No. 10-291

In the Supreme Court of the United States

JOHN TYLER CLEMONS, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

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

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether Congress's decision to set the size of the House of Representatives at 435 Members violates the Constitution.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-48) is reported at 710 F. Supp. 2d 570.

JURISDICTION

The judgment of the three-judge district court was entered on July 8, 2010. A notice of appeal was filed on July 9, 2010 (J.S. App. 47-48), and the jurisdictional statement was filed on August 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Article I, Section 2, Clause 3 of the Constitution provides that Representatives in the United States House of Representatives "shall be apportioned among the several States which may be included within this Union according to their respective Numbers," and that "[t]he Number of Representatives shall not exceed one

for every Thirty Thousand, but each State shall have at Least one Representative." Section 2 of the Fourteenth Amendment reiterates that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." The Constitution does not specify that Congress itself shall make the apportionment, but Congress's power to do so "has always been acted upon[] as irresistibly flowing from the duty positively enjoined by the constitution." *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842). Similarly, because the Constitution does not prescribe the total number of Representatives to be allocated among the States, Congress has also set the size of the House of Representatives.

After each decennial census from 1790 to 1910, Congress reconsidered the number of Representatives, enacting new apportionment legislation "within two years after the taking of the census." H.R. Rep. No. 2010, 70th Cong., 2d Sess. 1 (1929) *(1929 House Report)*. Until 1850, Congress first determined the number of persons that would be represented by each Representative, then divided that number into the population of each State, assigned the resulting number of Representatives (less any fractional remainder) to each State, and summed those numbers to arrive at the overall size of the House of Representatives. See *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 449-451 (1992). Although Congress repeatedly increased the number of persons represented by each Member of the House, the size of the House continued to grow steadily, rising from 105 Members in 1790 to 243 Members by 1850.[1]

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[1] The 1792 apportionment Act provided for an average constituency of 33,000 and arrived at a House with 105 Representatives. *Montana*,

After 1850, Congress began using an approach that set the overall size of the House of Representatives in advance and then proportionally distributed seats among the States. See Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1025 (1928). That practice also resulted in steady growth of the House, because Congress regularly increased the total number of Members to prevent any State from losing a Representative.[2] After the 1911 reapportionment, the House consisted of 435 Representatives. See Act of Aug. 8, 1911, ch. 5, § 1, 37 Stat. 13.

In the wake of the 1920 census, efforts to reapportion the House of Representatives foundered as a result of conflicts between those who advocated the addition of dozens of Representatives to prevent several States from losing any Representatives, and those who objected that the proposed enlargements would cause the House to "become too large and unwieldy." *1929 House*

503 U.S. at 449. Under the same ratio, the 1802 apportionment Act resulted in a House of 141 Members. *Id.* at 450 n.18. The ratio decreased to 35,000 in 1811; resulting in 181 Members; to 40,000 in 1822, resulting in 213 Members; and to 47,700 in 1832, resulting in 240 Members. *Ibid.*

[2] In 1852, Congress increased the size of the House from 233 to 234 so that California could retain its existing number of Representatives. Act of July 30, 1852, ch. 75, § 1, 10 Stat. 25. In 1862, Congress increased the size of the House to 241 Members so that an additional Representative could be given to each of eight States. Act of Mar. 4, 1862, ch. 737, 12 Stat. 353. In 1872, Congress increased the size of the House to 283, and then, four months later, assigned an additional Representative to each of nine States. Act of Feb. 2, 1872, ch. 11, § 1, 17 Stat. 28; Act of May 30, 1872, ch. 241, 17 Stat. 192. Successive apportionment Acts in 1882, 1891, and 1901 increased the size of the House to 325, then 356, then 386 Members. See Act of Feb. 25, 1882, ch. 20, § 1, 22 Stat. 5; Act of Feb. 7, 1891, ch. 116, § 1, 26 Stat. 735; Act of Jan. 16, 1901, ch. 93, § 1, 31 Stat. 733.

Report 3 (describing earlier effort). Opponents of those efforts summarized their objections as follows: "The membership of the House can not be increased indefinitely. A stop must be made some time, and in our opinion no time will ever be more opportune than the present, for we believe that a point has been reached where increased membership will result in decreased efficiency." H.R. Rep. No. 312, 67th Cong., 1st Sess. 36 (1921) (minority views objecting to reported bill providing for 460 Members); see also H.R. Rep. No. 1173, 66th Cong., 3d Sess. 29 (1921) (minority views objecting to earlier bill providing for 483 Members because such an increase "will result in that body becoming more unwieldy and cumbersome than it is at the present time"). As an outgrowth of those disagreements, Congress in the 1920s failed for the first time to reapportion the House of Representatives after a census.

By 1929, similar conflicts were predicted following the 1930 census, because, as a result of trends in population growth, it was expected that "the size of the House would have to be increased to approximately 535" in order to prevent any State from losing a Representative. *1929 House Report* 4. There remained, however, substantial opposition to such an increase. See, *e.g.*, *id.* at 8 (quoting Speaker of the House Nicholas Longworth: "Besides making necessary a remodeling of the south wing of the Capitol the House would become such an unwieldy body as to seriously interfere with the consideration and passage of proper legislation."). In order to avoid the "possible deadlock" that could follow the 1930 census, *id.* at 4, Congress enacted 2 U.S.C. 2a, the provision that appellants challenge in this case.

Section 2a provides for a "virtually self-executing" reapportionment process in the event that Congress

fails to enact new apportionment legislation following a decennial census. *Franklin* v. *Massachusetts*, 505 U.S. 788, 792 (1992). The statute directs that, within the first week of a new Congress that follows a census, the President "shall transmit to the Congress a statement showing the whole number of persons in each State" and "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." 2 U.S.C. 2a(a) (emphasis added). Each State is entitled to that number of Representatives "until the taking effect of a reapportionment" by Congress. 2 U.S.C. 2a(b).

Since 1930, Congress has considered and rejected proposals to increase the size of the House of Representatives. See, *e.g.*, *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. (1961). Supporters of an increase have stressed the workload of each Representative and the substantial number of persons represented by each Member. *Id.* at 214. Opponents have continued to rely on a desire to maintain the "orderly" and "deliberative" nature of the House. *Id.* at 215.

Congress has continued to allow the self-executing process prescribed by Section 2a to operate and has not enacted a new reapportionment following any census since Section 2a was enacted. Accordingly, the size of the House of Representatives has remained at 435 Mem-

bers since 1911—with the exception of a brief period after the admission of Alaska and Hawaii as new States. See *Montana*, 503 U.S. at 451 & n.24.

2. Appellants are voters from Mississippi, Delaware, Montana, South Dakota, and Utah. J.S. App. 2. In September 2009, they filed this action in the United States District Court for the Northern District of Mississippi against the United States Department of Commerce, the Secretary of Commerce, and the Director of the Bureau of the Census. J.S. 7.[3] Appellants seek a judgment declaring invalid Congress's decision to set the size of the House of Representatives at 435 Members, on the ground that that number inevitably creates unconstitutional interstate disparities in the average number of persons per Representative. J.S. App. 4-5. They contend "that the disparities violate the requirement that Representatives be apportioned to the States 'according to their respective numbers.'" *Ibid.* (quoting U.S. Const. Art. I, § 2, Cl. 3).

In their amended complaint, appellants "suggest" that the maximum variance that should be allowed between the largest and smallest districts should be 10%. Amended Compl. (Doc. 19) ¶ 40. Appellants propose two reapportionment plans that would "produce significant improvement in the measurements of disparity" by providing for a House of Representatives containing either 932 or 1761 Members, *id.* ¶¶ 38-39, and they request an injunction ordering, *inter alia*, "the implementation of [their proposed] Plan A or B * * * for the 2010 elections," *id.* Prayer for Relief ¶ 5.

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[3] Appellants also named as a defendant Lorraine C. Miller in her official capacity as Clerk of the United States House of Representatives, but later voluntarily dismissed their claims against her. J.S. 7-8.

Because appellants' suit questions the constitutionality of the apportionment of seats in the House of Representatives, a three-judge district court was convened to hear the case pursuant to 28 U.S.C. 2284(a). J.S. App. 2. Both sides moved for summary judgment. *Ibid.*

3. On July 8, 2010, the district court granted appellees' motion for summary judgment and denied appellants' cross-motion for summary judgment. J.S. App. 1-46. The court found no support for the view "that the Constitution as originally understood or long applied imposes the requirements of close equality among districts in different States that [appellants] seek here." *Id.* at 35. The court noted that appellants challenge an apportionment scheme in which "the population of the smallest congressional district is only 55 percent of that in the largest," *id.* at 3, even though "the first apportionment plan adopted by the Second Congress * * * gave a vote in Delaware the worth of only 60% of a vote in New York," *id.* at 34. The court further observed that "equivalent disparities have been the norm each decade since 1790." *Ibid.*

The district court also rejected appellants' argument that the existence of substantial interstate disparities in the average size of congressional districts is at odds with the precedents of this Court. J.S. App. 45. The district court observed that, although there is a "requirement of rough equality in population of districts within a State," *id.* at 39 (citing *Wesberry* v. *Sanders*, 376 U.S. 1 (1964)), this Court has recognized that "[t]he constitutional framework that generated the need for compromise [between the interests of larger and smaller States] 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 deter-

mining district sizes within state borders," *id.* at 43 (quoting *Montana*, 503 U.S. at 464). The district court concluded that "[t]he Constitution allows Congress to set the number of House members," and that appellants "seek judicial entry into the exact area of decision-making that was reserved for Congress." *Id.* at 44.

The district court further concluded that, even assuming Congress's determinations about the appropriate size of the House were required "to meet some fundamental level of reasonableness or good faith," J.S. App. 42-43, "it is not evident that Congress has failed properly to exercise its broad discretion," *id.* at 45. The court explained that "anything short of an astronomical increase in the number of House members would still leave the population disparities among interstate districts strikingly greater than those held unconstitutional for intrastate districts." *Id.* at 44. Thus, "Congress's failure[] * * * to make the inequality slightly less is within its discretion to balance many factors, including * * * unwieldiness, that cannot then be reviewed by elementary arithmetic." *Id.* at 44-45.

The district court also relied on the history of reapportionment, observing that the "practicalities" that have dictated the size of the House of Representatives over time have "allowed disparities as severe as those that form the factual basis of this lawsuit." J.S. App. 45. The court recognized that this Court had upheld the mathematical formula that has been used to apportion congressional seats since 1941 because "[f]or a half century the results of that method have been accepted by the States and the Nation." *Id.* at 46 (quoting *Montana*, 503 U.S. at 465-466). The district court thus concluded that "Congress's decision to limit the number of Representatives to 435 is valid." *Ibid.*

ARGUMENT

The three-judge district court correctly determined that appellants' legal claims are without merit and that appellees are entitled to judgment as a matter of law. Unlike the Senate, in which all States are represented equally, the House of Representatives was intended to provide for representation that was proportional to population, but that principle was never expected to require the sort of mathematical exactitude (or general levels of equality) that appellants claim are constitutionally compelled. It has always been understood that Congress has wide discretion to determine the size of the House of Representatives, taking into account the interest in having sufficient numbers to guard against corruption and provide for representation of local concerns and the competing interest in enabling the House to perform its legislative functions in an orderly manner. The current size of the House of Representatives, at 435 Members, reflects a reasonable accommodation of those interests. That number, together with the method of equal proportions for apportioning those Representatives among the several States that this Court sustained in *United States Department of Commerce* v. *Montana*, 503 U.S. 442 (1992), is "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin* v. *Massachusetts*, 505 U.S. 788, 804 (1992). Indeed, the interstate disparities that appellants challenge are well within the range of those that existed under most reapportionments in the Nation's history. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

A. The Constitution Gives Congress Wide Discretion To Determine The Size Of The House Of Representatives

1. Apart from the requirement that "[t]he Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative," Art. I, § 2, Cl. 3, the text of the Constitution imposes no restrictions on Congress's authority to determine the size of the House of Representatives. Consistent with those minimal restrictions, this Court has repeatedly recognized that "the Constitution vests Congress with wide discretion over apportionment decisions." *Wisconsin* v. *City of New York*, 517 U.S. 1, 15 (1995) (citing *Franklin*, *supra*). As the Court has explained, Congress's broad discretion in that area flows from the need for "compromise between the interests of larger and smaller States," which "motivated the original allocation of Representatives specified in Article I, § 2" and continued to guide all subsequent efforts "to achieve a fair apportionment for the entire country." *Montana*, 503 U.S. at 464.

At the Constitutional Convention in 1787, the delegates' debates about the appropriate number and distribution of Representatives reflected a balance between those who wanted the House to be numerous enough to ensure effective representation, and those who recognized that a larger size would bring other potential problems. On one hand, Elbridge Gerry noted that "the larger the number the less the danger of their being corrupted," and George Mason noted that a group too small "would neither bring with them all the necessary information relative to various local interests nor possess the necessary confidence of the people." 1 *The Records of the Federal Convention of 1787*, at 569 (Max Farrand ed., rev. ed. 1966) (Farrand). On the other hand, Oliver

Ellsworth expressed the concern "that the greater the number, the more slowly would the business proceed; and the less probably decided as it ought." *Ibid.*

2. From the beginning, constitutional commentators recognized the complex nature of the decision about how large the House of Representatives should be, as well as the reality that Congress would need discretion to determine that number over time. In *The Federalist*, James Madison wrote that "no political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature." *The Federalist No. 55,* at 373 (Jacob E. Cooke ed., 1961). The House of Representatives would need to be large enough to "secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes," and yet would also need to be "kept within a certain limit, in order to avoid the confusion and intemperance of a multitude." *Id.* at 374. Madison explained that "arithmetic principles" would offer no guidance about the proper size of the House, because "[s]ixty or seventy men[] may be more properly trusted with a given degree of power than six or seven[,] [b]ut it does not follow that six or seven hundred would be proportionably a better depositary." *Ibid.* Responding to critics of the Constitution who feared that the House would be too small, Madison projected that the size would increase to "at least one hundred" after the first census, "to two hundred" within a quarter-century, and "to four hundred" within a half century. *Id.* at 375. He "presume[d]" that the number 400 was sufficient to "put an end to all fears arising from the smallness of the body." *Ibid.*

Debate about whether the Constitution should set additional parameters for the proper size of the House

of Representatives continued in the First Congress. The first of the twelve constitutional amendments that Congress proposed in 1789 involved the size of the House. See Res. 3, 1st Cong., 1st Sess., Art. I, 1 Stat. 97. That amendment was never ratified by three-fourths of the States, but, according to its text, the minimum size of the House would have been 100 Members, and once the country's population had grown large enough for 200 Representatives, Congress would be allowed to "regulat[e]" its size between a minimum of 200 Representatives and a maximum of "one Representative for every fifty thousand persons." *Ibid.*; J.S. App. 23-24. As the district court observed, the debates about that failed amendment show that the Founding generation's competing concerns about when the House of Representatives would be too big or too small were about its size as a legislative body—not about achieving greater equality between the sizes of districts in different States. *Id.* at 24-26.

Soon after the Constitution was ratified, Justice James Wilson addressed the size of the House of Representatives in his law lectures. He recognized that there is "an extreme on one hand, as well as on the other. The number of a deliberative body may be too great, as well as too small." 1 *The Works of James Wilson* 418 (Robert Green McCloskey ed., 1967). Appellants quote Wilson's prediction at the Pennsylvania ratifying convention that the House of Representatives could one day be as large as 600 Members (J.S. 37), but they omit Wilson's later (and more relevant) observation that, because the number of Representatives could not be fixed in the Constitution itself, "[a] power, in some measure discretionary,

was, therefore, necessarily given to the legislature, to direct that number from time to time." *Ibid.*[4]

In 1833, Justice Joseph Story recounted the Founding generation's conclusion that "no one could doubt" that a 400-Member House "would be sufficiently large to allay all the fears of the most zealous admirers of a full representation." 2 Joseph Story, *Commentaries on the Constitution* § 649, at 118 (1833). Echoing Madison, Story concluded that the question of "what is the proper and convenient number" of members in a representative legislature "is as little susceptible of a precise solution, as any, which can be stated in the whole circle of politics." *Id.* § 650, at 119. After discussing the relative sizes of various legislatures, Story explained that the "question then is, and for ever must be, in every nation, a mixed question of sound policy and discretion, with reference to its size, its population, its institutions, its local and physical condition, and all the other circumstances affecting its own interest and convenience." *Id.* at § 652, at 120.

There is thus ample support for the proposition that Congress's "wide discretion over apportionment decisions" (*Wisconsin*, 517 U.S. at 15) encompasses its deci-

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[4] Some later commentators, with the benefit of several decades' practice, did not repeat Wilson's ratification-era reference to 600 Members. James Kent, for example, observed in 1826—when the House had 213 Members—that its then-current size "would seem to be quite large enough * * *, and unless the ratio be hereafter enlarged beyond one to every forty thousand persons, the house will be in danger of increasing too rapidly, and it will probably become, in time, much too unwieldy a body for convenience of debate and joint consultation." 1 James Kent, *Commentaries on American Law* 217 (1826); see also *ibid.* (explaining that, after a certain point, "any further increase neither promotes deliberation, nor increases the public safety").

sions about the number of Representatives that will constitute the House and be apportioned among the States.[5]

B. Congress Is Not Required To Choose A Number Of Representatives That Will Reduce Interstate Disparities In District Size Below Certain Levels

Appellants challenge Congress's decision to set the size of the House of Representatives at 435 Members. Because it is beyond dispute that 435 falls within the upper and lower limits established by the text of the Constitution, their challenge fails. As described above (see pp. 3-6, *supra*), multiple Congresses since 1911 have examined the size of the House of Representatives and concluded that it should continue to comprise 435 Members. Proposals to expand its size have been repeatedly rejected on the ground that the House would become "too large and unwieldy." *1929 House Report* 3; see also p. 5, *supra*. Appellants provide no basis for this Court to second-guess that conclusion.

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[5] The district court held that the question of how large the House of Representatives should be is not a nonjusticiable political question, because the courts already play a role in evaluating "electoral equality" and, in particular, in reviewing (in *Montana*) the mathematical formula Congress uses to apportion Representatives among the States. J.S. App. 6-9. Even assuming that the question of how large the House of Representatives should be is—like the mathematical formula in *Montana*—justiciable in some measure, the historical understanding discussed above reinforces the highly deferential nature of any judicial review, especially once the House of Representatives has reached a sufficient size to allow for an apportionment among the States that genuinely reflects the variation in their respective populations. The current number of 435 Representatives—who are apportioned (under the 2000 census) among the States in a manner that ranges all the way from one Representative for each of seven States to 53 Representatives for California—plainly crosses that threshold.

1. Contrary to appellants' contention (J.S. 13), no enlargement of the House of Representatives is compelled by the constitutional requirement that Representatives be apportioned to the States "according to their respective Numbers," U.S. Const. Art. I, § 2, Cl. 3; see also Amend. XIV, § 2. As this Court has explained, only three constraints bear on Congress's execution of that Clause: "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." *Montana*, 503 U.S. at 448-449. Congress's decision to set the size of the House at 435 Members is plainly consistent with those constraints.

2. Appellants attempt (J.S. 25-26) to infer a requirement of greater House membership from this Court's precedents concerning *intrastate* districting. But Congress's apportionment decisions cannot be evaluated under the same framework as States' districting decisions. As the Court has explained, in light of the competing interests at stake, Congress's discretion when making apportionment decisions must be "broader than that accorded to the States in the much easier task of determining district sizes within state borders." *Montana*, 503 U.S. at 464.

In *Montana*, the Court reversed a district court judgment that "looked to the principle of equal representation for equal numbers of people that was applied to intrastate districting in *Wesberry* v. *Sanders*[, 376 U.S. 1 (1964)], * * * and held it applicable to congressional apportionment of seats among the States." *Wisconsin*, 517 U.S. at 13 (describing *Montana*). Like appellants here, Montana was challenging a congressional apportionment decision that resulted in "a significant variance between the population of [its] single district

and the population of the 'ideal district.'" *Ibid.* In rejecting Montana's challenge, this Court focused on the fact "that the *Wesberry* line of cases all involved intrastate disparities in the population of voting districts, whereas Montana had challenged interstate disparities resulting from the actions of Congress." *Id.* at 14; see *ibid.* (noting that the inapplicable line of cases included *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Karcher* v. *Daggett*, 462 U.S. 725 (1983)). As the Court explained, "[r]espect for a coordinate branch of Government raises special concerns not present in" the Court's "previous apportionment cases concern[ing] States' decisions creating legislative districts." *Montana*, 503 U.S. at 459. Moreover, "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 (citations omitted). "[T]he need to allocate a fixed number of indivisible Representatives makes it virtually impossible to have the same size district in any pair of States, let alone in all 50." *Ibid.* That problem, of course, persists no matter what the fixed number of indivisible Representatives may be.

In *Wisconsin*, *supra*, the Court reiterated its conclusion that Congress's decisions about apportionment of Representatives should not be reviewed under the framework developed in the *Wesberry* line of intrastate-districting cases. The Court again explained that the difference between congressional apportionment decisions and state districting decisions was "significant beyond the simple fact that Congress was due more deference than the States in this area." 517 U.S. at 14. Looking once more to the reality that "the Constitution

itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the standard imposed by *Wesberry*," *id.* at 14-15, the Court held that the lower court "erred in holding the 'one person-one vote' standard of *Wesberry* and its progeny applicable" to action by "the federal rather than a state government" in a context where "constitutional requirements make it impossible to achieve precise equality in voting power nationwide," *id.* at 16.

In light of this Court's repeated recognition of the differences between intrastate and interstate districting decisions, there is nothing "hypocri[tical]" (J.S. 12) about requiring intrastate districts to be very close to equal while permitting Congress to consider factors other than interstate equality when establishing the size of the House of Representatives.[6]

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[6] The basis for appellants' reliance (J.S. 20) on *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999) is unclear. The Court there "conclude[d] that the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment" and therefore found it "unnecessary to reach the constitutional question presented." *Id.* at 343. The Court's conclusion that the plaintiffs in that case had standing to sue, *id.* at 330, also has no bearing here, since appellees do not challenge appellants' standing to bring this suit. Appellants' reference (J.S. 20-21) to *Utah* v. *Evans*, 536 U.S. 452 (2002), is similarly unilluminating. The principle stated there that "comparative state political power in the House [should] reflect comparative population," *id.* at 477, simply restates the Constitution's command that Representatives be apportioned to the States "according to their respective Numbers," Art. I, § 2, Cl. 3; see also Amend. XIV, § 2. The issue here relates to the reasonableness of the method by which Congress has elected to carry out that requirement. As in *Evans*, "the choice to base representation on population, like the other fundamental choices the Framers made, are matters of

3. Appellants' pleadings only underscore the untethered nature of their claim. Appellants acknowledge that "[a]ssessing the size of the House for reasonableness is indeed a political question," J.S. 25, but they nonetheless contend that this Court should evaluate the size of the House on the basis of whether Congress has done what is "practicable" to minimize disparities between districts in different States. J.S. 12, 25-30.

While appellants continue to claim that the current size of the House of Representatives is unconstitutional, every metric they suggest reveals the quixotic nature of their quest for intrastate equality. Although appellants invoke *Karcher*, see J.S. 11, 25-26, even increasing the House to 9380 Members—the maximum allowable under the Constitution in light of the 2000 census population—would not reduce interstate disparities below the level (0.7%) that was invalidated in the intrastate context in *Karcher*. As appellants' own statistics reveal, even if the size of the House were increased to 1760 Members, interstate disparities in the average number of persons per Representative would remain at around 10%. J.A. 6; see also Amended. Compl. ¶ 40 ("suggest-[ing]" that the maximum permissible variance in the interstate context should be 10%).

As the district court correctly concluded: "The Constitution requires proportionate representation, but it does not express how proportionate the representation must be." J.S. App. 11. There is simply "no reason to believe that the Constitution as originally understood or long applied imposes the requirements of close equality

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general principle that do not directly help determine the issue of detailed methodology before" the Court. 536 U.S. at 478.

among districts in different States that [appellants] seek here." *Id.* at 35.

C. The History Of Implementing The Constitution's Apportionment Provisions Confirms That The Interstate Disparities Challenged Here Are Constitutional

This Court has repeatedly recognized the importance of long-standing practices in construing structural constitutional provisions—including those associated with apportioning the House of Representatives. See *Wisconsin*, 517 U.S. at 21 (noting "the importance of historical practice" in conducting the census); *Franklin*, 505 U.S. at 803-806 (same); *Montana*, 503 U.S. at 465 (affirming apportionment by "the method of equal proportions" in part because it was adopted "after decades of experience, experimentation, and debate" and its results had "been accepted by the States and the Nation" for "a half century").[7] Here, appellants' position is directly at odds with the implementation of the Constitution's apportionment provisions, which has almost always involved disparities larger than the levels appellants propose, and has usually involved disparities larger than those they expect will result from the 2010 census.

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[7] See also, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003) (upholding an aspect of the President's foreign-affairs power because "the practice goes back over 200 years, and has received congressional acquiescence throughout its history"); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."); *Myers* v. *United States*, 272 U.S. 52, 152 (1926) (Congress cannot unilaterally "amend the Constitution" by departing from a construction that had been established "after full consideration and with the acquiescence and long practice of all the branches of government").

1. At the Constitutional Convention in 1787, nothing in the debates suggested that the size of the House of Representatives would need to be set at a number that would achieve a particular level of population equality among interstate districts. To the contrary, the delegates were aware that the representational framework they were creating would inevitably lead to disparities among the States. Thus, when the Convention considered a proposal to base direct taxes on the number of Representatives allocated to each State, rather than the number of inhabitants, delegates recognized that basing taxation on the number of Representatives would result in a disproportionate distribution of taxes among the States. Daniel Carrol objected that "[t]he number of Reps. did not admit of a proportion exact enough for a rule of taxation." 2 Farrand 350. And Oliver Ellsworth explained that, "[e]ven if the [number of Representatives] were proportioned *as nearly as possible* to the [number of inhabitants], * * * [a] State might have one Representative only, that had inhabitants enough for 1½ or more, if fractions could be applied." *Id.* at 358 (emphasis added). The delegates thus expected that there could be quite significant interstate disparities in the populations of House districts.

Similarly, when addressing the size of the original House of Representatives (before the first census), the Convention selected a comparatively small size instead of adopting more equivalent interstate districts. Multiple proposals were made to increase the initial allocation of 65 Representatives. See 1 Farrand 568-569 (proposal to double the number); 2 Farrand 553-554 (proposal to increase the number), 612 (proposal to increase the number generally by half). A significant increase in the number of Representatives would have allowed for a

finer division of Representatives among the States according to their estimated populations. But those proposals were rejected, at least in part because several of the delegates thought that the larger chamber would be inefficient and expensive. See 1 Farrand 569-570; 3 Farrand 336. As a result, the original House of Representatives reflected significant interstate disparities. The population of an average district in the most overrepresented state (Georgia) was 30,000, while that in the most under-represented State (Rhode Island) was 58,000. See Gov't D. Ct. Ex. D (Doc. 16-4), at 7. That disproportion is greater than any of the ones that appellants claim (J.S. 16) they currently suffer *vis-à-vis* Wyoming voters.

2. Appellants' arguments are also fatally undermined by Congress's long practice, from the First Congress until today, in implementing the Constitution's apportionment provisions. Appellants complain that, under 2000 census data, a voter in Montana can be said to possess only 54.7% of the power of a voter in Wyoming. J.S. 16. As the district court noted, however, a comparable difference resulted under the apportionment plan that followed the first census in 1790, which "gave a vote in Delaware the worth of only 60% of a vote in New York." J.S. App. 34.

Appellants contend at length (J.S. 33-38) that the district court erred by focusing on the 1792 apportionment, because Delaware's disadvantaged status at that point followed directly from the Constitution's requirement that there be no more than one representative per 30,000. That objection, however, applies only to the apportionment that took place in 1792, and it fails to respond to the district court's conclusion that "equivalent disparities have been the norm each decade since 1790."

J.S. App. 34. Thus, the district court observed, "[u]nder the 1800 apportionment, a vote in Delaware was worth only 54% of a vote in Tennessee." *Ibid.* Under the 1810 apportionment, "a vote in Tennessee was worth 86% of a vote in Massachusetts." *Id.* at 34-35. And under the 1820 apportionment, "a vote in Delaware was worth only 52% of a vote in Alabama." *Id.* at 35.

Indeed, the proportionality standard appellants suggest would render unconstitutional all but one reapportionment in American history. In their jurisdictional statement, appellants recede from the request in their amended complaint that Congress be ordered to increase the size of the House to at least 932 Members (see p. 6, *supra*). They now propose a purportedly "far more modest adjustment" to 658 seats.[8] J.S. 12. They say that such an increase would have the effect of creating the "lowest maximum disparity" between voting districts "since the 1910 census, when the number 435 was first adopted."[9] J.S. 11. In fact, the new disparity level

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[8] Appellants describe 658 seats as "comparable" to the British House of Commons. J.S. 11. They do not attempt to grapple with the fact that, as part of a parliamentary system with a Prime Minister and more than two major political parties, the House of Commons functions in dramatically different ways than the House of Representatives. Under a government-sponsored bill that has passed the House of Commons and is being considered by the House of Lords, the House of Commons would be reduced from 650 to 600 members at the next election. See Explanatory Notes to H.L. Bill 26–EN, Parliamentary Voting System and Constituencies Bill 2-3 (Nov. 3. 2010), http://www.publications.parliament.uk/pa/ld201011/ldbills/026/en/2011026en.pdf.

[9] When appellants describe the "disparity" or "deviation" between districts (J.S. 5-6, 11), they are no longer talking in terms of the notional share that a voter from one State (like Montana) possesses of the vote of someone from another State (like Wyoming), cf. J.S. 4, 16. Instead, they are describing the combined amount by which the average popu-

that appellants seek to impose—one of significantly less than 49%, see J.S. 6—would not just be the lowest since 1910, but the lowest since the reapportionment that followed the 1810 census, which is a stark outlier in the Nation's history. With the exception of 1810, the combined deviations from the ideal district in the most overrepresented State and the most underrepresented State have ranged from a low of 49.32% after 1840 (comparing Rhode Island and Arkansas), to a high of 121.45% after 1900 (comparing Nevada and Utah). Gov't D. Ct. Ex. D, at 1-7.[10]

Moreover, the maximum deviation that appellants project will result from retaining a 435-seat House of Representatives after the 2010 census—a deviation "between 64.0% and 64.47%," J.S. 5—will still be comfortably within the range reflected in the other reapportion-

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lations of the districts in the most over-represented State and the districts in the most under-represented State deviate from the population of an ideal district (which would be the national population divided by the number of districts nationwide). The data reflecting every State's deviation in the Constitution's original allocation of seats and in every reapportionment since 1792 are contained in the table that appellees submitted in the district court as Exhibit D to their Motion for Summary Judgment (Doc. 16-4).

[10] Under each reapportionment, the greatest combined deviation between the sizes of the districts in any two States has been as follows:

1790	64.99%	1860	67.87%	1940	82.67%
1800	82.05%	1870	80.32%	1950	68.45%
1810	15.44%	1880	86.93%	1960	62.97%
1820	81.22%	1890	92.20%	1970	68.24%
1830	55.67%	1900	121.45%	1980	57.17%
1840	49.32%	1910	70.24%	1990	60.73%
1850	64.17%	1930	110.30%	2000	63.38%

Gov't D.Ct. Ex. D, at 1-7. As explained above (see pp. 3-4, *supra*), there was no reapportionment following the 1920 census.

ments in the Nation's history. Such a deviation would, in fact, be smaller than those that occurred in 13 of the 21 prior reapportionments, and almost identical to (*i.e.*, within 1.5% of) those that occurred in 3 others.[11]

This Court held in *Montana* that "a half century" of consistent practice that had "been accepted by the States and the Nation" demonstrated the validity of Congress's decision to use the equal-proportions method of apportioning Representatives among the States. 503 U.S. at 465-466. Here, history's support runs much deeper, since appellants' proposals would invalidate nearly every reapportionment in our Nation's history. Although the decision to set the size of the House of Representatives at 435 Members has repeatedly resulted in significant interstate deviations in per-district population, Congress has acted well within its discretion in deciding upon that number.

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[11] As shown by the data in the preceding footnote, the maximum deviation was greater than 64.47% in the reapportionments that occurred after 1790, 1800, 1820, 1860, 1870, 1880, 1890, 1900, 1910, 1930, 1940, 1950, and 1970. And it was at least 62.97% in 1850, 1960, and 2000.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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