No. 10-291 NOV 22 2010

In The
Supreme Court of the United States

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

v.

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

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

REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Dated: November 22, 2010

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Questions Presented

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

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

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

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

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I.

This Court Has Jurisdiction

This is a direct appeal of right from the decision of a three-judge federal court under 28 U.S.C. § 1253. It raises a question of first impression; to wit, whether the principle of one-person, one-vote applies to the interstate apportionment of the United States House of Representatives. Appellants have asked this Court to enjoin the continued use of 2 U.S.C. § 2a which permanently fixes the size of the House at 435 seats.[1] There can be no doubt of the constitutional significance of the issue presented.

The government has not raised any argument which would suggest that this Court does not have jurisdiction. If the appellants lacked standing, as in *Sinkfield v. Kelly*, 531 U.S. 28 (2000) (*per curium*), then the claim of jurisdiction would fail. In the district court, the government stipulated that plaintiffs have proper standing and has not claimed otherwise here. If this Court lacked the ability to enjoin the operation of the challenged statute, as in *Norton v. Mathews*, 427 U.S. 524 (1976), then both the convening of a three-district court and direct appeal to this Court would be improper for lack of

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[1] The government's motion refers to a section of the Amended Complaint which sought injunctive relief relative to the 2010 elections. (*MDA* at 6.) Appellants withdrew those claims in the district court long before oral argument as the government acknowledged below.

jurisdiction. If the case were moot or unripe, then jurisdiction would fail. But neither these nor any other argument has been raised by the government suggesting that this Court lacks jurisdiction.

The government contends that the constitutional questions raised here are "insubstantial" but do not argue that the three-judge court was improperly convened below. A three-judge panel need not be convened under 28 U.S.C. § 2284 when the challenge to a relevant Act of Congress raises constitutional questions that are insubstantial. *Schneider v. Rusk*, 372 U.S. 224 (1963).

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 147 (1980) described the standard for determining whether a case was "insubstantial" for the purposes of convening a three-judge federal court and, consequently, direct appeal to this Court. This Court held that "constitutional claims will not lightly be found insubstantial" and "prior decisions are not sufficient to support a conclusion that certain claims are insubstantial unless those prior decisions inescapably render the claims frivolous."

This Court has never held that the principle of one-person, one-vote is inapplicable to the interstate apportionment of Congress. Rather, this Court has strongly suggested just the opposite. In *Department of Commerce v. Montana*, 503 U.S. 442, 461 (1992), this Court said:

> 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.

There are no prior decisions of this Court which make it "inescapable" that the appellants' claims are "frivolous." The government's arguments go to the merits and fall far short of the standard necessary for either dismissal or summary affirmance.

II.

The Government Continues to Assert that One-Person, One-Vote Applies Only to the States

Never once—neither in the district court nor its most recent filing in this Court—has the United States government ever admitted that voters are entitled to equal voting strength in elections for the United States House of Representatives. The government continues to claim that the discretion of Congress in fixing the size of the House is not limited by the constitutional requirement of proportional representation. Two statements by the

government reveal this contention. "Because it is beyond dispute that 435 falls within the upper and lower limits established by the text of the Constitution, their challenge fails." (*Motion to Dismiss or Affirm* [MDA] at 14). To the same effect, the government says: "Apart from the requirement that '[t]he Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative,' Art. I, § 2, Cl. 3, the text of the Constitution imposes no restrictions on Congress's authority to determine the size of the House of Representatives." (*MDA* at 10.)

The government's "upper limit" refers to the textual requirement that no district shall be smaller than 30,000 persons. The government computes a current maximum possible size of 9,380 districts. (*MDA* at 18). The "lower limit" is 50—one seat per state.

If Congress chose to create a House of 51 members, forty-nine states would have one member and California would have two. Yet, if New York voters challenged this system of apportionment, their case would fail because it would be "beyond dispute" that a House of 51 "falls within the upper and lower limits established by the text of the Constitution."

The size of the House has been frozen in place for 100 years—with only one temporary modest exception. The argument raised by the government leads to the necessary conclusion that if the size of the House had been frozen in place at 105 seats since the 1792 reapportionment, it would be equally valid.

If the House had 105 seats after the 2000 Census, twenty-six states would have a single representative. These states would range in size from Wyoming with 495,304 residents to Kentucky with 4,049,431 residents—a ratio of 8.7 to 1. Yet, the government contends that any challenge to such a system necessarily fails because 105 falls between 50 and 9,380.

In addition to the upper and lower limits, the Constitution also requires "that Representatives shall be apportioned among the several States according to their respective numbers." Amend. 14, Sec. 2. In *Franklin v. Massachusetts,* 505 U.S. 788, 804 (1992) this Court held that decisions impacting interstate apportionment must be "consistent with the constitutional language *and the constitutional goal of equal representation.*" (Emphasis added.) The government cannot escape the seminal proclamation in *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964) that "equal representation for equal numbers of people [is] the fundamental goal of the House."

It is impossible to reconcile the government's theory with statements of the Founders including James Wilson's contention that "equal numbers of people ought to have an equal [number] of representatives" and that "[e]very citizen of one State possesses the same rights with the citizens of another." 1 Records of the Federal Convention of 1787 179, 183 (June 9, 1787) (Max Farrand ed., 1911).

Moreover, why would it matter to a voter in Mississippi that her vote was equal to others in

Mississippi if she was significantly unequal compared to voters in Iowa or Rhode Island? The right of the people is to equal representation *in the House.*

This Court's long-established precedent makes it plain that the principle of one-person, one-vote applies to every level of government—including the national government. *See, e.g., Avery v. Midland County*, 390 U.S. 474 (1968). Since the federal courts have required that all levels of state government must meticulously apportion all legislative chambers according to the principle of "one-person, one-vote" it is simply unthinkable that the federal government can expect to prevail on a claim that this principle does not apply to its own apportionment decisions. No one claims that the same degree of mathematical precision is applicable. And the government even admits at one point the existence of a constitutional principle of proportional representation. (*MDA* at 18). However, the government never explains how proportional representation is constitutionally required but yet it is inapplicable regarding the choice of the size of the House.

It is simply illogical to contend that the principle of proportional representation does not impact the size of the House. A House of 50 meets the other textual requirements but it fails any measure of proportionality requirement.

In *Wesberry*, this Court broadly proclaimed that "[A]s 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. It further concluded that the theory of representation for the House requires that "every man's vote should count alike." *Id.* at 11. Additionally the Court held that "the principle solemnly embodied in the Great Compromise [requires] equal representation in the House for equal numbers of people." *Id.* at 14. Careful reading of *Wesberry* makes it plain that the Court's view of the Great Compromise mandates both interstate and intrastate equality—as nearly as is practicable.

In *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) this Court has noted that although "precise mathematical equality" may be impossible, that is no excuse for failing to achieve "population equality as nearly as is practicable."

III.

The Government's Approach to History Ignores Nearly Fifty Years of Judicial History

The appellants and the government have both used history to buttress their respective arguments. There is much to be said on both sides. The government's historical arguments really go to the merits of the case and do not support a decision that this case should be dismissed or summarily affirmed.

The government contends that the practice of interstate apportionment inequality is so long-standing that this case should be dismissed or summarily affirmed. Appellants respectfully suggest that even if the government's view of the historical practice was unassailable, this would not be a basis

for summary disposition in light of the contrary requirements of the text of the Constitution and the decisions of this Court.

Moreover, the history is not nearly as clear as the government would lead this Court to believe. This is particularly true of the views of the Framers. Both James Madison and James Wilson contended that the text of the Constitution required that the size of the House be adjusted "from time to time" as required by the growth of the nation. See, J. Madison, *The Federalist No. 55*, in *The Federalist*, 372-378 (Jacob E. Cooke ed. 1961). Since the text of the Constitution did not permanently fix a size for the House, Wilson said, "[a] power, in *some measure discretionary*, was therefore, necessarily given to the legislature, to direct that number from time to time." *(MDA* at 12-13.) (Emphasis added). This quotation confirms two positions advanced by the appellants. First, Congress does not possess absolute discretion regarding the size of the House; just *some measure* of discretion. Second, the House would need to be augmented from time to time to match the growth of the nation. When the House is frozen in place for 100 years while the nation triples in population, the fundamental goal of the House—equal representation—necessarily suffers.

At the end of the day, however, regardless of what is revealed by both parties' parsing of history, it is the text of the Constitution that ultimately controls. This is especially true when this Court has already reviewed the relevant history and constitutional text in *Wesberry* to conclude that

equal representation was "the fundamental goal" of the House.

While the government indeed has some support for its position in historical practice, the appellants find support for their position in the text of the Constitution, which requires that "Representatives must be apportioned among the several states according to their respective numbers," and a long-line of decisions of this Court interpreting this phrase to demand equal representation at all levels of government.

While there is a real and substantial clash between the parties, at this point it is clear this case deserves the full attention of this Court. The government seeks a dramatic exception from the general principle that equal voting strength is the right of every American. If such an exception is to be granted, it should be on the basis of plenary review by this Court and not by summary affirmance of a three-judge district court panel.

IV.

There is No Evidence Before This Court that A Larger House of Representatives is Impracticable

This Court has an established protocol for the review of apportionment challenges described most fully in *Karcher v. Daggett*, 462 U.S. 725, 730-731 (1983). Challengers must demonstrate that "population differences among districts could have been reduced or eliminated altogether." Then the burden shifts to the government to prove "that each

significant variance between districts was necessary to achieve some legitimate goal."

Appellants have proven that the levels of inequality are enormous. The disparity level is 9100% greater than the levels declared unconstitutional in *Karcher*. The appellants have also demonstrated that it is possible to create other apportionment plans that dramatically decrease the levels of inequality experienced by voters like themselves. That is all that is required to shift the burden to the government. The government must prove that any remaining disparity between voters is "necessary to achieve some legitimate goal." *Id.* at 731.

Because the government has rejected *in toto* the applicability of one-person, one-vote cases, it made no effort to meet this burden. It now merely offers conclusory assertions which are little more than sound-bites from another era.

For example, the government relies on the minority views in the House of Representatives regarding the failure of Congress to reapportion itself after the 1920 Census. From these minority views the government contends that the reason the reapportionment failed was because of the dispute over the workability of a larger House. (*MDA* at 3-4). The complete story reveals a completely different lesson. The majority of the House voted to increase its size to 483 seats. It was the Senate, and not the House minority, that defeated this increase. The Senate simply refused to allow rural states to lose relative power to more heavily populated states.

Michael Balinski and H. Peyton Young, *Fair Representation: Meeting the Ideal of One Man, One Vote*, Yale Univ. Press (New Haven 1982), p. 51.

More importantly, what was "practicable" in the 1920s or even the 1960s is no evidence of what is practicable today. The speed of communications and travel are among the more notable of the changes that have arisen in the intervening decades. The differences are not merely in degree; changes in kind have arisen. We live in a different age.

We also live in a different nation. In 1920, the population of the United States was 106,021,537. In 1960, it was 179,323,175. In 2000, it was 281,421,906. The population will exceed 300 million when the 2010 census is finalized. A House that was adequate for a nation of 106 million is not necessarily adequate for a nation of 300 million.

The government's arguments imply that Congress assesses the size of the House in some form of ongoing supervisory review. Yet, the most recent "evidence" offered to this Court are hearings held in 1961. This was three years prior to *Wesberry v. Sanders*. Congress has never seriously considered the impact of its constitutional obligation to require equality in the interstate apportionment of the House since the voters were first recognized as having a judicially-enforceable right to equal voting strength.

The government's argument that the level of disparity is relatively constant fails to recognize a significant factor that is obvious when the focus

shifts to actual individuals and their rights. While the percentages of disparity may have been relatively constant over time, the use of percentages masks the dramatic increase of the actual numbers of persons who are treated unequally. In 1792, the maximum disparity was 22,380 persons. In 2000, it was 410,012. In 2010, it will rise to at least 453,747. And the disparities will increase over time as the nation continues to grow. Just as the government never focuses on the rights of voters, it prefers to think of voters as percentages rather than as a growing number of real individuals who are being treated unequally.

Although the legal principle of equal representation is unchanging since it arises from the constitutional text, the assessment of what is practicable will change over time—especially when the period of time is 100 years. The relief requested by appellants will put the question of the practicability directly in front of the body with both the current knowledge and the constitutional duty to make a proper determination. Congress should be required to assess the situation in light of all of the modern facts and in light of its constitutional duty to maximize equality as nearly as is practicable. This approach is consistent with the standard reapportionment practice of this Court to allow the legislative body the first opportunity to remedy the inequality. *McDaniel v. Sanchez*, 452 U.S. 130, 150, fn. 30 (1981).

Congress should be enjoined from proceeding automatically to reapportion the House with 435 seats. Instead, it must first determine how it can

achieve greater equality within the bounds of practicability.

The right of voters to equal treatment has languished long enough.

Conclusion

For the foregoing reasons, the motion of the government to dismiss or affirm should be denied and this Court should note probable jurisdiction. Appellants again request expedited review in light of the pending census results.

Respectfully submitted,

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Dated: November 22, 2010