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.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs are voters in five states who claim that the Constitution requires the House of Representatives to expand in size to either 932 or 1,761 Representatives based on the results of the 2000 decennial census. Plaintiffs argue that the 2001 Congressional apportionment plan created interstate Congressional districts that vary in population, and that this variance violates the constitutional requirement that Representatives be apportioned to States "according to their respective numbers."

The same premise has been rejected by the only federal court that has considered it. Subject to an explicit minimum and maximum, the Constitution grants Congress discretion to fix the size of the House of Representatives. Plaintiffs' argument to the contrary is premised on a line of decisions requiring the States to achieve population equality, to the extent practicable, in drawing the Congressional districts within their States. The Supreme Court has already held this standard inapplicable to Congress's apportionment of Representatives among the States. The Court explained, and has since reiterated, that the same standard of population equality cannot apply to Congressional apportionment because the Constitution itself makes population equality

among interstate Congressional districts virtually impossible. Furthermore, over two hundred years of implementation of the apportionment provisions of the Constitution confirm the broad discretion the Constitution vests in Congress to fix the size of the House of Representatives, irrespective of population disparities that result from the number selected by Congress.

Plaintiffs' challenge is also barred by the six-year statute of limitations applicable to this action and/or the equitable doctrine of laches. Plaintiffs challenge the apportionment plan that followed the 2000 decennial census, which the President transmitted to Congress in January 2001. Instead of filing this lawsuit in 2001, however, Plaintiffs waited over eight years to challenge the plan. In those eight years, four Congressional election cycles have passed. The November 2010 mid-term elections are the only elections that remain before the apportionment plan Plaintiffs challenge will be superseded as a result of the next decennial census. Even if this lawsuit could be resolved by this Court and the Supreme Court prior to November 2010, the tumult that would accompany the rapid addition of many hundreds of Congressional districts before that time, and after numerous state candidate filing deadlines and primaries will have passed, strongly supports application of the doctrine of laches.

For these reasons, this Court should dismiss this lawsuit.

CONSTITUTIONAL & STATUTORY BACKGROUND

A. RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

Article I, Section 2, Clause 3 of the Constitution, as amended by the Fourteenth Amendment, provides that:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . . 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. Furthermore, an "actual Enumeration" of persons in the States must be made every ten years, "in such Manner as [the Congress] shall by Law direct." *Id.*

Pursuant to these provisions, Congress enacted the current Census Act, which directs the Secretary of Commerce to conduct a census, as of April 1 of 1980, and every tenth year thereafter, "in such form and content as he may determine." 13 U.S.C. § 141(a). The tabulations required for apportionment "shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b). Under the current apportionment law, the President must then transmit to Congress, during the first week of its next Session, "a statement showing the whole number of persons in each State," as ascertained by the census. 2 U.S.C. § 2a(a).

The President's statement must also show "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." *Id.* The apportionment law further provides that "[e]ach State shall be entitled . . . to the number of Representatives shown in the [President's] statement required by [2 U.S.C. § 2a(a)]," and it directs the Clerk of the House of Representatives, within 15 days after receipt of the President's statement, "to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." *Id.* § 2a(b).

B. CONSTITUTIONAL HISTORY

Even apart from the "great compromise" of the Constitutional Convention – which resulted in equal representation of the States in the Senate and representation of the States according to their respective populations in the House of Representatives – the composition of the House of Representatives was a subject of significant discussion during the Convention.

On July 5, 1787, Elbridge Gerry introduced a resolution that would have fixed the number of Representatives at "one Member for every forty thousand inhabitants," provided "[t]hat each State not containing that number shall be allowed one Member." 1 *The Records of the Federal Convention of 1787* 524 (Farrand ed. 1911) (hereafter "Farrand"). In the debate of this resolution, concern was expressed that "the Ratio of Representation proposed could not be safely fixed, since in a century & a half our computed increase of population would carry the number of representatives to an enormous excess." *Id.* at 541. Others objected that some measure of each State's wealth, in addition to or instead of its inhabitants, ought to be the measure of apportionment. *Id.* at 533-34, 541-42.

Ultimately a committee was formed (the Morris Committee) to consider the composition of the House of Representatives. *Id.* at 542. The Morris Committee recommended that the initial House consist of 56 members, with the distribution among the several States specifically set forth, and that Congress be accorded the power "to augment the number of representatives . . . upon the principles of . . . wealth and number of inhabitants." *Id.* at 557-58. In making this recommendation, the Morris Committee noted two objections to the ratio proposed by Gerry:

> The Ist. was that the Representation would soon be too numerous: the 2d. that the Westn. States who may have a different interest, might if admitted on that principal by degrees, out-vote the Atlantic. Both these objections are removed. The number will be small in the first instance and may be continued so, and the Atlantic States having ye. Govt. in their own hands, may take care of their own interest, by dealing out the right of Representation in safe proportions to the Western States.

Id. at 559-60.

The Morris Committee's proposal was then submitted to a grand committee of thirteen (the King Committee). *Id.* at 562. The King Committee proposed an initial composition of 65 members, again with the specific distribution set forth. *Id.* at 563. In debating this proposal,

James Madison moved to double the number of representatives because the proposed number "would not possess enough of the confidence of the people, and wd. be too sparsely taken from the people, to bring with them all the local information which would be frequently wanted." *Id.* at 568-69. The opposition pointed out the added expense and the dangers of excessive number reducing the body's efficiency. *Id.* at 569. Others suggested that a maximum number of Representatives might be fixed, thereby removing any danger of excess. *Id.* at 569-70. Madison's motion to increase the size was nonetheless defeated. *Id.* at 570. The Convention approved a resolution adopting a 65-member initial allocation of Representatives and further specifying that that number shall be augmented from time to time according to the "principle of . . . inhabitants." 2 Farrand at 13-14.

The resolution was then referred to a Committee of Detail, which maintained the initial allocation of 65 members but adopted a ratio of "one for every forty thousand" thereafter. *Id.* at 178. Madison objected that fixing a permanent ratio would eventually result in an "excessive" number of Representatives. *Id.* at 221. He moved to amend the provision to add the phrase "not exceeding" before "one for every forty thousand," and that amendment was accepted. *Id.* John Dickinson moved to add a provision guaranteeing at least one Representative to every State, which was also accepted. *Id.* at 223. Hugh Williamson later proposed a motion to increase the initial number by half and to give every State at least two Representatives. *Id.* at 553-54, 612. That proposal was defeated. *Id.* at 554, 612.

On September 10, 1787, a 23-article document was referred to the Committee of Style and Arrangement. *See id.* at 565-80. Article I, section 2, clause (b) of the document that emerged from the Committee stated in relevant part that "[t]he number of representatives shall

not exceed one for every forty thousand, but each state shall have at least one representative," and it set forth the 65-member initial allocation as previously resolved. *Id.* at 591.

On September 17, 1787, the last day of the Convention, Nathaniel Gorham moved to strike "40,000" and insert in its place "30,000" as the minimum number of persons per Representative. *Id.* at 643-44. According to Madison, "[t]h[is] would not he remarked establish that as an absolute rule, but only give Congress a greater latitude which could not be thought unreasonable." *Id.* at 644. The motion carried unanimously. *Id.*

C. STATUTORY HISTORY

In the decades following the ratification of the Constitution, Congress enacted a new apportionment act after each decennial census. In those acts, Congress fixed the size of the House by selecting a number of persons to be represented by each Representative (the "ratio"), and then allocated Representatives by dividing the ratio into each State's population. Act of Apr. 14, 1792, 1 Stat. 253 (one Representative per 33,000 persons); Act of Jan. 14, 1802, 2 Stat. 128 (33,000); Act of Dec. 21, 1811, 2 Stat. 669 (35,000); Act of Mar. 7, 1822, 3 Stat. 651 (40,000); Act of May 22, 1832, 4 Stat. 516 (47,700); Act of June 25, 1842, § 1, 5 Stat. 491 (70,680). These early apportionment acts generated extended debates about how best to handle the "fractional remainders" that resulted from the division of the ratio by each State's population and that led to population disparities among interstate districts. *See generally, e.g.*, Michel L. Balinski & H. Peyton Young, *Fair Representation: Meeting the Ideal of One Man, One Vote* 10-35 (2001).

Following the 1850 census, Congress enacted legislation that fixed the size of the House of Representatives at 233 members and dictated the apportionment method to be applied following each census, thereby making each decennial reapportionment virtually self-executing.

Act of May 23, 1850, §§ 24-26, 9 Stat. 428, 432-433. Representative Samuel Vinton had introduced the bill in large part to ensure that Congressional failure to enact an apportionment law after a decennial census would not block the decennial reapportionment. Cong. Globe, 31st Cong., 1st Sess. 862-63 (1850). Because the number would be fixed, any member wishing to increase or decrease the number would bear the burden to persuade Congress that a 233-member House was either too large or too small. *Id.* at 863. After debating the appropriate number, Congress settled on 233. *Id.* at 923-30, 939-40; Act of May 23, 1850, § 24, 9 Stat. 428, 432.

The fixed size did not last. In 1852, Congress assigned an additional Representative to California, Act of July 30, 1852, § 1, 10 Stat. 25, and, in 1862, assigned an additional Representative to each of eight States, Act of Mar. 4, 1862, 12 Stat. 353. In 1872, Congress increased the size of the House to 283, Act of Feb. 2, 1872, § 1, 17 Stat. 28, and then, four months later, assigned an additional Representative to each of nine States, Act of May 30, 1872, 17 Stat. 192. After each succeeding decennial census, Congress enacted a new apportionment law that increased the size of the House to prevent any State from losing a Representative. Act of Feb. 25, 1882, § 1, 22 Stat. 5 (325 Representatives); Act of Feb. 7, 1891, § 1, 26 Stat. 735 (356 Representatives); Act of Jan. 16, 1901, § 1, 31 Stat. 733 (386 Representatives); Act of Aug. 8, 1911, § 1, 37 Stat. 13 (435 Representatives).[1]

Following the 1920 census, Congress for the first time failed to pass any apportionment legislation. Controversy had arisen over the accuracy of the 1920 census, dramatic population shifts from rural to urban areas, and the large size of the House (483 members) that would have been necessary to prevent any State from losing a seat. *See* H.R. Rep. No. 70-2010, at 3 (1929).

[1] The 1911 Act fixed the total number of Representatives at 433 but provided that additional Representatives would be allocated to Arizona and New Mexico if, as happened the next year, they were admitted to the Union. Act of Aug. 8, 1911, § 2, 37 Stat. 14.

Numerous bills were introduced and hearings held at the beginning and toward the end of the 1920s, but Congress could not reach agreement. *See* H.R. Rep. No. 66-1173 (1921); H.R. Rep. No. 67-312 (1921); H.R. Rep. No. 70-1137 (1928); H.R. Rep. No. 70-2010 (1929); S. Rep. No. 70-1446 (1929); S. Rep. No. 71-2 (1929); *Apportionment of Representatives: Hearings on H.R. 14498, 15021, 15158 and 15217 Before the House Comm. on the Census*, 66th Cong., 3d Sess. (1920-1921); *Apportionment of Representatives in Congress Amongst the Several States: Hearings on H.R. 111, 398, 413, and 3808 Before the House Comm. on the Census*, 69th Cong., 1st Sess. (1926); *Apportionment of Representatives in Congress Amongst the Several States: Hearings on H.R. 13471 Before the House Comm. on the Census*, 69th Cong., 2d Sess. (1927); *Apportionment of Representatives: Hearing on H.R. 130 Before the House Comm. on the Census*, 70th Cong., 1st Sess. (1928).

By the end of the 1920s, concern had arisen that a similar controversy could prevent reapportionment following the 1930 census. *See* H.R. Rep. No. 70-2010, at 3 (1929). Population estimates suggested that a House comprised of 535 members may have been required to preserve the membership of every State following the 1930 census. *Id.* at 4. Anticipating the controversy that would follow a proposal to increase the body to such a significant size, Congress revisited the issue of permanently fixing the size of the House. *See id.*

Congress enacted permanent apportionment legislation as part of the Census Act of 1929. Act of June 18, 1929, § 22, 46 Stat. 21, 26-27. The Act directed the President, following each decennial census, to report to Congress the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives (435) according to several alternative apportionment methods. *Id.* § 22(a). If Congress did not enact a

different apportionment law before the end of that session, each State would be entitled to the number dictated by the method that had been used in the prior apportionment. *Id.* § 22(b).

In 1961, various bills were introduced and hearings held to consider increasing the size of the House. *See Increasing the Membership of the House of Representatives and Redistricting Congressional Districts: Hearings on H.R. 841, 1178, 1183, 1998, 2531, 2704, 2718, 2739, 2768, 2770, 2783, 3012, 3176, 3414, 3725, 3804, 3890, 4068, 4609, 6431, 7355, 8075, 8498, 8616 and H. J. Res. 419 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 1-21 (1961). Reasons cited in support of an increase included the increased workload of each Representative and the increased number of persons represented by each member. *Id.* at 214. Reasons cited against an increase included a desire to maintain the orderly, deliberative nature of the body. *Id.* at 215. These attempts to increase the size of the House failed, and the number of Representatives has remained fixed at 435.[2] *See* 2 U.S.C. § 2a(a).

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In reviewing a Rule 12(b)(6) motion, "the court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quotations omitted).

[2] The number of Representatives temporarily increased to 437 following the admission of Alaska and Hawaii in 1959, but it reverted to 435 following the 1960 census. *See* Act of July 7, 1958, § 9, 72 Stat. 339, 345; Act of Mar. 18, 1959, § 8, 73 Stat. 4, 8.

In reviewing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court may consider the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* (citations omitted). Furthermore, "[w]hen a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Id.*

A party is entitled to summary judgment under Rule 56 "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court views all the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion. *Reid v. State Farm Mutual Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). To avoid summary judgment, the non-moving party "may not rely merely on allegations or denials in its own pleading" but must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE UNTIMELY.

Plaintiffs challenge the constitutionality of the 1929 Act that fixed the size of the House of Representatives at 435, as implemented by the January 2001 apportionment plan that followed the 2000 decennial census. (*See* Compl. ¶ 1.) Instead of challenging that plan when it issued,

however, Plaintiffs waited over eight years, and until the eve of the 2010 decennial census, to bring their lawsuit. Their claims are barred by the statute of limitations and/or the equitable doctrine of laches.

A. PLAINTIFFS' CLAIMS ARE BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS AND SUBJECT TO DISMISSAL UNDER RULE 12(b)(1).

With one exception not applicable here, "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." 28 U.S.C. § 2401(a). Under established principles of sovereign immunity, the United States is immune from suit unless it consents, and the terms of its consent circumscribe this Court's jurisdiction. *United States v. Dalm*, 494 U.S. 596, 608 (1990). The six-year statute of limitations set forth at 28 U.S.C. § 2401(a) "is one such term of consent, and failure to sue the United States within the limitations period is not merely a waivable defense. It operates to deprive federal courts of jurisdiction." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); *see also W. Va. Highlands Conservency v. Johnson*, 540 F. Supp. 2d 125, 142-43 (D.D.C. 2008) (28 U.S.C. § 2401(a) is jurisdictional). Because the statute of limitations is jurisdictional, Plaintiffs bear the burden of proving the timeliness of their claims. *Figueroa v. United States*, 57 Fed. Cl. 488, 493 (Fed. Cl. 2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006).

On January 4, 2001, President Clinton transmitted a statement to the Speaker of the U.S. House of Representatives that provided "the apportionment population of each State as of April 1, 2000," and "the number of Representatives to which each State would be entitled" under 2 U.S.C. § 2a(a). (Ex. A, Decl. of Louisa F. Miller ("Miller Decl."), Attach. 2.) According to that statement, the States in which the five Plaintiffs reside were entitled to the following numbers of Representatives: Delaware (1), Mississippi (4), Montana (1), South Dakota (1), Utah (3). (*Id.*)

The Clerk of the House then informed each State, pursuant to 2 U.S.C. § 2a(b), that it was entitled to the number of Representatives reflected in the President's statement. (Compl. ¶ 15.) The number of Representatives to which each State is entitled has not changed since January 4, 2001. *See* 2 U.S.C. § 2a(a) (authorizing reapportionment only once every fifth Congress).

For purposes of the statute of limitations, then, this cause of action began to accrue on January 4, 2001. The six-year statute of limitations set forth at 28 U.S.C. § 2401(a) therefore expired on January 4, 2007, nearly three years before Plaintiffs filed this lawsuit. Their claims are barred.

B. PLAINTIFFS' CLAIMS ARE BARRED UNDER THE EQUITABLE DOCTRINE OF LACHES AND SUBJECT TO DISMISSAL UNDER RULE 12(b)(6).

Laches may be invoked to bar litigation if the defendant has shown "a delay in asserting a right or claim," "that the delay was not excusable," and "that there was undue prejudice to the party against whom the claim is asserted." *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir. 1980). "The defense is not restricted to cases in which only private law claims are asserted; it is also applicable to complaints based on constitutional claims[.]" *Id.* at 480. "Whether laches bars an action in a given case depends upon the circumstances of that case and is a question primarily addressed to the discretion of the trial court." *Id.* at 478.[3]

Courts routinely hold that belated challenges to redistricting and reapportionment plans are equitably barred. *White v. Daniel*, 909 F.2d 99, 102-04 (4th Cir. 1990); *Simkins v. Gressette*, 631 F.2d 287, 295-96 (4th Cir. 1980); *Md. Citizens for a Representative Gov't v. Governor of Md.*, 429 F.2d 606, 608-12 (4th Cir. 1970); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 907-09 (D. Ariz. 2005); *Fouts v. Harris*, 88

[3] "[T]he defense[] of … laches may be asserted by motion to dismiss for failure to state a claim – provided that the complaint shows affirmatively that the claim is barred." *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958).

F. Supp. 2d 1351, 1353-55 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *Maxwell v. Foster*, No. Civ.A.98-1378, 1999 WL 33507675 (W.D. La. Nov. 24, 1999); *MacGovern v. Connolly*, 637 F. Supp. 111, 115-16 (D. Mass. 1986). Indeed, although courts generally have discretion to apply the doctrine of laches, at least one federal Court of Appeals has held that a district court abused its discretion when it failed to apply the doctrine of laches to a belated challenge to a county redistricting plan. *White*, 909 F.2d at 104-05.

The factual circumstances of *Maryland Citizens for a Representative Government v. Governor of Maryland*, 429 F.2d at 608-12, are nearly identical in all relevant respects to those presented here. The plaintiffs in *Maryland Citizens* argued that the 1965 apportionment of the Maryland General Assembly was unconstitutional. *Id.* at 607-08. They did not file a lawsuit challenging that plan, however, until thirteen weeks prior to the candidate filing deadline for the 1970 elections. *Id.* at 609. The court explained that, even if plaintiffs' lawsuit were successful, neither the court nor the state legislature could have developed a new apportionment plan until the eve of the candidate filing deadline for the 1970 elections. *Id.* at 610. "Such a result would necessarily impose great disruption upon potential candidates, the electorate and the elective process." *Id.* The court also noted the "large potential for disruption in reapportioning with undue frequency," explaining that a reapportionment would again be required following the 1970 decennial census. *Id.* The Fourth Circuit therefore affirmed the district court's conclusion that injunctive relief was unavailable, explaining that the plaintiffs could file a lawsuit following the upcoming elections if the perceived deficiencies remained. *Id.* at 611-12.

As discussed above, the apportionment plan challenged in this case was effected in January 2001, when President Clinton transmitted a statement to the Speaker of the U.S. House of Representatives that provided "the apportionment population of each State as of April 1,

2000," and "the number of Representatives to which each State would be entitled" under 2 U.S.C. § 2a(a). (Ex. A (Miller Decl.), Attach. 2.) The public transmittal from the President to the Speaker contained all of the information upon which Plaintiffs now base their Complaint – the apportionment population of the nation, the apportionment population of each State, and the number of Representatives apportioned to each State. (*See id.*)

Although the reapportionment of the House every ten years is a "highly visible project which could not have escaped public attention," *Save Our Wetlands, Inc. (SOWL) v. U.S. Army Corps of Eng'rs*, 549 F.2d 1021, 1027 (5th Cir. 1977) (applying doctrine of laches), Plaintiffs waited more than eight years to challenge that reapportionment. They allowed four Congressional election cycles to pass and then allowed nearly a full year of the fifth and final election cycle to pass before they filed this lawsuit. The 2010 mid-term Congressional election process is now underway. Significant election deadlines in some States have already passed. The State of Illinois, for example, will hold the primary for its nineteen Congressional districts on February 2, 2010. (Ex. B, Illinois State Board of Elections, Election and Campaign Finance Calendar: 2010, at 16.) The filing period for Illinois Congressional major party candidates opened on October 26, 2009, and closed on November 2, 2009, less than seven weeks after Plaintiffs filed this lawsuit. (*Id.* at 3.) The proximity of the filing of this lawsuit to relevant candidate filing deadlines is closer even than in *Maryland Citizens*, where the Court of Appeals held that a lawsuit filed only thirteen weeks before the candidate filing deadline was barred. 429 F.2d at 609; *see also Ariz. Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 909 (lawsuit filed "just weeks" before critical election deadlines was barred); *McGovern*, 637 F. Supp. at 115 (lawsuit filed less than one month before nominations were due was barred). Election deadlines

in other States are also imminent. (*See, e.g.*, Ex. C, Texas Secretary of State, 2010 Primary Election Calendar, at 4 (noting candidate filing deadline of January 4, 2010).)[4]

Furthermore, the disruption to the political process that would result from the remedy Plaintiffs seek is many times greater than that which would have resulted in other redistricting and reapportionment cases in which laches has been applied. A victory for the plaintiffs in *White v. Daniel*, for example, would have required redistricting five board districts in one county. *See* 909 F.2d at 100. A victory for Plaintiffs here would require the creation of up to 1,326 Congressional districts in 50 States, the reopening of candidate filing deadlines in some or all States, and, likely, new primaries in some or all States. "[I]t does not take a fertile imagination to picture the administrative havoc a midstream reapportionment would wreak." *MacGovern*, 637 F. Supp. at 115.

Finally, Plaintiffs filed this lawsuit less than seven months before the 2010 decennial census date, which will lead to another nationwide reapportionment and redistricting in every State. *See* 2 U.S.C. § 2a; 13 U.S.C. § 141(a). A decision in Plaintiffs' favor would therefore result in two reapportionments in the span of one to two years. "[T]wo 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*, 909 F.2d at 104; *see also Fouts*, 88 F. Supp. 2d at 1354 (accepting defendants' argument that "requiring redistricting now, before the 2000 census[,] will result in two

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[4] This Court may take judicial notice of the state election schedules cited in this paragraph, which were obtained from websites maintained by the Illinois State Board of Elections, http://www.elections.state.il.us/DocDisplay.aspx?Doc=downloads/electioninformation/pdf/2010calendar.pdf&Title=2010 election and campaign finance calendar, and the Texas Secretary of State, http://www.sos.state.tx.us/elections/laws/2010primary.shtml. *See Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (taking judicial notice of document published on government website).

redistrictings within a two year period, with resulting voter confusion, instability, dislocation, and financial and logistical burden on the state"). *Cf. Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system[.]"). "The timing of this action with respect to the normal decennial reapportionment [therefore] weighs heavily against granting relief." *MacGovern*, 637 F. Supp. at 115.

This lawsuit could have been filed in January 2001. If Plaintiffs had done so, their apportionment plan could have applied to the elections of 2002, 2004, 2006, 2008, and 2010 without the level of disruption to the electoral process that would be occasioned by the remedy Plaintiffs now urge. "When the massive disruption to the political process of the [nation] is weighed against the harm to plaintiffs of suffering through one more election based on an allegedly invalid [apportionment] scheme, equity requires that [this Court] deny relief." *Id.* at 116. Because Plaintiffs sat on their claims through four election cycles, through nearly a year of the fifth and final election cycle for which the 2001 apportionment plan will be relevant, and until the eve of the next decennial census, Plaintiffs' claims are barred by the equitable doctrine of laches.[5]

[5] Although some courts have declined to apply laches in the context of challenges to redistricting or reapportionment plans, those cases are distinguishable. In *Jeffers v. Clinton*, for example, the court relied heavily on the fact that the lawsuit was filed a full 14 months before the candidate filing deadline and only two years after the Supreme Court had issued a "pole star" decision in the area. 730 F. Supp. 196, 201-03 (E.D. Ark. 1989), *aff'd sub nom. Clinton v. Jeffers*, 498 U.S. 1019 (1991). The proximity of the complaint to candidate filing deadlines is much closer in this case (7 weeks), and the Supreme Court has issued no recent "pole star" decision governing the issues presented here.

II. PLAINTIFFS HAVE NEITHER PLED A CLAIM WITH RESPECT TO THE 2011 CONGRESSIONAL REAPPORTIONMENT, NOR DEMONSTRATED THAT THEY WOULD HAVE STANDING TO ASSERT SUCH A CLAIM.

To the extent Plaintiffs also seek to challenge the Congressional apportionment plan that will follow the 2010 decennial census and control the 2012 through 2020 Congressional elections, they have failed to plead a single factual allegation either in support of the merits of such a claim or in support of their standing to assert such a claim.

As discussed above, to survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (quotations omitted). Furthermore, to survive a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "the burden is on the plaintiff to allege facts sufficient to support standing." *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 607 (5th Cir. 2004). To establish standing, a plaintiff must demonstrate, *inter alia*, that he has suffered an "injury in fact" – "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs have failed to allege such facts here. Plaintiffs' factual allegations relate solely to the 2001 Congressional apportionment plan, which was based on the results of the 2000 decennial census and controls the Congressional elections of 2002 through 2010. (*See* Compl. ¶¶ 21-45.) Following the 2010 decennial census, a new apportionment plan will control the next five Congressional elections. *See* 2 U.S.C. § 2a. The population disparities among interstate districts, which are the basis of Plaintiffs' Complaint, will change in the upcoming reapportionment. Districts that are more populous than the "ideal" district in the current apportionment plan may be less populous than the ideal district in the 2011 reapportionment.

(*See, e.g.*, Ex. D at 1 (Montana's district(s) 24.25% *less populous* than ideal following 1980 reapportionment but 40.38% *more populous* than ideal following 1990 reapportionment).[6]) At the very least, the extent to which every States' districts are more or less populous than the ideal district will certainly change – in some cases, significantly – in the upcoming reapportionment. (*See, e.g., id.* (South Dakota's district 32.92% more populous than ideal following 1980 reapportionment, 22.28% more populous than ideal following 1990 reapportionment, and 16.99% more populous than ideal following 2000 reapportionment).)

Although Plaintiffs purport to seek relief related to the 2011 apportionment plan (*see* Compl. at 12 ¶ 6), they have failed to plead a single factual allegation to support such a claim. They have not, for example, alleged that the districts in which they reside will be more populous than the ideal district following the 2011 reapportionment. (*See generally id.*) As such, they have failed to allege that the 2011 apportionment plan will injure them. They have therefore failed to meet their burden to establish that they have standing to pursue this claim, *see Lujan*, 504 U.S. at 560, and have failed to allege facts that, if true, would state a claim on the merits, *see Iqbal*, 129 S. Ct. at 1949. Any claim relating to the 2011 apportionment, to the extent Plaintiffs intend to assert one, is subject to dismissal under Rule 12(b)(1) and Rule 12(b)(6).

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[6] For purposes of this brief, we calculate population disparities in the same manner as Plaintiffs. Plaintiffs first calculated the population of the "ideal" district by dividing the nation's total apportionment population by the number of Congressional districts. (*See* Compl. ¶ 21.) They then calculated the percent deviation from the "ideal" district for each State's Congressional district(s) as follows:

$$\%\ \text{Deviation from Ideal} = \frac{\text{Ideal District Size} - \text{District Size for [State]}}{\text{Ideal District Size}}$$

(*See id.* ¶¶ 21-24.) Exhibit D provides each State's percent deviation from ideal for every decennial reapportionment from 1790 to 2000.

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR RELIEF.[7]

Plaintiffs' argument that the Constitution requires a dramatic expansion of the House of Representatives is inconsistent with the text of the Constitution, the case law, the background of the constitutional apportionment provisions, and the history of their implementation.

A. CONGRESS HAS VERY BROAD DISCRETION TO FIX THE SIZE OF THE HOUSE OF REPRESENTATIVES.

The constitutional provision Plaintiffs challenge – the requirement that Representatives be apportioned to the States "according to their respective numbers" – imposes three limitations on Congress's apportionment discretion:

> 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.

U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 447-48 (1992). The 2001 Congressional apportionment plan is consistent with these requirements. That plan creates no district smaller than 30,000 inhabitants, no district crosses State lines, every State has at least one Representative, and the remaining 385 Representatives are apportioned by population according to the mathematical method of "equal proportions." (*See* Ex. A (Miller Decl.) ¶ 5 & Attach. 1 at 1.) With respect to the size of the House of Representatives, the Constitution requires no more.

In the only similar challenge to the size of the House of Representatives, the U.S. District Court for the Southern District of New York readily dismissed the plaintiff's argument that the

[7] While this case is subject to dismissal under Rule 12(b)(6) for failure to state a claim, Defendants have supported their argument with materials beyond the pleadings. (*See* Exs. A & D.) If the Court relies upon these materials, Defendants respectfully request that the Court instead grant judgment in Defendants' favor pursuant to Rule 56.

House of Representatives must consist of roughly 7,000 members in order to ensure population equality among interstate Congressional districts:

> The inequality of which [plaintiff] complains inheres in our constitutional structure. So long as the Constitution requires apportionment of seats in the House of Representatives among the *states*, inequalities of voting power of the kind mentioned above are inevitable in view of population differences; the question is a matter of degree. [Plaintiff] argues that this Court should order the Congress to ameliorate inequality of voting power within our constitutional framework by creating more seats in the national legislature. He cites no decision, and this Court is aware of no decision, that has ordered such a remedy. The 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) (emphasis in original), *aff'd*, 742 F.2d 1437 (2d Cir. 1984). Plaintiffs can point to no decision to the contrary.

Supreme Court case law strongly supports the result reached in *Wendelken*. In *United States Department of Commerce v. Montana*, the State of Montana challenged the 1991 Congressional apportionment plan on the basis that the mathematical apportionment method utilized by Congress created unnecessary population disparities among interstate Congressional districts. 503 U.S. at 444-46. Montana argued that the mathematical method it advocated ("harmonic mean") would have achieved a more equivalent distribution of the 435 Congressional seats than the method Congress has utilized since 1941 ("equal proportions"). *Id.* at 460.

The Court rejected Montana's argument. *Id.* at 461-66. Consistent with the district court's reasoning in *Wendelken*, the Supreme Court explained that constraints imposed by the Constitution itself make the goal of equal representation among Congressional districts in different States "illusory":

> The constitutional guarantee of a minimum of one Representative for each State inexorably compels a significant departure from the ideal. In Alaska, Vermont, and Wyoming, where the statewide districts are less populous than the ideal district, every vote is more valuable than the national average. Moreover, the 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.

> Accordingly, although "common sense" supports a test requiring "a good-faith effort to achieve precise mathematical equality" *within* each State, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.

Id. at 463 (emphasis in original, citations omitted). The Court upheld the 1990 Congressional apportionment plan despite the inequalities of which the plaintiffs complained, noting the broad discretion the Constitution confers upon Congress to apportion Representatives. *See id.* at 464; *see also Wisconsin v. City of New York*, 517 U.S. 1, 15 (1996) (Congress has "wide discretion over apportionment decisions and the conduct of the census.").

Plaintiffs' argument that a requirement of population equality dictates the minimum size of the House has far less force even than Montana's unsuccessful argument that it dictates an apportionment method. James Madison said that "[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* James Madison, *The Federalist No. 55, in The Federalist*, 372, 373 (Jacob E. Cooke ed., 1961). Even more so than Congress's selection of an apportionment method, a mathematical formula cannot dictate the solution to the complex "political problem" that is the size of the House; to the contrary, it has long been recognized that the size of the House is a determination that will be based on a variety of other considerations:

> Nothing can be more fallacious than to found our political calculations on arithmetical principles. 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 proportionably a better depositary. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that in 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. In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob.

Id. at 374; *see also* James Madison, *The Federalist No. 58*, *in The Federalist*, 391, 396 (Jacob E. Cooke ed., 1961) ("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.") (emphasis in original).

Consistent with these principles, 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. U.S. Const. art. I, § 2, cl. 3; *Whelan v. Cuomo*, 415 F. Supp. 251, 256 (E.D.N.Y. 1976) ("Congress was given considerable flexibility in determining the actual number of representatives so long as the total did not exceed one representative for every 30,000 inhabitants."); *see also Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842) (that Constitution grants apportionment power to Congress follows "irresistibly" from express delegation of power to conduct census). Applying a standard of population equality to fix a minimum number of Representatives several times larger than the number set by Congress would eviscerate the discretion the Constitution vests in Congress to consider these various complexities and to fix an appropriate number within the range expressly set forth in the Constitution.

Furthermore, applying a standard of population equality to the determination of the number of Representatives does not lend itself to any reasonable limitation. Based on the results of each decennial census, a mathematically-determined number of Representatives would maximize population equality among interstate Congressional districts. Plaintiffs suggest that a 1,761-member House would provide a sufficient level of equivalence. (*See* Compl. ¶¶ 38, 41.)

If equality among interstate districts overrides Congress's judgment that 435 Representatives is an appropriate number, however, there is no basis for selecting 1,761 over a larger number that would achieve even greater population equality. (*Compare* Ex. D at 1 (9,356-member House could be arranged to result in maximum deviation of 4.81%) *with* Compl. ¶ 39 (Plaintiffs' 1,761-member House results in maximum deviation of 9.92%[8]).) By selecting 1,761, Plaintiffs appear to have made a policy determination that a 1,761-member House is large enough, despite the population disparities that would persist in such a plan and that could be remedied by expanding the House beyond that number. The Constitution, however, does not vest discretion in Plaintiffs or this Court to make that policy determination. It vests that discretion in Congress.

After fourteen decades of debate regarding the size of the House of Representatives, and after repeated expansion of the House in those fourteen decades, Congress determined that the membership of the House should be fixed at 435 following every decennial census. It fixed the size in part to ensure that political deadlock did not again obstruct a decennial reapportionment, *see Franklin v. Massachusetts*, 505 U.S. 788, 791-92 (1992); S. Rep. No. 71-2, at 2-3 (1929) ("The need for legislation of this type is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment . . . . As a result, great American constituencies have been robbed of their rightful share of representation[.]"), and in part because of the concern that the House was becoming too large to be effective and would continue to expand if the number were not presumptively fixed prior to each decennial census return, *see* H.R. Rep. No. 70-2010, at 4 (1929) (noting "the amount of opposition that might naturally rise up against a proposal that would increase the membership

[8] The maximum deviation is the sum of the percent deviation from ideal for the smallest Congressional district and the percent deviation from ideal for the largest Congressional district. For the 2001 apportionment plan, the maximum deviation – the disparity of which Plaintiffs complain here – was 63.38%. (Compl. ¶¶ 24-30.)

from 435 to 535"); S. Rep. No. 70-1446, at 9 (1929) ("The committee agrees that the limitation [435] is sustained by every consideration of effectual parliamentary government."). Although hearings were held in the early 1960s to assess whether the number should be increased, *see Hearings on H.R. 841, 1178, 1183, 1998, 2531, 2704, 2718, 2739, 2768, 2770, 2783, 3012, 3176, 3414, 3725, 3804, 3890, 4068, 4609, 6431, 7355, 8075, 8498, 8616 and H. J. Res. 419 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 87th Cong. 1-21 (1961), Congress retained the 435-member House. Because the Constitution does not require otherwise, Congress's good-faith determination that the House of Representatives should consist of 435 members is entitled to substantial deference.

In sum, by fixing the number of Representatives at 435, apportioning at least one Representative to each State, and apportioning the remaining Representatives according to a method the Supreme Court has held to be consistent with the Constitution, *Montana*, 503 U.S. at 463-64, Congress effected a constitutionally permissible apportionment plan in 2001.

B. THE CASES UPON WHICH PLAINTIFFS RELY ARE INAPPOSITE.

Plaintiffs incorrectly cite *Karcher v. Daggett*, 462 U.S. 725 (1983), and related cases for the proposition that those decisions impose limitations upon Congressional apportionment determinations. (Compl. ¶ 17.)

Karcher is an application of the intrastate redistricting standard set forth in *Wesberry v. Sanders*, 376 U.S. 1 (1964). At issue in *Wesberry* was the constitutional requirement that Representatives be chosen "by the People of the several States." *Id.* at 7-8. In consideration of that provision, the Supreme Court imposed a requirement that the *States* achieve population equality, as nearly as practicable, when drawing the Congressional districts *within* their States. *Id.*

The Supreme Court, however, has already declined to extend the *Wesberry* standard to the separate constitutional requirement – the one at issue here – governing *Congress's* apportionment of Representatives *among* the States. *Montana*, 503 U.S. at 464. In *Montana*, the Court explained that "[r]espect for a coordinate branch of Government raises special concerns not present in our prior cases." *Id.* at 459. It further noted that, while population equality is an achievable goal for intrastate redistricting, the Constitution makes the goal of population equality among interstate districts "illusory." *Id.* at 463-64 ("[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."). As such, the Court held that "[t]he constitutional framework that generated the need for compromise in the apportionment process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders." *Id.* at 464. The standard of population equality set forth in *Wesberry* as applicable to intrastate redistricting therefore does not extend to Congressional apportionment determinations. *See id.*; *see also Wisconsin*, 517 U.S. at 18 (noting inapplicability of *Wesberry* to Congressional apportionment determinations and holding *Wesberry* likewise inapplicable to Congressional census determinations).

Plaintiffs' argument that a standard of population equality overrides Congress's judgment as to the appropriate size of the House of Representatives is unsupported by any case law.

C. THE BACKGROUND OF THE CONSTITUTION'S APPORTIONMENT PROVISIONS AND THE HISTORY OF THEIR IMPLEMENTATION CONFIRM THE VALIDITY OF THE CURRENT APPORTIONMENT PLAN.

The breadth of Congress's discretion to fix the size of the House of Representatives is confirmed by the background of the apportionment provisions of Article I, by the actions of the

first several Congresses, by the Fourteenth Amendment, and by two hundred years of experience in the implementation of the Constitution's apportionment provisions.

1. *Constitutional Background*

The Framers' debate about the size of the initial House – and whether and how to fix the size of future Congresses – reflected the tension between those who believed the body must be numerous enough to ensure effective representation and those who believed the body must not be too numerous to be efficient. *Compare* 1 Farrand at 568 (expressing concern that number "would not possess enough of the confidence of the people, and wd. be too sparsely taken from the people, to bring with them all the local information which would be frequently wanted") *with id.* at 569 ("Mr. Elsworth urged the objection of expence, & that the greater the number, the more slowly would the business proceed[.]"). Nothing in these debates suggests that the Framers intended the size of the House to be fixed at the number that would achieve a particular level of population equality among interstate districts.

To the contrary, the Framers were aware that the representational scheme they were creating would lead to disparities among interstate Congressional districts. In considering whether direct taxes should be based on the number of Representatives allocated to each State, rather than on the number of inhabitants in each State, concerns were raised that basing taxation on the number of Representatives would result in inaccuracies in taxation: "Even if [Representatives] were proportioned as nearly as possible to [inhabitants], it would be a very inaccurate rule [for taxation] – A State might have one Representative only, that had inhabitants enough for *1 ½ or more*, if fractions could be applied[.]" 2 Farrand at 358 (emphasis added); *see also id.* at 350 ("The number of Reps. did not admit of a proportion exact enough for a rule of taxation."). The Framers' recognition that the representational scheme they were creating meant

that States with one Representative may have enough inhabitants for "1 ½ or more" is inconsistent with Plaintiffs' argument that Montana, which has one Representative but enough inhabitants for 1.4 (*see* Compl. ¶¶ 23, 29), is unconstitutionally underrepresented.

Furthermore, the Framers themselves selected a smaller initial House over the potential for more equivalent interstate districts. Near the end of the debates, several proposals were considered to increase substantially the initial allocation of 65 Representatives. 1 Farrand at 568-69 (proposal to double the number); 2 Farrand at 553-54, 612 (proposal to increase the number by half). A significant increase in the number of Representatives would, of course, have allowed for a finer division of Representatives among the States according to their estimated populations. The Framers rejected those amendments, at least in part because certain members viewed the resulting number as inefficient and expensive. 1 Farrand at 569-70. They adopted the 65-member initial apportionment despite the population disparities among interstate districts that flowed from that plan.[9] (*See* Ex. D at 6 (reflecting a maximum deviation of approximately 71% in the Framers' apportionment of Representatives).)

The Framers understood that a similar process of deliberation and compromise would characterize future Congressional determinations regarding the size of the House. *See, e.g.*, James Madison, *The Federalist No. 58, in The Federalist*, 391, 394 (Jacob E. Cooke ed., 1961) ("The large States . . . will have nothing to do but to make reapportionments and augmentations mutually conditions of each other; and the senators from all the most growing States will be bound to contend for the latter, by the interest which their States will feel in the former. . . . *[A]fter securing a sufficient number for the purposes of safety, of local information, and of*

[9] The 65-member initial apportionment was based on population estimates rather than an actual enumeration. As a result, the population disparities in the constitutional apportionment (*see* Ex. D at 6), in contrast to those for every other apportionment, are only estimates.

diffusive sympathy with the whole society, they will counteract their own views by every addition to their representatives.") (emphasis in original). *Cf. Montana*, 503 U.S. at 464 (recognizing that same "spirit of compromise" that motivated original allocation of Representatives characterizes Congressional apportionment determinations today).

Plaintiffs argue that, when fixing the number of Representatives, Congress may not engage in the same process of deliberation and compromise as the Framers. They argue that Congress must instead accept a House that is double or quadruple the size that resulted from its deliberation and compromise, all in the name of an arbitrarily-selected standard of population equality that even the Framers did not achieve in the initial allocation. Their argument is mandated by neither the letter nor the spirit of the Constitution.

2. *Congressional Implementation of Apportionment Provisions*

"[A] critical tool of constitutional interpretation" involves examining the understanding of constitutional provisions in the period shortly following the ratification. *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008). In particular, "the interpretations of the Constitution by the First Congress are persuasive." *Franklin*, 505 U.S. at 803. Furthermore, in the context of challenges to Congressional apportionment plans, a long history of acceptance by the States and the nation of the challenged apportionment procedures supports a conclusion that Congress had ample power to enact those procedures. *Montana*, 503 U.S. at 465-66 ("For a half century the results of that [apportionment] 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.").

Congress's implementation of the apportionment provisions of the Constitution shortly after, and in the two centuries since, the ratification of the Constitution supports the conclusion

that the 2001 apportionment plan is lawful. Population disparities of similar magnitude to those of which Plaintiffs complain now have existed since the nation's founding. Indeed, the apportionment plan that followed the first decennial census created a maximum deviation larger than that created by the 2001 apportionment plan. In this early apportionment plan, Delaware's district was 61.28% more populous than the ideal district, and New York's districts were 3.71% less populous than the ideal district. (*See* Ex. D at 6.) The maximum deviation in this first reapportionment was therefore 64.99% (*see id.*), a number greater than the 63.38% disparity of which Plaintiffs now complain (Compl. ¶ 30). This early Congress's adoption of a number that created population disparities among interstate districts greater than those that exist today supports the conclusion that the current plan is permissible. *Cf. Franklin*, 505 U.S. at 803 ("[T]he interpretations of the Constitution by the First Congress are persuasive.").

The apportionment plans following nearly every decennial census since that time include comparable – and in many cases, greater – population disparities among interstate Congressional districts. (*See* Ex. D at 1-6.) For over two centuries, Congress's broad discretion to fix the size of the House at the number it deems appropriate, despite population disparities among interstate districts that inevitably flow from that number, "ha[s] been accepted by the States and the nation." *Montana*, 503 U.S. at 465-66. That 220-year history further supports the conclusion that the 2001 apportionment plan is consistent with the Constitution. *Id.* at 466.

3. *The Fourteenth Amendment*

The Fourteenth Amendment was ratified in 1868. Cong. Globe, 40th Cong., 2nd Sess. 4295-96 (1968). The relevant language of Section 2 of the Amendment reiterates verbatim the relevant language of Article I, Section 2, Clause 3 of the Constitution:

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

U.S. Const. amend. XIV, § 2 (emphasis added to relevant language).

In the eight decennial reapportionments that preceded the adoption of the Fourteenth Amendment, the maximum deviations were, in many cases, more significant than the maximum deviation in the current plan. (*Compare* Ex. D at 4-6 (64.99% (1790); 82.05% (1800); 15.44% (1810); 81.22% (1820); 55.67% (1830); 49.32% (1840); 64.17% (1850); 67.87% (1860) *with id.* at 1 (63.38% (2000)).) In light of this eight-decade apportionment history, the incorporation of the same apportionment language into the Fourteenth Amendment in 1868 is a ratification of the flexibility this language was understood to confer upon Congress to fix the size of the House 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.").

* * *

The size of the House of Representatives is an issue that has been subject to substantial debate in our nation's 220-year history. Because the Constitution vests very broad discretion in Congress to fix the size of the House, however, this debate is one that must occur in Congress, not this Court. In the challenged apportionment plan, no district is smaller than 30,000 inhabitants, no district crosses State lines, every State has been apportioned at least one Representative, and the remaining 385 Representatives have been apportioned by population according to a method approved by the Supreme Court. The Constitution requires no more.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss this action with prejudice.

Respectfully submitted,

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Dated: December 21, 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2009, 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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