by multiplying their representatives, beyond a certain limit, they strengthen the barrier against the government of a few. Experience will forever admonish them that on the contrary, after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer and often, the more secret will be the springs by which its motions are directed.

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[6] Plaintiffs claim that the population disparities among interstate districts could be reduced somewhat if the House expanded to 441 Representatives. (Pls.' MSJ at 1, 9-10.) Plaintiffs argue, however, that a 441-member House would still be unconstitutional. (*See id.* at 10.) We therefore do not address their commentary as a serious proposal, except to say that a 441-member House may slightly reduce population disparities now but may not do so following a subsequent census. To the extent Plaintiffs suggest that Congress must pass a new apportionment act every year, that suggestion is inconsistent with the Court's holding in *Montana*, 503 U.S. at 465.

Federalist No. 58 at 395-96 (emphasis removed); *see also Federalist No. 55* at 374 ("[T]he number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude."). Madison not only recognized the need for a limit but also provided the general range he deemed excessive: "Sixty or seventy men, may be more properly trusted with a given degree of power than six or seven. But it does not follow, that six or seven hundred would be proportionally a better depository." *Federalist No. 55* at 374. Madison's views as to an appropriate number, of course, are not binding on Congress because they are not contained in the Constitution. Nonetheless, that the number selected by Congress is consistent with the views of the Framer regarded as the "father of the Constitution," *see, e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994), supports the reasonableness of Congress's limitation.

The number selected by Congress is also reasonable when viewed in the context of the "constitutional goal of equal representation." *See Wisconsin*, 517 U.S. at 20. In evaluating the reasonableness of the number selected by Congress from this perspective, the Framers' initial apportionment serves as a model of the "spirit of compromise" that the Supreme Court has held is an acceptable component of Congress's apportionment determinations today. *See Montana*, 503 U.S. at 464. The Framers' initial apportionment compromise allocated 65 Representatives among 13 States, producing a maximum deviation between the smallest and largest districts of 70.87% according to the Framers' population estimates. (Gov't MTD/MSJ, Ex. D at 6.) Today's apportionment compromise mirrors that scheme. Indeed, it allocates a proportionately greater number of Representatives (435 Representatives among 50 States, instead of 65 Representatives among 13 States) and produces a smaller maximum deviation between the largest and smallest districts (63.38%, instead of 70.87%). (*See id.* at 1.)

In sum, even if the standard of review set forth in *Montana* and *Wisconsin* applies to the determination at issue here, Plaintiffs have failed to demonstrate that Congress's selection of a 435-member House was unreasonable.

C. PLAINTIFFS' HISTORICAL REFERENCES TO THE IMPORTANCE OF A POPULATION-BASED APPORTIONMENT METHOD DO NOT ADDRESS THE NUMBER OF REPRESENTATIVES.

Plaintiffs cite excerpts of the constitutional history and early nineteenth century sources in support of their argument that the Constitution imposes a standard of population equality that controls the number of Representatives. In particular, Plaintiffs point to general references in the historical record to the value of proportional representation. (*See* Pls.' MSJ at 15-17; Pls.' Opp'n at 21-28.) These statements, however, reflect the principle in Article I, Section 2, Clause 3 that Representatives must be allocated in proportion to State population, in contrast to the Senate's equal apportionment – *i.e.,* the "great compromise" of the Convention. They do not address the separate determination of the number of Representatives. To the contrary, complete examination of the portions of the historical record that Plaintiffs cite, coupled with the actual decisions made by the Framers, confirm that Congress has broad discretion to determine the total number of Representatives.

Plaintiffs' citations to Justice Wilson are illustrative. (*See* Pls.' Opp'n at 24-25; Pls.' MSJ at 16.) In the course of reaching the "great compromise," Justice Wilson argued that Pennsylvania and New Jersey, which had very different populations at the time the Constitution was adopted, should receive 12 and 5 Representatives, respectively. (Pls.' Opp'n at 25.) His view that the States should be apportioned a number of Representatives in relation to their respective populations was, of course, adopted. To the extent Plaintiffs also construe his statement to suggest that the ratio between these two States was required to be exactly 12 to 5,

the Framers did not adopt that proposal. The final apportionment compromise established a smaller initial House and necessarily set forth a less precise ratio (8 to 4) for the representation of Pennsylvania and New Jersey.[7] U.S. Const., Art. I, § 2, cl. 3. Justice Wilson's comments are support for the "great compromise," not the separate debate regarding the total number of Representatives.

Plaintiffs also cite Daniel Webster for the proposition that Representatives must be apportioned "as near as may be" to absolute equality. (Pls.' Opp'n at 25-27.) A complete reading of Webster's relevant writings, however, indicates that his remarks concerned the apportionment method, not the number of Representatives. Plaintiffs correctly note that Webster argued that the 1832 apportionment bill did not achieve a sufficient level of population equality among interstate Congressional districts. *See* 6 *The Writings and Speeches of Daniel Webster* (hereafter "Webster") 102, 102-106 (1903). As Plaintiffs' discussion indicates, however, Webster's proposed remedy was a different apportionment *method*, not an increase in the total number of Representatives. *Id.* at 106 ("The Committee . . . are of opinion that the bill should be altered in the mode of apportionment.") Indeed, Webster believed that the "number of Representatives . . . is, of necessity, limited." *Id.* at 113. His approach to apportionment reflected that view. His approach was to *first* decide the number of seats to be distributed, *then* compute the exact quota deserved by each State. *Id.* at 110-11 ("[T]he first thing naturally to be done is to decide on the whole number of which the House is to be composed."). Webster's statement that equality must be achieved "as near as may be" therefore cannot be construed as an

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[7] According to the Framers' estimates, the populations of Pennsylvania and New Jersey were 360,000 and 138,000, respectively (*see* Gov't MTD/MSJ, Ex. D at 6), which amounts to a population ratio of 12 to 4.6. As such, a representation ratio of 12 to 5, the example Justice Wilson offered, would have accomplished a more precise apportionment than the 8 to 4 ratio ultimately adopted.

opinion that Congress must dramatically increase the number of Representatives, but only as an opinion that Congress must select an apportionment method that results in the most equivalent distribution of Representatives.

Plaintiffs' citation to Justice Story's *Commentaries on the Constitution* reflects a similar defect. (*See* Pls.' MSJ at 21.) The passage Plaintiffs cite addresses the "great compromise," not the number of Representatives. *See* 2 *Commentaries* § 630 ("[A]n equality of representation and vote by each state . . . was negatived in the convention at an early period, seven states voting against it, three being in its favour, and one being divided.") Justice Story separately addressed the number of Representatives. *Id.* § 645 ("The next part of the clause relates to the total number of the house of representatives."). With respect to the number, Justice Story reported that Congress had complete discretion: "[I]t was left *completely* in [Congress's] discretion, not only to increase, but to diminish the present number [65]." *Id.* § 648 (emphasis added). He set forth the following considerations upon which Congress should base the number of members:

> The question then is, and for ever must be, in every nation, a mixed question of sound policy and discretion, with reference to its size, its population, its institutions, its local and physical condition, and all the other circumstances affecting its own interests and convenience.

Id. § 652. Justice Story also explained that the original "First Amendment," which would have severely constrained Congress's discretion to determine the number of Representatives,[8] was rejected because "[i]t was probably thought, that the whole subject was safe, where it was

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[8] That amendment would have provided: "Article the first. . . . After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons." Akhil Reed Amar, "The Bill of Rights as a Constitution," 100 *Yale L.J.* 1131, 1138 (1991).

already lodged; and that congress ought to be left free to exercise a sound discretion, according to the future exigencies of the nation, either to increase, or diminish the number of representatives." *Id.* § 673. The notion that Congress's determination as to the appropriate number of Representatives must be disregarded in deference to some unstated standard of population equality is inimical to the discretionary approach reflected in the *Commentaries*.

In sum, nothing in the constitutional history demonstrates that the Framers intended the number of Representatives to be controlled by an unarticulated standard of population equality.

D. TWO HUNDRED YEARS OF CONGRESSIONAL APPORTIONMENT HISTORY SUPPORT THE CONSTITUTIONALITY OF THE CHALLENGED PLAN.

The government explained in its opening brief that over two centuries of Congressional implementation of the apportionment provisions of the Constitution confirm the breadth of Congress's discretion to select the number of Representatives. (*See* Gov't MTD/MSJ at 28-30.) Plaintiffs' response to this argument is three-fold: (1) the apportionment plans for 1790 through 1860 are invalid precedent because they preceded adoption of the Fourteenth Amendment; (2) the apportionment plans for 1870 to 1950 are invalid precedent because the admission of Nevada necessitated large population disparities; and (3) the nation's apportionment history is irrelevant. Plaintiffs' efforts to distinguish two centuries of historical precedent are meritless.

1. *Apportionment Plans that Preceded the Fourteenth Amendment.*

Plaintiffs explain that, for purposes of determining the apportionment population, the Constitution as originally drafted counted slaves as three-fifths of a free person. (Pls.' MSJ at 30.) From this fact, Plaintiffs argue that "'[o]ne person, one-vote' was not the practice of the day" (*id.*), that it only became a constitutional principle with the ratification of the Fourteenth Amendment in 1868 (*id.* at 32), and that all apportionments preceding that date are invalid

precedent for the government's position (*id.* at 30). There are at least two problems with Plaintiffs' argument.[9]

First, the Fourteenth Amendment did not change the provision of the Constitution at issue in this case. The Fourteenth Amendment equalized the manner in which persons were counted by requiring the count to include the "whole number of persons in each State," U.S. Const., amend. XIV, § 2, rather than "free Persons" and "three fifths of all other Persons," U.S. Const., Art. I, § 2, cl. 3. The constitutional provision from which Plaintiffs purport to derive a requisite number of Representatives, however, is the requirement that Representatives be apportioned to the States "according to their respective numbers." (*See* Pls.' MSJ at 1.) With respect to this provision, the language of the Fourteenth Amendment is identical to the original language. *Compare* U.S. Const., Art. I, § 2, cl. 3, *with* U.S. Const., amend. XIV, § 2. Because the relevant language did not change, its meaning did not change. Indeed, the ratification of the identical language in the Fourteenth Amendment, in the face of eight decades of population disparities among interstate districts that could have been diminished by drastically altering the number of Representatives, confirms that the Constitution affords Congress discretion to select the number of Representatives. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

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[9] Aside from these two problems, Plaintiffs' argument also contradicts their frequent citation of constitutional and early nineteenth century sources in support of their position. On the one hand, Plaintiffs argue that the Framers intended the "one person, one vote" principle to control the number of Representatives. (*See* Pls.' MSJ at 15-17; Pls.' Opp'n at 21-28.) On the other hand, Plaintiffs argue that the principle of "one person, one vote" did not even exist until 1868. (Pls.' MSJ at 30, 32.) Plaintiffs cannot have it both ways. With respect to the total *number* of Representatives, the principle Plaintiffs urge did not control then and does not control now.

Second, the population disparities among interstate Congressional districts that followed ratification of the Fourteenth Amendment were of approximately the same magnitude as those in the preceding decades. (*See* Gov't MTD/MSJ, Ex. D at 3-6). Like the early Congresses, the post-Fourteenth Amendment Congresses did not dramatically increase the number of Representatives in order to minimize those disparities. Plaintiffs' argument that the Fourteenth Amendment created an entirely new constitutional requirement to do so is not supported by the historical record.

2. *The Admission of Nevada.*

Plaintiffs next dismiss the significance of the apportionment plans of 1870 through 1950 on the basis that Nevada was admitted to the Union in 1864 with a small population. (Pls.' MSJ at 30-31.) Plaintiffs argue that Nevada's admission is to blame for the significant disparities among interstate Congressional districts in this eighty-year period. (*See id.*)

The population disparities allegedly caused by Nevada's admission to the Union, however, could have been dramatically reduced if the 1872 and subsequent Congresses had significantly increased the number of Representatives. While Congress did pass an Act in 1872 to prohibit the future admission of new States unless they were sufficiently populous, that same Congress did not enlarge the House to reduce the disparities that Plaintiffs claim were caused by Nevada's admission. Tripling the number of Representatives in 1872 could have produced an "ideal" district of 43,561 persons and a maximum percentage deviation of less than 14 percent. (*See* Ex. E.) Instead, the 292-member plan that the 1872 Congress actually adopted produced a maximum percentage deviation of over 80 percent. (*Id.*) The admission of Nevada, and the Congressional response to it, further supports the conclusion that the current 435-member

limitation is consistent with the longstanding interpretation of the apportionment provisions of the Constitution.

3. *The Significance of History.*

Plaintiffs next discount the relevance of history altogether. (*See* Pls.' MSJ at 32.) Plaintiffs' argument ignores the Supreme Court's most recent statements emphasizing the importance of Congressional apportionment history in evaluating challenges to Congressional apportionment determinations. In *Montana*, the Supreme Court considered five decades of apportionment history relevant to its decision to uphold the apportionment method selected by Congress. 503 U.S. at 465-66 ("For a half century the results of that method have been accepted by the States and the Nation. That history supports our conclusion that Congress had ample power to enact the statutory procedure in 1941 and to apply the method of equal proportions after the 1990 census."); *see also Wisconsin*, 517 U.S. at 21 ("[W]e previously have noted . . . the importance of historical practice in this area."). Certainly two centuries of comparable historical precedent is relevant here.

Plaintiffs' disregard of historical practice also ignores the importance of the apportionment determinations made by the very early Congresses: "[E]arly congressional practice[] provides contemporaneous and weighty evidence of the Constitution's meaning." *Alden v. Maine*, 527 U.S. 706, 743-744 (1999) (quotations omitted); *see also Franklin*, 505 U.S. at 803 ("[T]he interpretations of the Constitution by the First Congress are persuasive[.]"). As such, the first reapportionment act – which resulted in a maximum percentage deviation of 64.99% (Gov't MTD/MSJ at 6) – is particularly probative evidence that the 2001

reapportionment plan – which resulted in a maximum percentage deviation of 63.38% (*id.* at 1) – is constitutional.[10]

In sum, population disparities among interstate Congressional districts of the magnitude that exist today have existed since the nation's founding. Those disparities have resulted from the distribution of a fixed number of Representatives selected by Congress within the constitutionally-prescribed range. This 220-year apportionment history supports the conclusion that is plain from the face of the Constitution – that Congress has discretion to limit the number of Representatives to 435.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court dismiss this action with prejudice.

Respectfully submitted,

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[10] Plaintiffs complain that the disparities have been "increasing over time." (Pls.' MSJ at 33.) In support of their argument, they explain that the *absolute* difference in population between the most and least populous districts has increased since 1790. (*Id.*) Comparing absolute differences, however, is a meaningless exercise unless the population in the plans being compared is the same. To determine whether the disparities have "increase[ed] over time," relative difference is the only meaningful measure.

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 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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