

No. 26-205

IN THE
Supreme Court of the United States

UNIVERSITY OF SOUTH FLORIDA
COLLEGE REPUBLICANS ET AL.,
Appellants,

v.

SECRETARY OF COMMERCE ET AL.,
Appellees.

**On Direct Appeal from the District Court
for the Middle District of Florida**

**BRIEF OF *AMICI CURIAE* STATES OF
FLORIDA AND TEXAS IN SUPPORT OF
APPELLANTS**

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INTEREST OF THE *AMICUS CURIAE*

The States of Florida and Texas, like other States, have a substantial and compelling interest in the decennial census, specifically in how the apportionment base is calculated for distribution of seats in the House of Representatives and of federal funds. Florida's interest is particularly relevant to these issues because, based on the Census Bureau's own analysis of the 2020 Census, Florida was significantly undercounted. That undercount deprived Florida of an additional seat in the House of Representatives to which it was entitled—as well as a corresponding deprivation in federal funding. For a decade, this miscount will directly harm Floridians by diminishing their rightful voice in the House and artificially shrinking their share of federal resources. Florida's interest, therefore, in an *actual* and unadulterated enumeration for apportionment purposes couldn't be clearer. Indeed, all States share an interest in preventing behind-the-curtain manipulation of one of the Constitution's most valuable tools aimed at equal representation: the decennial census.

SUMMARY OF ARGUMENT

Each decennial census, the Census Bureau is tasked with enumerating the people inhabiting these United States. That enumeration, or count, determines how members of the House of Representatives are apportioned across the States and federal funds are distributed. Apportionment aims to ensure equal representation. To safeguard apportionment, the Framers required that the census be conducted by actual enumeration.

The linguistic precision of *actual enumeration* was aimed at a process that the Framers knew was fraught with potential manipulation. After all, the larger a State's number of inhabitants, the greater its representation in the House of Representatives. Estimations, inferences, and statistical extrapolations left too much room for manipulation. So actual enumeration, or counting, became the fixed standard for census taking.

And the Framers and founding-era Americans knew what *actual enumeration* meant. Those words bore plain meaning at that time (and today), and it was commonly understood that an actual count did not include estimates or inferences. In fact, many Framers particularly pointed out the differences between actual counting and conjecture (i.e., an estimate or inference).

The *Utah v. Evans* merits decision marked an erroneous departure from the original meaning of the Census Clause. It permits estimates and inferences in determining apportionment. As such, this Court should retreat from that opinion and reinforce the Framers' linguistic precision, which required the actual counting of inhabitants for apportionment. The district court panel below prematurely dismissed this case on standing and errantly analyzed the statute of limitations applicable to the Plaintiffs' claims. Should this case proceed, it presents an appropriate vehicle to revisit and recede from *Evans*' flawed conclusions.

ARGUMENT

I. Article I, Section 2 requires “actual Enumeration” to determine the apportionment base for allocating seats in the House of Representatives and distributing federal funds.

Every ten years, the Nation takes an enumeration, or count, of its population so that House seats and federal funds are accurately apportioned amongst the States. *Trump v. New York*, 592 U.S. 125, 128–29 (2020); *see also* U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV.¹ This, the Census, remains one of our Nation’s most valuable tools aimed at equal representation of the People. *Wesberry v. Sanders*, 376 U.S. 1, 12–13, 17–18 (1964). As such, apportionment of members of the House of Representatives must be done in a manner that respects the Peoples’ voices, for this apportionment directly determines political power, which must be distributed equally. *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (explaining that political equality—foundational to this Nation—is best summarized as “one person, one vote”); *see also The Federalist* No. 57, at 385 (James Madison) (Jacob E. Cooke ed., 1961) (“Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.”);

¹ Congress has delegated the authority to conduct decennial censuses to the Secretary of Commerce who oversees the Census Bureau. *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 321 (1999).

Wesberry, 376 U.S. at 10 (“If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all.” (citation omitted)).²

“Mindful of the importance of calculating the population, the Framers chose their language with precision, requiring an ‘actual Enumeration’” for the apportionment base of the decennial census. *Utah v. Evans*, 536 U.S. 452, 489 (2002) (Thomas, J., dissenting in part) (quoting U.S. Const. art. I, § 2, cl. 3). Post-ratification, Congress immediately took note of that linguistic precision, “requiring census enumerators to swear an oath to make ‘a just and perfect enumeration’ of every person within the division to which they were assigned.” *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 335 (1999) (quoting Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101 (1790)). In fact, for the following 14 censuses, enumerators visited each

² For apportionment, “constituents” or “inhabitants” were those counted toward making the apportionment base and distributing members of the House in turn. See Jay E. Town, *Counting Heads: The Decennial Census and Adjustments to Enumeration*, 96 Notre Dame L. Rev. Reflection 107, 122–23 (2021). At the framing, “inhabitants” were those with “principal and continuing residency in a state.” *Id.* at 122. Included therein are citizens, *id.*, but *not* illegal aliens. *Id.* at 124–25. Indeed, if illegal aliens were included in the apportionment base, American citizens’ votes would be diluted and representation would be skewed. *Id.* at 126–30. The Census Bureau, itself, recently explained that inhabitants—countable toward the apportionment base—are those usual residents who are members of the body politic. Decennial Census of the Population of Americas; Proposed Residence Criteria and Proposed Regulations for Demographic Questions, 91 Fed. Reg. 174 (Sept. 10, 2026) (to be codified at 15 C.F.R. pts. 60 & 70).

home, in person. *Id.*; *see also id.* at 335 n.5 (citing statutes requiring, e.g., that “enumeration shall be made by an actual inquiry at every dwelling-house, or of the head of every family, and not otherwise”). Beyond physically visiting homes, enumerators had to swear (or affirm) that they “made[] a just and perfect enumeration and description of all persons resident within [their] district.” Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101 (1790).³ The point: remove the possibility for manipulation. “Census taking is an age-old practice” rife “with manipulation for political and fiscal gains.” *Evans*, 536 U.S. at 496–97 (Thomas, J., dissenting in part) (citing A.B. Wolfe, *Population Censuses Before 1790*, 27 J. Am. Statistical Ass’n 357 (1932)). By requiring an actual count, the Framers (Federalists and Anti-Federalists alike) sought to minimize the potential for manipulation. *Id.* at 500–01.⁴

Alexander Hamilton explained that “[a]n actual census or enumeration of the people must . . . effectually shut[] the door to partiality or oppression.” *The Federalist* No. 36, at 226 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (explaining that proportional taxes would be determined not in the sole discretion of the Legislature but through a fixed standard provided by the Census Clause: actual enumeration). James Madison also warned that “the States should

³ *See also* Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an “Actual Enumeration”*, 77 Wash. L. Rev. 1, 54 (2002) (citation omitted).

⁴ Conjectures or estimates are far too susceptible to this manipulation or deception. *See infra* note 8.

feel as little bias as possible to swell or to reduce the amount of their numbers.” *Id.* No. 54, at 371 (James Madison).

Meanwhile, prominent Anti-Federalists agreed. George Mason explained that the very “nature of man” is to gain and preserve power—“those who have power in their hands will not give it up while they can retain it.” *Evans*, 536 U.S. at 502 (Thomas, J., dissenting in part) (citation omitted). Roger Sherman, once a proponent of unfettered legislative discretion for census taking, was “convinced . . . that the periods [and] the rule of revising the Representation ought to be fixt by the Constitution.” *Id.* (emphasis removed). Nathaniel Ghorum remarked that since bias was present at the Convention, “[h]ow can it be expected that the Legislature hereafter under the full biass of those views, will be able to settle a standard.” *Id.*

Thus, “it was clear that the principle [sic] concern was that the Constitution establish a standard resistant to manipulation.” *Id.* at 503.⁵ To achieve representation in proportion to actual population, the Framers used linguistic precision, requiring that an “actual Enumeration” be made for the census. See Lee, *supra* note 3, at 62.

⁵ The *Evans* majority presumed, instead, that accuracy was the motive behind the Census Clause, but that presumption ignores the full scope of history surrounding “actual enumeration” and the practicalities of apportionment. 536 U.S. at 487–88 (O’Connor, J., dissenting in part).

II. “Actual Enumeration” in Article I, Section 2 rules out sampling as a valid method of determining the apportionment base.

The requirements of the Census Clause are determined by its original meaning—“the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.” *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824).⁶ Cognizant of the temptation to inflate census returns and skew representation in the House of Representatives, the Framers required an actual count to determine apportionment. U.S. Const., art. I, § 2, cl. 3. Their language was precise—each census would be accomplished through “actual Enumeration,” taking place every ten years after the first census. *Id.*

The terms *actual* and *enumeration* were not general glosses or amorphous guideposts. *Contra Evans*, 536 U.S. at 474 (majority opining that “the text uses a general word, ‘enumeration’ that refers to a counting process without describing the count’s methodological details”). Instead, each word had specific meaning. That the Framers did not spell out precisely how to count persons does *not* mean that census enumerators did not actually have to count or could rely on estimates or sampling to accomplish a “count.” Actual enumeration means actually counting. It does not mean sampling.

⁶ The Census Clause was amended by the Fourteenth Amendment, but the requirement of actual enumeration remained.

Justice Thomas plainly laid out the case for actual enumeration and the Framers' linguistic precision in his *Evans* dissent. He explained that "at the time of the founding," "[a]ctual" meant "really done." *Evans*, 536 U.S. at 492 (Thomas, J., dissenting in part) (quoting Nathan Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789)). The term *actual* meant "in act, not purely in speculation" or "merely potential." *Id.* (quoting Thomas Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796)). Enumeration was defined at the founding "as '[t]he act of numbering or counting over." *Id.* (citation omitted). In other words, "enumeration" meant "to count over distinctly" or "to number." *Id.* (quoting Samuel Johnson, *A Dictionary of the English Language* 658 (4th rev. ed. 1773)). "Count was defined as 'to number; to tell.'" *Id.* (quoting Johnson, *supra* at 435). Put differently, counting was accomplished by naming "one by one, or by small numbers, [to] ascertain[] the whole number of units in a collection." *Id.* (quoting 1 Noah Webster, *An American Dictionary of the English Language* (1828)). According to the Clause's plain text, enumerators must *actually* count.

Not only did the Framers use precise language to require an actual enumeration or counting, they understood the difference between actual counting and other tabulation methods—like statistical sampling. For example, James Madison explained that the census would provide an "exact number" of persons versus "assertions and conjecture." 2 The Founders' Constitution 139 (P. Kurland & R. Lerner eds. 1987). When Great Britain struggled over how to calculate its population—whether by count or estimate—Benja-

min Franklin was consulted. “Franklin’s own correspondence indicates that he and his contemporaries were aware of, and even participated in, the British discussion on issues of population.” Lee, *supra* note 3, at 40.

John Adams explained to a foreign friend who was interested in “exact and authentic information on the present situation of American affairs” that “[t]he only certain way of determining the ratio of the increase of the population is, by authentic numerations of the people.” *Id.* at 45 (citation omitted). Adams understood and explained that his authentic numerations were *not* estimates—even sophisticated ones. *Id.* Reporting on the first census’s results to friends abroad, Thomas Jefferson went so far as to distinguish between “actual returns” from the census with black ink and “conjecture[s]” marked by red ink. *Id.* at 57 n. 304 (citation omitted). President Washington, while acknowledging that imperfection inheres in any method of counting, nevertheless praised the “authenticated number” produced by the official census returns, which was “far greater . . . than has ever been allowed in Europe.” *Id.* at 58 (citation omitted).

Moreover, estimates and samples were commonplace during and before the founding era, but the Framers chose to discard that practice. During the colonial period, “estimates” were taken of the population of various colonies for tax and militia purposes. *Id.* at 42. John Adams noted that population estimates were taken of the colonies but that those estimates were based on “speculation” rather than “authentic lists of the population” which “number[ed]

the people.” *Id.* at 45 (citation omitted).⁷ The Framers and the founding-era generation, thus, understood the difference between counting and estimations.

There can be no doubt that the Framers knew what their words meant and that those words were commonly understood. They were keenly aware that estimates could be used to determine population. Yet, they chose their words carefully and required actual counting, fixing the standard for the Decennial Census so that their linguistic precision could serve as a bulwark against manipulation.

III. Statistical imputation is a forbidden form of sampling, and, as such, this Court should retreat from *Utah v. Evans* and reinforce the original meaning of the Census Clause.

While sampling is allowed for non-apportionment purposes, it is forbidden when it comes to apportionment. 13 U.S.C. § 195. “From the very first census, the census of 1790, Congress has prohibited the use of statistical sampling in calculating the population for purposes of apportionment.” *Dep’t of Com.*, 525 U.S. at 335; *see also id.* at 335 n.5.

“[S]ampling occurs whenever the information on a portion of a population is used to infer information on the population as a whole.” *Evans*, 536 U.S. at 482

⁷ Across the pond, the distinction between “actual enumeration” and estimates was also well-known. Lee, *supra* note 3, at 62. “[A]ssessments of population on both sides of the Atlantic routinely contrasted methods of drawing ‘conjectural estimates’ with the more costly approach of conducting an ‘actual enumeration.’” *Id.*

(O'Connor, J., dissenting in part) (citation and quotation marks omitted). Thus, if the Census Bureau uses “a predefined, deterministic method to select a portion of the population and then use[s] that portion of the population to estimate unknown information about the overall population,” it engages in forbidden sampling. *Id.* When it engages in imputation, the Census Bureau does essentially the same thing. *Id.* at 482–83. Imputation uses “inferences” and “estimates” to fill in missing data points. *See* Susanne Rassler et al., *Imputation*, in *Encyclopedia of Survey Research Methods* 322–23 (Paul J. Lavrakas ed., 2008). So does sampling.

The *Evans* majority on the merits, however, missed this essential similarity. To illustrate what it thought was a meaningful difference between the two methods, it described how a librarian might determine the amount of books in a library using sampling versus using imputation. 536 U.S. at 465. Using sampling, the librarian might count the books on every tenth shelf and then multiply that number by ten. *Id.* In other words, the librarian would gather a partial count and extrapolate from that partial count to the whole. *Id.* Using imputation, the librarian might start out trying to count all the books, but when encountering empty spaces would project how many books would ordinarily fill those spaces and then determine a total count. *Id.*⁸

⁸ The majority appeared unfazed by the striking possibilities for manipulation with their own formulation of imputation. *See Evans*, 536 U.S. at 471–72 (dismissing, without analysis, the fear that imputation is manipulable). Given the possibility for multi-

It is unclear how this illustration shows imputation to be distinct from sampling in terms of what 13 U.S.C. § 195 is actually designed to prevent. Both statistical methods require drawing inferences and making estimates. The *Evans* majority seemed attracted to the “difference in the *target* of the inference”: sampling is “an extrapolation from a part presumably representative of the entire population to the entire population,” whereas imputation is an “interpolation from surrounding books, presumably representative of the missing books, to the books to be counted.” *Jason Wejnert, Utah v. Evans and Statistical Methods in Census Apportionment*, 43 *Jurimetrics J.* 441, 447 (2003). Perhaps so, but “it is not clear . . . why this difference . . . is legally significant. *Id.*

Continuing on the merits, the *Evans* majority professed that imputation differs “in degree if not in kind” from sampling. 536 U.S. at 471. But it “provide[d] no statistical basis for claiming a difference of degree matters to the question of what constitutes sampling, nor d[id] it explain how a meaningful line between sampling and nonsampling could be drawn on such a

ple inferences, imputation allows the imputing party to infer favorable data to one state while unfavorable data to another. It should not be hard to imagine how imputation is susceptible to manipulation—any time an inference or estimate is involved, the statistician inferring or estimating must make a choice as to what to include. Actual counting is imperfect, but it minimizes the potential for manipulation that allowing inferences invites.

Perhaps the majority simply trusted the Census Bureau. *Id.* at 472. But the Framers were not so trusting and believed that “the periods & the rule of revising the Representation ought to be fixt by the Constitution.” *Id.* at 502 (Thomas, J., dissenting in part). They fixed those periods and rules by requiring actual enumeration.

basis.” *Id.* at 484 (O’Connor, J., dissenting in part). In other words, the degree or size of an inference may be interesting, but it is legally irrelevant. The very use of inferences is what makes imputation a forbidden form of “sampling.”

The majority also seemed to think imputation was meaningfully distinct from sampling because the Bureau used it after making an effort at a full count, rather than choosing sample sizes first. *Id.* at 466–67. But “sampling from collected data is a recognized form of sampling.” *Id.* at 484 (O’Connor, J., dissenting in part). The Bureau still draws inferences and makes estimates, altering the ultimate enumeration, regardless of whether it does so during the course of collecting data or at the end.

Finally, the *Evans* majority intimated that imputation was not sampling because the Census Bureau’s “immediate objective was the filling in of missing data as part of an effort to count individuals one by one.” *Id.* at 467. As Justice O’Connor put it, the majority thought the Census Bureau “never meant to engage in sampling.” *Id.* at 485 (O’Connor, J., dissenting in part). There is, however, “no statistical basis for defining sampling in terms of intent.” *Id.* There is no logical basis, either. Subjective intent doesn’t alter reality. Plainly, whether one intends to sample or impute doesn’t matter if a sample or imputation is drawn.

As explained, the goal of the Census Clause is equal representation, political manipulation must be minimized. And just as sampling must be forbidden for its susceptibility to political manipulation, so too

must imputation as another variant of the same species. “[I]n every census where imputation would alter the resulting apportionment, the mere decision to impute or not to impute is a source of possible manipulation.” *Evans*, 536 U.S. at 487 (O’Connor, J., dissenting in part). By allowing imputation (“sampling in disguise”) for apportionment, the *Evans* majority made it easier to manipulate the Census. See Nathan T. Dwyer, *Utah v. Evans: How Census 2000’s “Sampling in Disguise” Fooled the Supreme Court into Allocating Utah’s Seat in the U.S. House of Representatives to North Carolina*, 31 *Pepp. L. Rev.* 1055, 1078 (2004).

The results of the 2020 Census demonstrate how imputation can give rise to pernicious manipulation. Under the Biden Administration’s watch, Florida and Texas lost seats in the House of Representatives that they should have gained. App. 102–03a, 108a.⁹ The Census Bureau’s imputation, or sampling in disguise, led to those results.

Minnesota took the last seat in the House of Representatives, but only 1.8% of its population was omitted from the Census, i.e., uncounted. Courtney Hill et al., *Census Coverage Estimates for People in the United States by State and Census Operations 2020 Post-Enumeration Survey Estimation Report*, U.S.

⁹ The Census Bureau’s own data shows how historically terrible the 2020 Census was. Press Release, U.S. Census Bureau, *U.S. Census Bureau Releases 2020 Undercount and Overcount Rates by State and the District of Columbia* (May 19, 2022), <https://perma.cc/2CPY-HLS4>. And the skewing appeared political—five conservative states were undercounted while six liberal states were overcounted. *Id.*

Census Bureau 17 (June 2022), <https://perma.cc/X5EPW8YW>. The Bureau left out 9.2% of Florida's population and 7.6% of Texas's on the other hand. *Id.* Imputation did not save Florida. Commonsensically, because Florida's population was so drastically omitted, it follows that Florida should have benefitted from imputation proportional to its omitted population. But the inferences drawn to impute uncounted persons across the states were not so proportional.

Minnesota benefited from a 2.5% imputation rate, but it only had 1.8% of its population go uncounted. *Id.* New York benefited from a 4.9% imputation rate, while 5.9% of its population was uncounted. *Id.* Compare that to the unfavorable treatment of Florida—Florida benefitted from a 3.6% imputation rate, but 9.2% of Florida's population was uncounted. *Id.* Or consider Texas, which benefitted from a 3.5% imputation rate, but 7.6% of its population was uncounted. *Id.* at 18. That disparity is drastic and demonstrative of statisticians' discretion as to what inferences may be drawn.

Using the *Evans* majority's librarian analogy, the librarian counting missing books in Florida and Texas (people) could have imputed those books onto the shelves (inferring that the books existed). For whatever reason, the librarian did not. But the librarian did impute books onto the shelves for states like Minnesota and New York, which benefited from favorable inferences. This is precisely the kind of manipulation that the Framers sought to prevent so that the people of these United States would have equal representation in the House of Representatives.

* * * * *

This Court’s judicial power “is fundamentally the power to decide cases in accordance with the law.” *Gamble v. United States*, 587 U.S. 678, 713 (2019) (Thomas, J., concurring). Put differently, the power of the Court is to say what the law is regarding a particular case or controversy. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The merits decision of *Evans*, which allowed a form of sampling in disguise to determine apportionment (contrary to the Constitution and 13 U.S.C. § 195), is demonstrably wrong and not in accordance with the law. Thus, the “rule is simple.” *Gamble*, 587 U.S. at 718 (Thomas, J., concurring). “When faced with a demonstrably erroneous precedent . . . [do] not follow it.” *Id.*

By requiring that census enumerators actually count persons within the States, our Framers undertook a revolutionary task. President Washington explained that the “authenticated number” produced by the actual enumeration would be “far greater . . . than has ever been allowed in Europe” and that the returns would “have no small influence in enabling them to form a more just opinion of our present and growing importance than has yet been entertained here.” Lee, *supra* note 3, at 58 (citation omitted). They used linguistic precision to require an actual count in an effort to prevent political manipulation in apportionment, which aims to ensure equal representation. The Framers were not ignorant of estimations and other forms of statistical sampling—they simply chose not to allow such manipulable statistical methods to determine apportionment.

The merits holding of *Utah v. Evans* got it demonstrably wrong on the original meaning of the Census Clause. The Framers fixed the method of census taking—actual enumeration. As such, this Court ought to recede from that decision and reaffirm the Census Clause’s original meaning, requiring actual enumeration.¹⁰

¹⁰ All counsel of record was notified pursuant to Rule 37.2 that this Amicus Brief would be filed with the Court.

CONCLUSION

The Court should summarily reverse the order of the District Court for the Middle District of Florida.

Respectfully submitted,
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