In the United States District Court
For the Northern District of Mississippi

John Tyler Clemons, *et al*.	)	
	)	
Plaintiffs,	)	
-v-	)	Case No.
	)	3:09-CV-00104-WAP-SAA
	)	
United States Department of Commerce; *et al*.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case presents the following central issue: Does the language of Art. I, Sec. 2 and Amend. 14, § 2 which requires that "Representatives shall be apportioned among the states according to their respective numbers" require that Congress adhere to the principle of one-person, one-vote when apportioning the House?

Nine voters from the five most under-represented states in the nation have filed this historic constitutional challenge to the statute (2 U.S.C. § 2a) which freezes the size of the United States House of Representatives at 435 seats. By freezing the size of the House, Congress necessarily creates extreme interstate malapportionment. Voters in Montana are "worth" only 54.6% of voters in Wyoming. The malapportionment that results from this statute is 9100% greater than the congressional reapportionment that was declared unconstitutional in *Karcher v. Daggett*, 462 U.S. 725 (1983).

Other than the extreme nature of the malapportionment, the only thing that distinguishes this case from *Karcher* (and many other similar decisions) is that Congress,

rather than a state legislature, is responsible for the unequal treatment of voters. The federal government contends that it need not comply with the constitutional standard of one-person, one-vote. States have been held to an incredibly rigorous standard of equality when apportioning that state's seats in the U.S. House. A deviation of less than 1% was ruled unconstitutional in *Karcher*. But, the federal government claims that its apportionment decisions are simply exempt from the requirement of voter equality. In other words, the federal government claims that states must strain gnats while it may swallow camels.

Plaintiffs demonstrate that there is serious malapportionment between the states. They also demonstrate that this inequality may be substantially remedied by increasing the size of the House. Plaintiffs do not ask this Court to order a particular size of the House. Plaintiffs only seek a declaration that the current inequality is unconstitutional and ask this Court to allow Congress the first opportunity to remedy this error.

The Supreme Court has required that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. Perfection is not required. "As near as practicable" is the standard. If the House were increased by just six seats, a clear improvement would be made in the degree of inequality. To achieve standards of equality that align with the Court's precedent, the size of the House will have to be increased more substantially. Plaintiffs have submitted two plans that demonstrate that substantial improvements are possible. It is practicable to have greater equality.

STANDARD OF REVIEW

Plaintiffs have filed their motion for summary judgment pursuant to Fed. Rule of Civ. Pro. 56 which allows such a judgment "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." See also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Each plaintiff has filed an affidavit demonstrating that he or she is a duly registered and qualified voter in the respective states. Affidavits from two qualified experts, together with a substantial number of exhibits, have been filed to demonstrate that the current apportionment plan is dramatically unequal. These affidavits also establish that increasing the size of the House (that is, decreasing the size of congressional districts) will materially remediate the level of inequality.

All of the real facts in this case are the numbers from the official census of the United States. There are no disputes about those numbers. There is no basis for reasonable dispute about the expert calculations which are based on those numbers. This case clearly is ready for summary judgment on the motion of both parties. The disputes are entirely legal, not factual.

ARGUMENT

I

THE INTERSTATE APPORTIONMENT OF THE U.S. HOUSE RESULTS IN EXTREME LEVELS OF INEQUALITY

The 2000 census fixed the population of the United States, for apportionment purposes, at 281,424,177. Dividing this number by 435 districts yields a target of 646,952 persons per congressional district for an ideal district. Twenty-six states are "over-represented"—that is, the average district size for that state is *less* than the size of the ideal district. Eight states are significantly over-represented—that is, the deviation of the state's population from the ideal district is 5% or greater. In ascending order, these

eight states are Vermont (1 district) with 5.7% over-representation; New Mexico (3 districts) with 6.0% over-representation; Hawaii (2 districts) with 6.0% over-representation; West Virginia (3 districts) with 6.6% over-representation; Nebraska (3 districts) with 11.6% over-representation; Rhode Island (2 districts) with 18.9% over-representation; and Wyoming (1 district) with 23.4% over-representation.[1]

Twenty-four states are "under-represented"—that is the average district size for that state is *greater* than the size of the ideal district. Eight states are significantly under-represented. In ascending order these eight states are Connecticut (5 districts) with 5.4% under-representation; Oregon (5 districts) with 6.0% under-representation; Oklahoma (5 districts) with 6.9% under-representation; Mississippi (4 districts) with 10.2% under-representation; Utah (3 districts) with 15.2% under-representation; South Dakota (1 district) with 17.0% under-representation; Delaware (1 district) with 21.4% under-representation and Montana (1 district) with 39.9% under-representation.[2]

The population deviation (per district) for the five most under-represented states, compared to the *ideal* district was: Montana, (258,364); Delaware, (138,116); South Dakota, (109,922) Utah, (98,619); and Mississippi, (66,280).[3] The population deviation for the five most under-represented states, compared to the *smallest* district (Wyoming) was: Montana, (410,012), Delaware, (289,764); South Dakota, (261,570); Utah, (250,267); Mississippi, and (217,928).[4]

The "maximum percentage deviation" (adding the absolute percentage deviations of most under-represented and over-represented districts) under the current

[1] Brace, Ex. 9; Ladewig Ex. 3.
[2] *Id.*
[3] Ladewig, Ex. 3.
[4] Ladewig, Aff. p. 5. para. 19.

apportionment plan is 63.38%. The "maximum population deviation" (adding the absolute population deviations of the most under-represented and over-represented districts) is 410,012 persons.[5]

The eight most over-represented states have a combined total of 20 congressional seats for 11,655,688 residents. The seven most under-represented states have a combined total of 20 congressional seats for 14,424,261 residents. Even though both groups of states get exactly 20 seats in Congress, the seven most under-represented states have a combined total of 2,768,573 more residents than the eight most over-represented states. The average congressional district size for the eight most over-represented states is 582,784. The average size of districts in the seven most under-represented states is 721,213.[6] Thus, the voters in Oregon, Oklahoma, Mississippi, Utah, South Dakota, Delaware, and Montana are "worth" only 80.8% of the voters in Vermont, New Mexico, Hawaii, West Virginia, Iowa, Nebraska, Rhode Island, and Wyoming.[7]

The Supreme Court's most common method of comparison in one-person, one-vote cases is to contrast the two districts that are most over-represented and under-represented. It takes 183 voters in Montana to equal 100 voters in Wyoming.[8] Thus, Montana voters are "worth" only 54.6% of voters in Wyoming.[9] This disparity is so extreme that it brings back the distasteful episode in American history where slaves were counted as three-fifths (60%) of a person for apportionment purposes.

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[5] Ladewig, Ex. 3.
[6] Calculations based on Ladewig, Ex. 3.
[7] *Id.* All comparisons of voting strength of this kind are calculated by dividing the population of the smaller state by the larger state.
[8] Ladewig Aff., p. 5., para. 21.
[9] Calculation from same data as fn. 8.

There are 217,928 more persons in *each* of Mississippi's four congressional districts compared to Wyoming.[10] This means the portion of Mississippi's total population that is "under-valued" is 869,192 residents (217,928 per district times four.) Thus, Mississippi voters are "worth" 69.4% as much as voters in Wyoming. The "worth" of the other three states compared to Wyoming is: Utah (66.2%), South Dakota (65.4%), and Delaware (62.9%).[11] It takes the following number of voters in each of the five most under-represented states to equal 100 voters in Wyoming: Montana (183), Delaware (159), South Dakota (153), Utah (151), and Mississippi (144).[12] This problem with under-representation would not evaporate if Wyoming was not a part of the calculus. Montana's voters are "worth" 58.0% as much as Rhode Island voters and 63.2% of Nebraska voters.[13]

Iowa is the 30th most populous state in the country with 2,931,923 residents. Mississippi is the 31st most populous state in with 2,852,927 residents.[14] Iowa has five seats in Congress while Mississippi has four. Mississippi voters are "worth" 82.2% as much as the voters in Iowa.[15]

A.

THE INEQUALITY WILL REMAIN AFTER THE 2010 CENSUS

Kimball Brace, an apportionment expert[16] who advises the Bureau of the Census and numerous state legislatures on apportionment matters, has calculated projected

[10] Ladewig Aff., p. 5. para. 19.
[11] Calculation from same data as fn. 10.
[12] Ladewig Aff., p. 5, para. 21.
[13] Calculation from Ladewig, Ex. 3.
[14] Brace, Ex. 9.
[15] Calculation from *Id.*
[16] See, Brace Affidavit for his lengthy qualifications as an apportionment expert.

population figures for 2010 using a variety of methods.[17] First, there is a "long-term" trend model that reflects the overall change that has occurred so far this decade; that is from 2000 to 2009, and projects the trend forward nine months to correspond to census day on April 1, 2010. Second, there are four "mid-term" trend models that use the population change that has occurred from 2004 to 2009, from 2005 to 2009, from 2006 to 2009, and from 2007 to 2009. Finally, a "short-term" trend model incorporates the change that has occurred in just the past year, from 2008 to 2009, and carries that rate of change forward to 2010.[18]

These various models produce remarkably similar results. First, in every projection, (including the Bureau of the Census 2009 official projections), the most over-represented state will now be Rhode Island rather than Wyoming. The range of the maximum percentage deviation from each of these six methods ranges from 64.0% to 64.47%.[19] The maximum population deviation ranges from 453,747 to 457,483. For comparative purposes, these same maximum deviation figures for the 2000 census were 63.38% or 410,012 persons.[20]

Utah is projected to get another congressional seat after the 2010 census.[21] Thus, it will no longer be an under-represented state. The other four states in this litigation will remain as under-represented states. The following table includes projections for each of the four states, where we give the current (2000 census) under-representation percentage, the lowest projected under-representation and the highest projected under-representation.

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[17] The Supreme Court has relied on such scientific projections in this very context. In *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 330 (1999), the Court relied on expert projections about impact of the use of sampling techniques in the 2000 census and the impact upon interstate congressional apportionment.
[18] Brace Exhibits 10-15.
[19] *Id.*
[20] Brace, Ex. 9.
[21] Brace, Ex. 10.

State	Current	Lowest projected	Highest projected
Montana	39.9%	38.26%	38.52%
Delaware	21.4%	25.80%	26.07%
South Dakota	17.0%	15.15%	15.43%
Mississippi	10.2%	4.27%	4.52% [22]

The history of interstate apportionment demonstrates that the number of voters impacted by unequal allocation of representatives has steadily risen over time and is now starting to dramatically escalate. Dr. Ladewig's affidavit (and exhibits) reveal the maximum population deviation for all apportionments since 1790. He includes projected apportionment deviations for 2010, 2020, and 2030 based on Bureau of the Census official projections.

Census year	Maximum Deviation
1790	22,380
1800	28,423
1810	5,615
1820	34,163
1830	27,674
1840	35,186
1850	59,694
1860	83,221
1870	104,487
1880	132,061
1890	160,338
1900	234,607
1910	147,734
1930	309,952
1940	248,984
1950	235,865
1960	258,466
1970	320,114
1980	296,833
1990	347,680
2000	410,012
2010 (projected)	448,712
2020 (projected)	491,787
2030 (projected)	629,962[23]

[22] Brace, Ex. 9-15.
[23] Ladewig, Aff. p. 13-14, para. 45.

B.
INCREASING THE SIZE OF THE HOUSE WILL DRAMATICALLY REDUCE THE INEQUALITY

While there are a wide variety of methods to calculate and portray the measurements of inequality between voters, in making our projections for increasing the size of Congress we will rely on the two methods the Supreme Court most commonly employs—maximum deviation as a percentage and maximum deviation in total population. The current numbers for these calculations from the 2000 census are a maximum deviation of 63.38% and 410,012 persons.[24] All of our projections are based on the 2000 census to show what the inequality levels would have looked like with different sizes of Congress. We are not asking this Court to order Congress to impose a new apportion of a new fixed size of the House. Rather, plaintiffs are requesting this Court to declare the current law that freezes the size of the House (2 U.S.C. § 2a) as unconstitutional and to allow Congress an opportunity to remediate the problem according to the constitutional standards this Court determines to be required by Art. I, § 2 and the 14th Amendment.

According to calculations made by apportionment expert, Dr. Jeffrey Ladewig of the University of Connecticut, it is certain that increasing the size of the House (which is to say decreasing the size of congressional districts) would provide multiple opportunities to significantly reduce the problem of inequality and under-representation.

For example, by adding just *six* seats to the House of Representatives the problem with under-representation would decrease appreciably. If the House had 441 seats

[24] Ladewig, Ex. 3.

instead of 435 seats, the percentage deviation would improve by 11.29 percentage points (from 63.38% down to 52.09%) and the total population deviation would improve by 77,602 (from 410,012 to 332,410).[25] However, even these with these improvements, the malapportionment would still be materially higher than levels ruled unconstitutional by the Supreme Court in congressional apportionment cases.

Dr. Ladewig has calculated the size of the House necessary to reach various targets in diminishing the degree of under-representation and unequal voting strength. For each of the examples that follow, the number of seats in the House is the *smallest* size that would achieve each of the targets. The following tables include the "deviation target", the size of the House, and the actual deviation which would be produced by the given example.[26]

Target	Size of House [27]	Actual Max. Population Deviation
Current	435	410,012
Below 400,000	441	332,410
Below 300,000	523	270,200
Below 250,000	652	219,886
Below 200,000	658	190,359
Below 150,000	806	144,882
Below 100,000	932	76,667
Below 50,000	1405	49,484
Below 20,000	1740	16,884

Target	Size of House	Actual Max. % Deviation
Current	435	63.38%
Below 60%	441	52.09%
Below 50%	529	49.87%
Below 40%	913	33.17%
Below 30%	932	25.39%
Below 20%	1664	17.55%
Below 15%	1704	14.57%
Below 10%	1760	9.91%[28]

[25] Compare Ladewig Ex. 3 (Apportionment of 435) with Ladewig Ex. 12, p. 4 (Apportionment of 441).
[26] Ladewig. Aff., p. 7, para. 25.
[27] See, Ladewig, Ex. 12 for a detailed statement of the deviation levels for each permutation of the size of the House of Representatives. One page gives the figures for each "size of House."
[28] Ladewig, Aff, p. 7. at para. 26.

Plaintiffs' amended complaint presents two alternative plans for decreasing the problem of voter inequality. Plan A calls for a House of 932 seats.[29] Plan B originally called for a House of 1761 seats. Dr. Ladewig improved the plaintiffs' calculations and showed that a House of 1760 seats would actually produce slightly better results.[30] Each of these plans was chosen because they were the smallest size of House that would reach certain milestones in reducing the levels of deviation based on the census of 2000.

Plan A (932 seats) is the smallest size of the House of Representatives that drops the maximum population deviation to a number under 100,000 persons. Plan A's maximum population deviation is 76,667. Plan A is also the smallest size of the House of Representatives that would achieve a maximum percentage deviation under 30%. Its maximum percentage deviation is 25.39%.[31]

Plan B (now 1760 seats)[32] is the smallest size of the House of Representatives that drops the maximum percentage deviation below 10%. This is a very significant milestone. The Supreme Court has allowed state legislatures the discretion to create state legislative apportionment plans that are up to a 10% maximum percentage deviation. See, e.g., *Connor v. Finch*, 431 U.S. 407, 418 (1977). Plaintiffs respectfully suggest that this clearly would satisfy the constitutional standards for one-person, one-vote in the context of interstate apportionment. We have supplied the Court with other alternatives to allow the Court to see the range of options for various disparity levels, but we do not go higher than 1760 because we are confident that the Court would not require a more

[29] Ladewig, Ex. 5.
[30] Ladewig Aff., p. 8, para. 27.
[31] Ladewig Aff., p. 8, para. 28.
[32] Ladewig, Ex. 6.

rigorous level of maximum percentage deviation than the 10% figure the Supreme Court has authorized for the states when they are apportioning their own state legislatures. Plan B would have a maximum population deviation of just 15,580.[33]

Plaintiffs are not asking this Court to impose a specific apportionment plan; rather to declare that the current statute that imposes a fixed number of seats results in an unconstitutional level of voter inequality and to allow Congress an opportunity to remediate the problem. Congress will have choices in how this task can be accomplished. For example, if Congress decides to eliminate non-citizens (including illegal aliens) from the apportionment calculations, the number of seats required to reach a particular standard of equality may well be able to be achieved with a smaller House.

Apportionment expert Kimball Brace calculated one possible scenario to demonstrate this possibility. Using the projections of population for the 2010 census, he has made two calculations for districts of 300,000 persons. Using the normal method of calculating all residents (citizens and non-citizens), a House with districts of 300,000 persons would create a House of 1028 seats. This maximum percentage deviation for such a plan would be 29.98%.[34] If only citizens are counted, districts of 300,000 would produce a House of 940 seats. The maximum population deviation for such a plan would be 23.41%.[35]

We do not request that the Court order non-citizens to be excluded from the calculations. We view this as a matter for the discretion of Congress.[36] This example is

[33] Ladewig Aff, p. 8, para. 29.
[34] Brace, Ex. 16.
[35] Brace, Ex. 17.
[36] The state of Hawaii was allowed to use registered voters for its state apportionment plans in *Burns v. Richardson*, 384 U.S. 73 (1966). In *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969), the Court also discussed, but reserved decision, on the exclusion of non-voters from apportionment plans.

given just to highlight the fact that Congress will have to make choices in how it will implement the principle of one-person, one-vote and that the nature of those choices could well impact the size of the House of Representatives.

II

THE RIGHT TO AN EQUALLY WEIGHTED VOTE IS A FUNDAMENTAL CONSTITUTIONAL RIGHT

The Supreme Court has repeatedly stated that the right to vote is "fundamental." *Northwest Austin Municipal Utility District No. 1 v. Holder*, ___U.S.___, 174 L. Ed. 2d 140, 149 (2009); *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, (1979)"); *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) ([Citizens have a] "strong interest in exercising the 'fundamental political right' to vote. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)").

The Court has also repeatedly echoed the theme that "one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore,* 531 U.S. 98, 104 (2000). "It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)." *Bush v. Gore,* 531 U.S. at 105.

The principle that "each person's vote [should] be given equal weight" has been applied by the Supreme Court in elections for President, (*Bush v. Gore, supra*); Congress, *Wesberry v. Sanders,* 376 U.S. 1 (1964); state legislatures, *Reynolds v. Sims*, 377 U.S. 533 (1964); and local governments; *Avery v. Midland County*, 390 U.S. 474 (1968). As we have demonstrated in our reply brief to the government's motion to dismiss, it cannot

be doubted that the principle of one-person, one-vote applies to interstate apportionment decisions by Congress. This requirement cannot be doubted in light of the explicit language of both Art. I, § 2, and the 14th Amendment which requires that "Representatives shall be apportioned *among* the several States *according to their respective numbers.*" It is also plain on the face of the Supreme Court's decisions which have interpreted these constitutional texts. *See, e.g. Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

> We hold that, construed in its historical context, the command of Art. I § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.

There are many constitutional cases where the rights of the citizens are pitted against the interests of the government. While the rights of the voters in this case may not be perfectly aligned with the interests of politicians who wish to retain their personal power, the Supreme Court has identified the relevant interest of the *government* in this context—and it is fully in line with the interests of the voters. "Since '**equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives**,' *Wesberry v. Sanders, supra,* at 18, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969) (Emphasis added).

It is true that *Kirkpatrick* dealt with a state's apportionment of its seats in the U.S. House. But the bold declaration that "equal representation for equal numbers of people is the fundamental goal for the House of Representatives" makes no sense if the only meaning is intrastate equality. How is it possible for anyone to claim that this "fundamental goal of the House" is being achieved when, compared to a congressional

district in Wyoming, a Mississippi congressional district has 217,928 more persons per district? And the other four states are even worse—Utah (250,267), South Dakota (261,570), Delaware (289,764), and Montana (410,012)—all on a per-district comparison.[37] This is not what the Framers intended when they created the House of Representatives.

A.

THE FOUNDERS INTENDED VOTERS TO HAVE EQUALITY IN THE HOUSE

While we will not repeat the full argument on this point from our brief in response to the government's motion, it is important to review the record of the Constitutional Convention to highlight the significance of the principle of proportional representation in the crafting of our nation's founding document. The government's brief also undertook its own review of the historical record. We respectfully suggest that the government brief principally relied on random comments made in the course of the political dialog; it rarely focused on the actual decisions made in the process of constructing the Constitution.

For example, it is quite true that Gouvenor Morris advanced the position urged by the federal government in this present litigation. He argued for giving the legislature virtually unfettered discretion in the apportionment of the House. (1 *Records of the Federal Convention of 1787* at 571 (M. Farrand ed. 1911). However, a substitute from a committee report recommended that a periodic census be required and that "the Legislature shall alter or augment the representation accordingly." (*Id.* at 575). The

[37] Ladewig Aff., p. 8, para. 19.

census was created to fulfill the constitutional duty to achieve proportional representation.

George Mason argued that the revision in apportionment should be done "according to some permanent and precise standard" which was "essential to fair representation." *Id.* at 578. Mason said, "From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it." *Id.* Both Hugh Williamson of North Carolina and Edmund Randolph of Virginia argued in favor of a mandatory method of calculating and changing the apportionment. Randolph considered it "inadmissible" for a "larger & more populous district of America should have less representation, than a smaller & less popular district." *Id.* at 579-80. Failure to abide by this principle, Randolph continued, would result in an "injustice of the Govt. [which] will shake it to its foundations." *Id.*

James Wilson reminded the delegates to the Convention that "Waters of Bitterness have flowed from unequal Representation." James Hutson (ed.), *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (Yale University Press 1987) p. 133. Charles Pickney, who was a delegate at the Convention described the apportionment decision to his fellow South Carolinians at that state's ratification convention:

> After much anxious discussion, —for had the Convention separated without determining upon a plan, it would have been on this point, —a compromise was effected, by which it was determined that the first branch be so chosen as to represent in due proportion the people of the Union; that the Senate would be the representatives of the states, where each should have an equal weight.

3 Farrand at 249.

Arguing for a population-based theory of representation, Madison proclaimed that "Representation was an expedient by which the meeting of the people themselves was rendered unnecessary; and that representatives ought therefore to bear a proportion to the votes which their constituents if convened, would respectively have." 2 Farrand at 8.

The reason the Framers required a census to be taken was to fulfill the goal of the constitutional text that representatives be "apportioned among the several states according to their respective numbers." The power of Congress to regulate elections for Congress found in Art. I, § 4 was for a similar purpose. In *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970), the Court said: "In the ratifying conventions speakers 'argued that the power given Congress in Art. I, § 4, was meant to be used to vindicate the people's right to equality of representation in the House,' *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964)." With this power, comes the solemn and binding obligation to create an apportionment plan that vindicates the people's right to equality of voting strength—as nearly as is practicable.

III

THE FEDERAL GOVERNMENT'S CLAIM FOR AN EXEMPTION FROM OBEDIENCE TO THE CONSTITUTION, UNDERMINES THE AUTHORITY OF THE FEDERAL COURTS

The moral authority of the federal courts to impose the dictates of the federal Constitution upon state elections is severely undermined by the federal government's contention that the federal government has no duty to guarantee reasonable equality for voters in the apportionment of the House of Representatives. In the very context at issue here—compliance with one-person, one-vote in congressional apportionments—the Supreme Court declared: "[T]o abandon unnecessarily a clear and oft-confirmed

constitutional interpretation would impair our authority in other cases…" *Karcher v. Daggett*, 462 U.S. 725, 733 (1983).

This is especially true in light of the Court's constitutional order that the States follow the principle of one-person, one-vote in the apportionment of both houses of the state legislature. *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964). *Lucas* involved a constitutional challenge to a Colorado voter initiative which provided for proportional representation in the state House while providing for a different theory in the state Senate.

Justice Tom Clark dissented from the imposition of the one-person, one-vote scheme on the Colorado Senate.

> Finally, I cannot agree to the arbitrary application of the "one man, one vote" principle for both houses of a State Legislature. In my view, if one house is fairly apportioned by population (as is admitted here) then the people should have some latitude in providing, on a rational basis, for representation in the other house. The Court seems to approve the federal arrangement of two Senators from each State on the ground that it was a compromise reached by the framers of our Constitution and is a part of the fabric of our national charter. But what the Court overlooks is that Colorado, by an overwhelming vote, has likewise written the organization of its legislative body into its Constitution, —and our dual federalism requires that we give it recognition.

377 U.S. at 742-743.

Justice Clark appealed the nature of the federal system. Only the U.S. House of Representatives must be apportioned on the basis of one-person, one-vote. The U.S. Senate is apportioned by States instead of by voters. He argued that Colorado should have had the latitude to do the same thing.

Justice Stewart also dissented noting that:

> In *Wesberry v. Sanders* the Court held that Article I of the Constitution (which ordained that members of the United States Senate shall represent grossly disparate constituencies in terms of numbers, U.S. Const., Art. I, § 3, cl. 1; see

> U.S. Const., Amend. XVII) *ordained that members of the United States House of Representatives shall represent constituencies as nearly as practicable of equal size in terms of numbers.* U.S. Const., Art. I, § 2.

377 U.S. at 745, fn. 3. (Emphasis added.)

Think of the moral outrage that Justices Clark and Stewart would have been able to muster if the argument had been presented that, in addition to the Senate, Congress was under no obligation to apportion the House according to the principle of equality of population. It is not idle speculation to suggest that the Court may well have lacked the votes to reach its conclusion in *Lucas* if the federal government filed a brief in *Lucas* arguing that Congress is under no obligation to apportion the House under the one-person, one-vote principle.

The Supreme Court has long proceeded upon the clear understanding that the House was to have districts substantially equal in size. If this premise is removed, every decision from *Reynolds* on is undermined. Moreover, the Great Compromise which gave us the political basis for the Constitution itself is simply erased.

IV

PLAINTIFFS' CLAIM SATISFIES THE ELEMENTS REQUIRED FOR SUCCESSFUL ONE-PERSON, ONE-VOTE CHALLENGES

The standards for Congressional apportionment challenges were most recently described in *Karcher v. Daggett*, 462 U.S. 725, 730 (1983):

> Article I, § 2, establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "as nearly as is practicable." See *id.*, at 7-8, 18. As we explained further in *Kirkpatrick v. Preisler*:

> "[The] 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." 394 U.S., at 530-531.
>
> Article I, § 2, therefore, "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id*., at 531. *Accord*, *White v. Weiser*, 412 U.S., at 790.

In an effort to achieve equality "as nearly as practicable," several criteria have been identified:

1. Does the current apportionment deviate from absolute equality?
2. Has the government made a good faith effort to achieve absolute equality?
3. If such efforts have been made and variances still exist, has the government justified the variance no matter how small?
4. Is the population variance "limited"?
5. If so, is the variance "unavoidable" in spite of a good-faith effort to achieve absolute equality, or is there justification shown by the government for these "limited population variances"?

We address each of these criteria in turn.

1. Does the current apportionment deviate from absolute equality?

We turn to a brief review of the cases where the Supreme Court has found congressional apportionment schemes to violate the rule of one-person, one-vote. These cases clearly reveal that the disparities that are present here are vastly greater than those previously held to be unconstitutional.

After *Wesberry*, the leading case is *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) which presented a challenge to the apportionment of Missouri's congressional districts. Missouri's pre-*Wesberry* congressional districts were held unconstitutional in earlier litigation. The district court gave the Missouri legislature time to respond to its decision with a new apportionment plan. It was a subsequent plan that was before the Supreme

Court in *Kirkpatrick*. The most populous district was 445,523. The smallest was 419,721. The ideal population per district was 431,981. The ratio of the largest to smallest districts was 1.06 to 1 voters. The variance between the largest and smallest districts was 25,802 (maximum population deviation). The largest district was 3.13% above the ideal district while the smallest was 2.84% below the ideal—a maximum percentage deviation of 5.97%. 394 U.S. at 528-529.

Missouri's defense was that these levels of deviation were *de minimus*. Therefore, the state contended, there was no need to justify the deviation levels under the standards identified in *Wesberry*. The Court said that it was required to "elucidate the 'as nearly as practicable' standard" in light of the facts of the case and the arguments raised by Missouri. *Id.* at 528. The Court held:

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* 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.

Id. at 530.

The Court said that "the population variances among the Missouri congressional districts were not unavoidable." Moreover, the Court noted "it is not seriously contended that the Missouri Legislature came as close to equality as it might have come." *Id.* at 531. The Court agreed with the district court's assessment that the apportionment plan was nothing more than "an expedient political compromise." *Id.*

On the same day as *Kirkpatrick*, the Court ruled that New York's congressional apportionment was unconstitutional in *Wells v. Rockefeller*, 394 U.S. 542 (1969). The New York apportionment plan had districts that ranged from 382,277 to 435,880—a

maximum population deviation of 53,603 persons. The ratio of the largest to smallest district was 1.139 to 1. The maximum deviation above the state mean was 6.488% and the maximum deviation below the mean was 6.608% — or 13.096% maximum percentage deviation. *Id.* at 547 (Appendix). The New York plan featured five sub-districts in the state. Each of those sub-districts had two to eight congressional districts. An attempt was made to equalize population within each of these regional clusters. The Court said: "Equality of population among districts in a substate is not a justification for inequality among all the districts in the State." *Id.* at 546.

The apportionment plan adopted for congressional districts within Texas subsequent to the 1970 Census was challenged under the one-person, one-vote principle in *White v. Weiser*, 412 U.S. 783 (1973). The largest district was 477,856 while the smallest was 458,851—a variance of 19,275 persons. The percentage deviation ranged from +2.43% to -1.7%—a total deviation of 4.13%. *Id.* at 784. Significantly, the plaintiffs in *White* presented the district court with an alternative plan with much lower total deviations. The Court held that the presence of alternative plans with smaller deviations conclusively demonstrated that the variances in the state-adopted plan were not unavoidable. *Id.* at 790. The Court concluded that these deviations were unconstitutional, rejecting an invitation to modify the *Kirkpatrick* principles by allowing a *de minimus* deviation. *Id.* at 792-793.

The fourth, and final, case where the Supreme Court has held a congressional apportionment plan to be unconstitutional on the basis of one-person, one-vote[38] is *Karcher v. Daggett*, 462 U.S. 725 (1983). After the 1980 Census, New Jersey lost a

[38] This does not include a number of cases where the Court has considered challenges to congressional apportionments on the basis of either racial or political gerrymanders. Our analysis is restricted to cases involving straightforward one-person, one-vote disparities.

congressional seat going from 15 to 14 seats in the House. The apportionment plan adopted by the New Jersey legislature had very small disparities. The population of the largest district was 527,472 while the smallest was 523,798—a total deviation of 3,674 persons. As a percentage, the total deviation was 0.6984%—approximately two-thirds of one percent. *Id.* at 728. Another plan had been introduced in the legislature with even smaller deviations from the ideal. This plan had a maximum population deviation of 2,375 between the smallest and largest districts—which is a maximum percentage deviation of 0.4514%. *Id.* at 729. The Court ruled the plan adopted by the legislature to be unconstitutional rejecting the claim that deviations this small were the "functional equivalent" of a plan with "districts of equal population." *Id.* at 738.

It is quite revealing to review the current levels of inequality compared to these four cases.

Case Name	Max. % Deviation	Max. Population Deviation
Kirkpatrick	5.97%	25,802
Wells	13.096%	53,603
White	4.13%	19,275
Karcher	0.6984%	3,674
Current case	**63.38%**	**410,012**[39]

The maximum percentage deviation here is 9100% greater than the deviation found to be unconstitutional in *Karcher*. It is 484% greater than the deviation found to be unconstitutional in *Wells.* It should be remembered that all of these deviations are numbers from a single congressional district. A single congressional district in *Karcher* was held to be unconstitutional for being 3,674 larger than another district. In the case at bar a single congressional district is 410,012 people larger than another district—both having only one representative.

[39] Ladewig, Ex. 4.

There is little doubt that the most egregious example in American history of inequality relative to congressional apportionment was the decision at the Constitutional Convention to count slaves as three-fifths of a person for apportionment purposes. The voters of Montana are being currently counted as less than three-fifths of a person compared to the voters of Wyoming. Montana votes are "worth" 54.6% of Wyoming votes. The voters of Mississippi (69.4%), Utah (66.2%), South Dakota (65.4%), and Delaware (62.9%) are only slightly better than three-fifths of a person—they have a long way to go to reach the "level" of being worth four-fifths of a voter in Wyoming, much less true equality.

It is obvious why the federal government chose to defend this case on the theory that one-person, one-vote does not apply to the federal government. If this principle applies at all and if there is any limitation on the discretion of Congress whatsoever, then it is beyond doubt that these levels of inequality are simply too great to sustain or justify.

2. Has the government made a good faith effort to achieve absolute equality?

What has the federal government done to attempt to achieve congressional districts of equal size? The answer is obvious—very little has been done in the last 100 years. And nothing at all has even been attempted since the landmark decision of *Wesberry v. Sanders.* This lawsuit is the first serious effort to force the federal government to explain this anomaly—and the answer it has proffered is a bit astonishing: The federal government has no duty to comply with the standard of one-person, one-vote in the interstate apportionment of the House of Representatives.

The only thing that has been done in the last 100 years to achieve a more equal apportionment between the states was the adoption of a new method of calculating the fractional remainders. This formula (the "method of equal proportions"), which is still in place, was first used after the 1930 census and was codified in 1941. *United States Department of Commerce v. Montana*, *supra,* 503 U.S. at 451-452.

Montana challenged this method in the above-cited case claiming that an alternative method would produce a smaller absolute deviation for the voters of their state. A critical factor in the Court's rejection of the arguments of Montana was the impact of Montana's preferred methodology on other states—particularly the State of Washington. Contrasting the Montana claim from a typical one-person, one-vote claim the Court said:

> In cases involving variances within a State, changes in the absolute differences from the ideal produce parallel changes in the relative differences. Within a State, there is no theoretical incompatibility entailed in minimizing both the absolute and the relative differences. In this case, in contrast, the reduction in the absolute difference between the size of Montana's district and the size of the ideal district has the effect of increasing the variance in the relative difference between the ideal and the size of the districts in both Montana and Washington. Moreover, whereas reductions in the variances among districts within a given State bring all of the affected districts closer to the ideal, in this case a change that would bring Montana closer to the ideal pushes the Washington districts away from that ideal.

Id. at 461-462.

In other words, the Montana claim was rejected, in large part, because the state failed to demonstrate that the overall equality for the nation as a whole would be improved by the adoption of its alternative method of calculating fractional remainders.

A serious effort was made to increase the House after the 1920 Census. The House of Representatives passed a bill raising the size of the House to 483 seats. But this

bill was defeated in the Senate.[40] An attempt was made to fix the number at 435 but this was also rejected because a number of powerful states would have lost seats. The upshot of these political machinations was the absolute failure of Congress to reapportion itself after the 1920 Census. Why did Congress fail to change? Was it concern about the efficiencies in the House? There is no evidence that has been offered in this litigation to support such an assertion.

The scholarly treatise cited by the Justice Department offers this explanation:

> The reason was rural reaction to the enormous gains in population being made by the cities. Rapid industrialization, the first World War, and the increasing mechanization of agriculture had all combined to accelerate migration from the rural to the urban states during the preceding decade. The census of 1920 showed an overall increase of some 14 million persons, but the rural population had actually declined by 5 million and the cities had swelled by 19 million. If the 435 seats of the House had been reapportioned by Webster's method in 1920, ten rural states would have lost 11 seats, California would have gained 3, and Michigan and Ohio 2. Altogether nineteen states would have been affected.
>
> But the agriculture states still had the votes—particularly in the Senate—and grasped at any means to prevent or delay the inevitable erosion of their power.[41]

For these reasons, according to the Justice Department's-endorsed treatise: "In the end the 1911 apportionment stood for the entire decade [of the 1920s] and there was to be no apportionment based on the 1920 census—in direct violation of the Constitution."[42] Why would it be a violation of the Constitution to fail to reapportion after the 1920 Census? If the government is serious about its own argument in this case, the failure of 1920 would not be a violation of the Constitution at all. Why not? If Congress has the complete discretion to apportion itself on any means it wishes (so long as each district is

[40] Fair Representation cited in the other brief at p. 51.
[41] *Id.*
[42] *Id.*

greater than 30,000 persons and every state gets at least one representative) then it is not a failure to use the 1910 census for the 1920s. By logical extension, it would not be a violation of the Constitution to use the 1910 census in 2010—save for the fact that all states admitted in the interim would have to have at least one seat.

The only serious effort in Congress to remediate the problem of malapportionment was when the House tried to increase the House to 483 seats in the aftermath of the 1920 census. This was rejected by the Senate for reasons that cannot serve as anything resembling a legitimate constitutional justification. Congress has done nothing to pursue voter equality in the aftermath of *Wesberry v. Sanders.* By virtue of its silence and inaction, it is obvious that Congress believes that one-person, one-vote is a command that the states must obey. Congress considers itself exempt.

3. If such efforts have been made, and variances still exist, has the government justified the variance, no matter how small?

The government cannot legitimately make a claim to have satisfied this criterion. Good-faith efforts to eliminate the deviation are a prerequisite for any claim that remaining variances are justified. The only justification offered by the government in its brief—other than the inapplicability of the constitutional directive to achieve proportional representation—is that the current levels of deviation are "unavoidable" in light of the self-imposed limitation of 435 seats. We will address this argument *infra* in connection with the fifth *Karcher* standard.

It is self-evident that the variances that remain are far from small. If any state presented variances of the magnitude we have in this case, the decision to be rendered would be automatic. No possible justification could ever be sufficient to equate 183 voters in Montana or 144 voters in Mississippi with 100 voters in Wyoming.

4. Is the population variance "limited"?

It is self-evident that the variance is not "limited." Plaintiffs acknowledge that the variance is as small as can be achieved with a fixed adherence to 435 seats in the House. However, since there is no constitutional requirement of limiting the House to this size, this artificial constraint cannot be the final word on the subject.

5. If so, is the variance "unavoidable" in spite of a good-faith effort to achieve absolute equality, or is there justification shown by the government for these "limited population variances"?

In order to attempt to show a justification for a deviation from absolute equality, the variances must be "limited population variances." Variances that are 9100% greater than those found to be unconstitutional in *Karcher* cannot possibly be considered to meet this threshold requirement. Despite the failure of the government to demonstrate any "good faith effort to achieve absolute equality" it still contends that the present extreme inequalities are justified because the problem is "unavoidable."

We address two issues in this connection: (1) Is the current level of disparity truly unavoidable? (2) Has the government offered any justification for the maintenance of the current disparities?

Is the current level of disparity truly unavoidable?

The government contends that treating Montana voters as 54.6% of Wyoming voters is unavoidable. This is only true if House remains at 435 seats. If the House were increased just six seats, Montana would get an additional seat in the House and the difference between these two states would be essentially eliminated. Montana would have two districts averaging 452,658 while Wyoming would have 495,304 in its

district.[43] In this scenario, Wyoming voters would be "worth" 91.4% of Montana voters. While this scenario would still leave serious discrepancies in other states, the overall picture would improve and the glaring inequity between Montana and Wyoming would be fully resolved.

We have demonstrated that is it possible to decrease the maximum population deviation from 410,012 to 76,667 by raising the size of the House to 932 seats (Plan A). This plan would decrease the maximum percentage deviation from 63.38% to 25.39%.[44] Under Plan A, the two states on the outer edges would be Idaho and Wyoming. Idaho voters would be "worth" 76.4%[45] of a Wyoming voter—a significant improvement of the 54.6% level of today (Montana vs. Wyoming).

We have also demonstrated that it is possible to decrease the maximum population deviation from 410,012 to 15,580 by increasing the House to 1760 seats (Plan B). Plan B would decrease the maximum percentage deviation from 63.38% to 9.91%.[46] In the head-to-head comparison of the two most-impacted states, New Mexico voters would be "worth" 90.4% of Rhode Island voters. All other voters in the United States would be in a better position in terms of relative equality.

In *Wesberry*, 376 U.S. at 18, the Court said:

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

[43] Ladewig, Ex. 12.
[44] Ladewig, Ex. 5.
[45] Ladewig, Ex. 12.
[46] Ladewig, Ex. 6.

The plaintiffs are not asking this Court for mathematical precision. They are simply asking that their votes be as nearly equal to the voters from other states "as is practicable." It has clearly been shown that it is possible to create apportionment plans for the House that treats voters from all states in a far more equal manner.

Is there a justification for refusing to create a more equal system?

Since the government has rejected the applicability of the one-person, one-vote standard to interstate apportionment, there has been no argument advanced attempting to justify any deviation from this standard. However, one such argument might be implied from the government brief: the history of unequal apportionment is longstanding, therefore it should be permitted to continue to operate in a grossly unequal manner.

There is utterly no doubt that the apportionment plans that started after the 1790 census violated the principle of one-person, one-vote. The original constitutional text provided that counting for apportionment would be based on the formula of "adding to the whole Number of free Persons, including those bound to Service for a Term of Years, *and excluding Indians not taxed, three fifths of all other Persons.*" Art. I, § 2 (emphasis added.) Slaves were counted as three-fifths of a person. Indians not taxed were excluded altogether. Not only were slaves not considered as whole persons, they couldn't vote at all. One-person, one-vote was not the practice of the day. This observation undermines any use of the statistics from 1790 through 1860. Our national commitment to equality changed dramatically with the adoption of the 13th, 14th, and 15th Amendments.

The First Reapportionment After the 14th Amendment Reveals a Commitment to Equal Voting Power

Nevada was admitted to the Union in 1864 despite the fact that it had less than 60,000 residents, which had been the figure established by the Northwest Ordinance for

applying for statehood, and which was generally accepted as the required threshold.[47] The extremely low population of Nevada severely skewed the interstate apportionment numbers through the 1950 Census, as Dr. Ladewig's affidavit illustrates.[48]

Census Date	Maximum Deviation	Nevada's Percent
1870	80.32%	67.45%
1880	86.93%	59.01%
1890	92.20%	73.69%
1900	121.45%	78.95%
1910	70.24%	61.82%
1930	110.30%	69.22%
1940	82.67%	63.39%
1950	68.45%	53.54%

After the very first census which included Nevada in 1870, Congress took action to stop admitting states that skewed the population equality in the House. The 1870 census gave a population for Nevada of 42,491. The median size of districts in the 1872 apportionment was 130,533. The 1872 Apportionment Act (17 Stat. 28)[49] contained the following provision:

> Sec. 5. That no State shall be hereafter admitted to the Union without having the necessary population to entitle it to at least one Representative according to the ratio of representation fixed by this bill.

This was also the law which required all states with more than one district to divide the state into districts "containing as nearly as practicable an equal number of inhabitants." 17 Stat. 28 § 2. The Supreme Court relied upon this language from this 1872 enactment to guide its decision in *Wesberry v. Sanders.* 376 U.S. at 43.

Congress recognized that it was out of proportion because of the admission of a severely under-populated state and took decisive steps to move the House toward a more equal system of representation by requiring states to have a more equal population upon

[47] Peter Raven-Hansen, "The Constitutionality of D.C. Statehood", 60 GEO. WASH. L. REV. 160, 191 (1991).
[48] Ladewig Aff., p. 12, para. 42.
[49] A copy of this 1872 Act is attached to this brief for the convenience of the Court.

admission. This Act of 1872 demonstrated a commitment to equality of congressional districts both on an interstate and intrastate basis.

It must be remembered that it was the 14th Amendment that eliminated the whole notion of apportionment inequality that was built into the Three-Fifths Compromise. The controlling constitutional language in this case was adopted in 1868 as Amend. 14, § 2. In the very first reapportionment after the adoption of the 14th Amendment, Congress recognized that it had a problem with interstate apportionment. Thus, the Act of 1872 was clearly designed to implement the principle of one-person, one-vote that was proclaimed in the 14th Amendment. Congress recognized that it would take some time to remedy the Nevada problem. But they would never have sanctioned a delay of 140 years.

The admission of new states has long been a factor in skewing the figures from apportionment calculations. However, it has now been over fifty years since any state was admitted to the Union. The political configuration of the United States is not likely to change and it is time that Congress shoulders its constitutional responsibility to provide an apportionment plan whereby: "Representatives shall be apportioned among the several States according to their respective numbers." Amend. 14, § 2.

Moreover, we cannot lose sight of the fact that in 1962, the Supreme Court broke with its longstanding policy of non-interference in apportionment cases. *Baker v. Carr*, 369 U.S. 186 (1962). The Tennessee apportionment that was challenged in that case had been on the books since 1901. Likewise in *Reynolds v. Sims*, 377 U.S. 533, 540 (1964), the Alabama legislature had not been reapportioned since the 1900 census. In both of these cases, inequality of long duration provided no justification for refusing to obey the Constitution of the United States.

The relevant historical practice to reveal the intention of the framers is not the era of the Three-Fifths Compromise. The intentions of the framers of the 14th Amendment—which is the most relevant text—is found in the Act of 1872. One-person, one-vote for both interstate and intrastate purposes was clearly set forth in this Act.

It is apparent that the trends toward greater inequality are increasing over time. In 1790, the maximum population deviation was 22,380—mainly as a function of refusing to count fractional remainders. It dipped to a low of 5,615 in 1810. With the admission of Nevada, the deviation exceeded 100,000 for the first time in 1870 (actual figure: 104,487). The first use of the "method of equal proportions" in 1930 led to the first time the maximum population deviation passed 300,000 (actual figure: 309,952). The maximum population deviation was fairly stable from 1930 (309,952) through 1990 (347,680), dipping and rising during that period. However, it passed a critical threshold in 2000 of exceeding 400,000 (410,012) and the projections of the Census Department show that it will be close to 500,000 in 2020 (491,787) and jumps dramatically to 629,962 in 2030.[50]

Although the government has not made any arguments or advanced any evidence that would sustain a claim that it is "inefficient" to operate a House chamber larger than 435 seats, Dr. Ladewig's Exhibit 11 demonstrates that seven modern, western democracies have lower chambers that are larger than the United States House of Representatives—even though every one of these nations have a population that is only a fraction of the population of the United States. Any claim that Congress made a considered judgment to permanently fix itself at 435 for reasons of efficiency is totally

[50] Ladewig, Ex. 8.

disproven by that fact that a measure passed the House after the 1920 census to increase the chamber to 483 seats. The judgment of the House was overridden by an obstructionist Senate. Any notion that 435 seats was chosen as the result of a carefully considered determination of the optimal size for efficiency cannot be sustained.

The plain fact is that Congress has been growing as an institution since the 1910 census when the number of seats was first set at 435. In 1893, each Representative was entitled to hire one to two staff members. In 1919, the number of authorized staff was fixed at exactly two per representative. It grew to three in 1940, six in 1945, seven in 1949, and to eight in 1955. In 1956, for the first time, there were differing staff sizes depending on the size of the district that the member represented. If the district was greater than 500,000, then the representative got one additional staffer than the minimum number. This was kept in place through the following changes: staff increased to nine (or ten for large districts) in 1956, to ten (or eleven) in 1961 and so on through four additional staff increases. After 1972, when 16 staffers were authorized, districts greater than 500,000 no longer got an extra staffer. The current size of the staff has been frozen at 22 members since 1979.[51]

Congress itself recognized that it was the growth of the size of the districts that necessitated the growth of the staff of Congress. A larger country requires more people to deal with its needs. Congress has gotten larger as an institution because of our nation's growing population. The people's "share" of each member of the House has plummeted. The decrease in the quality of representation may not give rise to any constitutional claim

[51] All information in this paragraph is from www.rules.house.gov/archives/jcoc2s.htm.

in and of itself. However, it certainly is relevant in the assessment of any claim by the government that the people's interests are best served by a House of 435.

The present degree of inequality is egregious and is going to get increasingly worse. The time has come to require Congress to reapportion itself according to the dictates of the Constitution of the United States.

> The apportionment statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

Wesberry, 376 U.S. at 7.

This Court should rule that 2 U.S.C. §2a is unconstitutional because it freezes the House of Representatives at a size that necessarily results in an extreme violation of the longstanding principle of one-person, one-vote.

CONCLUSION

For the foregoing reasons, plaintiffs pray that their motion for summary judgment be granted.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument in this matter.

Respectfully submitted this 19th day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2010, I electronically filed the foregoing with the Clerk of the Court using the ECF System, which sent notification of such filing to the following counsel of record:

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September; at Harrisonburg, on the Tuesday after the second Monday of April and October; and at Abingdon, on the Tuesday after the fourth Monday of May and October. And all recognizances, indictments, or other proceedings, civil or criminal, now pending in either of said courts, shall be entered and have day in court, and be heard and tried according to the times of holding said court, as herein provided.

See *Post*, p. 53.

Pending process.

APPROVED, February 1, 1872.

February 2, 1872.

CHAP. XI.—*An Act for the Apportionment of Representatives to Congress among the several States according to the ninth Census.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the third day of March, eighteen hundred and seventy-three, the House of Representatives shall be composed of two hundred and eighty-three members, to be apportioned among the several States in accordance with the provisions of this act, that is to say: to the State of Maine, five; to the State of New Hampshire, two; to the State of Vermont, two; to the State of Massachusetts, eleven; to the State of Rhode Island, two; to the State of Connecticut, four; to the State of New York, thirty-two; to the State of New Jersey, seven; to the State of Pennsylvania, twenty-six; to the State of Delaware, one; to the State of Maryland, six; to the State of Virginia, nine; to the State of North Carolina, eight; to the State of South Carolina, five; to the State of Georgia, nine; to the State of Alabama, seven; to the State of Mississippi, six; to the State of Louisiana, five; to the State of Ohio, twenty; to the State of Kentucky, ten; to the State of Tennessee, nine; to the State of Indiana, twelve; to the State of Illinois, nineteen; to the State of Missouri, thirteen; to the State of Arkansas, four; to the State of Michigan, nine; to the State of Florida, one; to the State of Texas, six; to the State of Iowa, nine; to the State of Wisconsin, eight; to the State of California, four; to the State of Minnesota, three; to the State of Oregon, one; to the State of Kansas, three; to the State of West Virginia, three; to the State of Nevada, one; to the State of Nebraska, one: *Provided*, That if, after such apportionment shall have been made, any new State shall be admitted into the Union, the Representative or Representatives of such new State shall be additional to the number of two hundred and eighty-three herein limited.

Number of members of the House of Representatives after March 3, 1873, and how apportioned; See 1872, ch. 239. *Post*, p. 192.

in new States afterwards admitted. See 1872, ch. 139. *Post*, p. 61.

SEC. 2. That in each State entitled under this law to more than one Representative, the number to which said States may be entitled in the forty-third, and each subsequent Congress, shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of Representatives to which said States may be entitled in Congress, no one district electing more than one Representative: *Provided*, That in the election of Representatives to the forty-third Congress in any State which by this law is given an increased number of Representatives, the additional Representative or Representatives allowed to such State may be elected by the State at large, and the other Representatives to which the State is entitled by the districts as now prescribed by law in said State, unless the legislature of said State shall otherwise provide before the time fixed by law for the election of Representatives therein.

Election of members of the forty-third Congress, &c.;

of the additional representatives in States entitled thereto.

1872, ch. 253. *Post*, p. 195.

SEC. 3. That the Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is hereby fixed and established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is hereby fixed and established as the day for the election, in each of said States and Territories, of Representatives and Delegates to the Congress commencing on the fourth day of March next thereafter.

Day established for the election of representatives, &c., to the forty-fifth Congress;

to subsequent Congresses.

Elections to fill vacancies. See 1872, ch. 139. *Post*, p. 61.

SEC. 4. That if, upon trial, there shall be a failure to elect a Representative or Delegate in Congress in any State, District, or Territory, upon the day hereby fixed and established for such election, or if, after any such election, a vacancy shall occur in any such State, District, or Territory, from death, resignation, or otherwise, an election shall be held to fill any vacancy caused by such ailure, resignation, death, or otherwise, at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur.

No State to be admitted to the Union without what population.

SEC. 5. That no State shall be hereafter admitted to the Union without having the necessary population to entitle it to at least one Representative according to the ratio of representation fixed by this bill.

Number of representatives apportioned to any State to be proportionally reduced, if the right to vote is denied or abridged, except, &c.

SEC. 6. That should any State, after the passage of this act, deny or abridge the right of any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendments to the Constitution, article fourteen, section two, except for participation in the rebellion or other crime, the number of Representatives apportioned in this act to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

APPROVED, February 2, 1872.

CHAP. XII.—*An Act to authorize the Payment of duplicate Checks of disbursing Officers.* Feb. 2, 1872.

Duplicate checks may be issued by disbursing officers in place of original checks lost, &c., after, &c.: to be paid, &c.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in place of original checks, when lost, stolen, or destroyed, disbursing officers and agents of the United States are hereby authorized, after the expiration of six months from the date of such checks, and within three years from such date, to issue duplicate checks, and the treasurer, assistant treasurers, and designated depositaries of the United States are directed to pay such checks, drawn in pursuance of law by such officers or agents, upon notice and proof of the loss of the original check or checks, under such regulations in regard to their issue and payment, and upon the execution of such bonds, with sureties, to indemnify the United States, as the Secretary of the Treasury shall prescribe: *Provided*, That this act shall not apply to any check exceeding in amount the sum of one thousand dollars.

Limit to amount.

Provision in case the officer issuing the check be dead or not in office.

SEC. 2. That in case the disbursing officer or agent by whom such lost, destroyed, or stolen original check was issued, be dead, or no longer in the service of the United States, it shall be the duty of the proper accounting officer, under such regulations as the Secretary of the Treasury shall prescribe, to state an account in favor of the owner of such original check for the amount thereof, and to charge such amount to the account of such officer or agent.

APPROVED, February 2, 1872.

CHAP. XIII.—*An Act to admit certain Machinery imported from foreign Countries free of Duty.* Feb. 2, 1872.

The Calcasieu sulphur, &c., company, may import free of duty certain machinery, &c., within one year.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Calcasieu sulphur and mining company of New Orleans be, and is hereby, permitted to import, free of duty, under such rules and regulations as the Secretary of the Treasury shall prescribe, certain machinery and accompanying implements for the purpose of, and to be used only in, making a series of experiments in mining for sulphur in the parish of Calcasieu, in the State of Louisiana: *Provided*, That the value of such importation shall not exceed the sum of seventy-five thousand dollars, and that said machinery and implements be imported within one year from and after the passage of this act.

Limit to value.

APPROVED, February 2, 1872.