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No. 140, Original

IN THE
Supreme Court of the United States

LOUISIANA, *et al.*, *Plaintiffs*,

v.

JOHN BRYSON, Secretary of Commerce, *et al.*,
Defendants.

On Motion for Leave to File Bill of Complaint

Brief *Amicus Curiae* of U.S. Border Control, U.S. Border Control Foundation, U.S. Justice Foundation, Institute on the Constitution, Gun Owners of America, Inc., Gun Owners Foundation, English First, English First Foundation, Conservative Legal Defense and Education Fund, The Lincoln Institute for Research and Education, Public Advocate of the United States, Policy Analysis Center, Del. Bob Marshall, Rep. Charles Key, Del. Don Dwyer, Rep. Matt Shea, Sen. Kit Jennings, Bob Fanning, and Chuck Baldwin in Support of Plaintiffs

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INTEREST OF THE *AMICI CURIAE*¹

U.S. Border Control (www.usbc.org), **Gun Owners of America, Inc.** (www.gunowners.org), **English First** (www.englishfirst.org), and **Public Advocate of the United States** (www.publicadvocateusa.org) are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code (“IRC”).

U.S. Border Control Foundation (www.usbcf.org), **U.S. Justice Foundation** (www.usjf.net), **Gun Owners Foundation** (www.gunowners.com), **English First Foundation** (www.englishfirstfoundation.org), **Conservative Legal Defense and Education Fund** (www.cldef.org), **The Lincoln Institute for Research and Education** (www.lincolnreview.com), and **Policy Analysis Center** are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

Each of the above nonprofit organizations is interested in the public policy process, the proper construction of state and federal constitutions and statutes, and questions related to human and civil rights secured by law.

¹ It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Institute on the Constitution (www.iotconline.com) is an unincorporated educational association established in Maryland in 2000, intended to reconnect Americans to the history of the American Republic and to their heritage of freedom under law.

Delegate **Bob Marshall** (R-VA-13) (www.delegatebob.com) is a senior member of the Virginia House of Delegates. Representative **Charles Key** (R-OK-90) (www.charleskey.com) is a member of the Oklahoma House of Representatives. Delegate **Don Dwyer** (R-MD-31) (delegatedwyer.com) is a member of the Maryland House of Delegates. Representative **Matt Shea** (R-WA-4) (www.voteshae.com) is a member of the Washington House of Representatives. Senator **Kit Jennings** is a member of the Wyoming Senate. **Bob Fanning** is a candidate for Governor of Montana, and **Chuck Baldwin** is a candidate for Lt. Governor of Montana (fanning-baldwin.com).

STATUTE INVOLVED

13 U.S.C. § 141(a)-(b):

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the “decennial census date”, in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States

under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * *

SUMMARY OF ARGUMENT

The United States Census Bureau maintains that the Bureau “is required by the U.S. Constitution to count everyone living in this country, regardless of immigration or citizenship status.”² That claim is demonstrably untrue.

First, the United States Constitution did not create the Census Bureau, or even the Department of Commerce, of which the Bureau is a part. Thus, the Constitution vests no power directly in the Bureau. Rather, the Census Bureau is a creature of the United States Congress. As such, its powers and duties are determined by statute, not by the Constitution. Even then, the law establishing the Bureau must itself be “made in pursuance” of the Constitution in order for it to be the law of the land. *See* U.S. Constitution, Art. VI, Cl. 2.

Further, the Constitution does not require, or even authorize, a census “count [of] everyone living in this

² *See* 2010 Census Constituent FAQs, Q. 2 (U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau), <http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf> (hereinafter “2010 Census FAQs”).

country.” Rather, Article I, Section 1, Clause 3, as amended by Section 2 of the 14th Amendment, authorizes a targeted decennial census of the “respective numbers” of the People of the several States, not a wholesale count of the numbers of persons found “living” in the United States. Only by such a tailored count can the constitutionally-authorized decennial census serve the purpose for which that census has been required — the apportionment of representation of the people of the several states in the U.S. House of Representatives.

Lastly, it is manifestly untrue that the decennial census ordained by the Constitution is to be taken without regard to a person’s “immigration or citizenship status.” The decennial census is conducted for the apportionment of representation in the House of Representatives, the members of which are “chosen every second Year by **the People** of the several States.”³ The first sentence of the 14th Amendment establishes a symbiotic relationship between a person’s United States citizenship and that person’s State citizenship. Thus, whether a person is part of the People of a State is largely, if not exclusively, dictated by a person’s “immigration or citizenship status.” Any census that ignores that connection is fatally flawed.

³ Art. I, Sec. 2, Cl. 1, U.S. Constitution (emphasis added).

ARGUMENT

I. THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION IN THIS CASE TO PRESERVE THE INTEGRITY OF THE HOUSE OF REPRESENTATIVES AND ELECTORAL COLLEGE.

Exceeding his authority under 13 U.S.C. § 141(a) by counting citizens of foreign nations in the 2010 census,⁴ the Secretary of Commerce (“the Secretary”) conducted an erroneous count, then reported that erroneous count to the President of the United States under 13 U.S.C. § 141(b). In turn, the President transmitted to Congress an inaccurate “statement showing the whole number of persons in each state ... and the number of Representatives to which each State would be entitled....” 2 U.S.C. § 2a(a). The Clerk of the House of Representatives then sent an erroneous “certificate of the number of Representatives to which such State is entitled....” 2 U.S.C. § 2a(b). Thus, the Secretary of Commerce’s error of law in conducting the census has set in motion a process which will result in an incorrect allocation of seats in the House of Representatives among the several States. The Declaration submitted by Plaintiffs demonstrates each of five States (Louisiana, Missouri, Montana, North Carolina, and Ohio) losing one seat to which it is properly entitled, with those seats being transferred to three States which are not entitled to those seats (California (2), Texas (2), and Florida (1)).

⁴ See discussion *infra*, pp. 7-11.

See Declaration of Troy C. Blanchard, Ph.D., Exh. 1 to Louisiana's Complaint.

In addition to improperly reallocating the relative political power of these States in Congress, the Secretary's report and President's transmittal of his statement to Congress has had the effect of improperly changing the composition of the Electoral College which is composed of a "Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...." Art. II, Sec. I, Cl. 2. Thus, President Obama's reliance on the Secretary's count has altered the composition of the electoral college as it will exist when it meets in December 2012 to elect the President of the United States — an election in which President Obama is a candidate. In an era of close elections which have involved the intervention of this Court,⁵ it is entirely possible that the outcome of the vote of the Electoral College following the November 2012 general election will be so close that its outcome will be decided by the five electoral votes shifted by the actions of President Obama and his Secretary of Commerce. For this reason alone, resolving the legality of this Administration's actions now, prior to the November 2012 election, is critical to the preservation of the integrity of the December 2012 vote of the Electoral College, and confirms the need for expedition made possible by plaintiffs' complaint filed directly in this Court.

⁵ See Bush v. Gore, 531 U.S. 92 (2000).

II. CONGRESS DID NOT AUTHORIZE THE DEPARTMENT OF COMMERCE TO INCLUDE IN THE 2010 CENSUS PERSONS WHO ARE NOT MEMBERS OF THE POLITY OF ONE OF THE SEVERAL STATES OF THE UNION.

By statute, Congress has directed the Secretary of Commerce to “take a decennial census of **population** as of the first day of April” every 10 years after the year 1980 “in such form and content as he may determine....” 13 U.S.C. § 141(a) (emphasis added). The Secretary has construed section 141(a) to require the Census Bureau to count all persons “living” on a particular day in April within the geographic boundaries of the United States of America, including the District of Columbia and the territories and other possessions of the United States. *See* 2010 Census FAQs, Q. 2. Such an interpretation would appear to be based upon the premise that Congress has required, or at least authorized, the Bureau to count persons without regard to their legal status.

It is well established, however, that the language of section 141 must not be interpreted in the abstract, but rather in accordance with the constitutional authority to conduct a decennial census vested in Congress by Article I, Section 2, Clause 3, as amended by Section 2 of the 14th Amendment. *See Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 321 (1999). Taken together, these constitutional provisions provide for a decennial census for the purpose of “apportion[ing] [the number of] representatives among the several States according

to their respective numbers,” and, to that end, vest Congress with the power to direct an “actual enumeration” — “counting the whole number of persons in each State, excluding Indians not taxed.” *Id.* Constrained both by (i) the purpose that representation of the States in the House of Representatives be proportionate to the populations of each State, and (ii) the requirement to determine the number of persons State by State, the decennial census was not designed to count willy nilly the number of persons found living in the United States as a whole. Rather, the constitutional text contemplates a count of the number of persons who constitute the “population” of each State. *Id.*

Even the Secretary acknowledges that the Bureau’s authority does not extend to “**visitors**” who happen to be present at a particular place of residence on census day. 2010 Census FAQs, Q. 24. Such a person would not be part of the “population,” that is, a part of “the whole number of people or inhabitants **occupying** a specific geographical locality.” See N. Webster, Third International Dictionary, p. 1766 (1964) (emphasis added). But the Secretary insists that the decennial population count must include any person who is a **citizen of a foreign country**, including any such person living in the United States merely to attend college, because such person “lives and sleeps most of the time” within the United States. See “Residence Rule and Residence Situations for the 2010 Census,” Items # 8 and 14 (hereinafter “Residence Rules”).⁶

⁶ http://www.census.gov/population/www/cen2010/redi_rules/resid_rules.html

Simply because a person “lives and sleeps most of the time” in a specific geographic place does not mean that such person “occupies” that place. To **occupy** means more than that — it means “to take up residence in,” “[to] settle in,” or “to hold possession of.” See N. Webster, p. 1561. To occupy, then, connotes a stay of some indefinite duration, not a limited period such as a citizen of a foreign country on a work or student visa. Counting foreign citizens on temporary visas is outside the authority granted to the Secretary under 13 U.S.C. § 141(a).

The Secretary’s authority is also constrained by 13 U.S.C. § 141(b), which assigns to him a related task, to be completed “within nine months after the census date,” namely, “[t]he tabulation of total population by States under subsection (a) of this section **as required** for the apportionment of Representatives in Congress....” (Emphasis added.) The Bureau is “required” by section 141(b) to ensure that the decennial census count is used properly to apportion the Representatives of Congress according to the number of persons who constitute the people of each State. This reading is consistent with the constitutional purpose of the decennial census which is designed to ensure that membership in the U.S. House of Representatives is based upon a principle of popular sovereignty, namely, that the members of the House would truly be “chosen every second Year by **the People** of the several states.” See U.S. Constitution, Art. I, Sec. 2, Cl. 3 (emphasis added).

As James Madison observed in Federalist 52:

As it is essential to liberty, that the government in general should have a common interest with **the people**; so it is particularly essential, that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, **the people**. [*The Federalist*, No. 52, p. 273 (G. Carey & J. McClellan, eds.: Liberty Press 2001) (emphasis added).]

And as Madison further observed that as for:

the house of representatives [and] the apportionment of its members to the several states.... [i]t is not contended, that the number of **people** in each state ought not be the standard for regulating the proportion of those who are to represent **the people** of each state. [*Id.*, at 282 (emphasis added).]

In this context, “the total population by States,” as stated in section 141(b), takes on a more specific meaning, namely, “a body of persons having some quality or characteristic in common” over and above that of “occupying” a particular geographic area. See N. Webster, *Third International Dictionary*, p. 1766. That common quality or characteristic would be shared by those persons who constitute **the People** of each constituent State of the federal union established by the Constitution — that is, those who owe allegiance to a particular State.

Citizens only of foreign nations, whatever their legal status — student, worker (legal/documentated or illegal/undocumented), landed immigrant or non-

immigrant — do not owe allegiance to any State, and, therefore, are not citizen members of any State polity. See U.S. Constitution, 14th Amendment, Sec. 1. As Thomas Cooley explained:

It is impossible to conceive of such a status as citizenship of a State unconnected with citizenship of the United States, or of citizenship of the United States within a State unconnected with citizenship of the State. [T. Cooley, The General Principles of Constitutional Law in the United States, pp. 244-45 (Little, Brown Boston: 1880).]

Properly construed, 13 U.S.C. § 141 does not authorize the inclusion of foreign citizens in the decennial census for the purpose of apportionment of members of the representatives.

III. CONGRESS IS NOT AUTHORIZED BY THE CONSTITUTION TO INCLUDE IN THE DECENNIAL CENSUS ANY PERSON WHO IS NOT A MEMBER OF THE POLITY OF ANY ONE OF THE SEVERAL STATES.

A. Congress Does Not Have Plenary Authority to Conduct a Decennial Census of the American People.

Article I, Section 2, Clause 3, as amended by Section 2 of the 14th Amendment, specifies the kind, method, frequency, and purpose of the decennial census.

First, it authorizes Congress to provide for a count of the number of persons State by State, not of the number of persons without regard to their relationship to a particular State. To be counted in the decennial census, a person must be “in” a State, and numbered accordingly, not “in” the District of Columbia or territory of the United States. As plainly stated in the 14th Amendment, “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State.” *See also Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 321-22 (1999).

Second, while Congress is authorized to direct “the manner” in which the persons included in the census may be counted, Congress is not permitted to stray from the constitutional mandate that there must be an “actual enumeration” of the persons counted.⁷ To be sure, the “actual enumeration” requirement does not mandate that each person counted must be seen and individually verified by a census taker. But this Court has narrowly construed Congress’s power over the “manner” of such “actual enumeration” only to include those persons who have been verified by reliable methods, such as certain kinds of hearsay, or by imputation based upon actual counts of persons in comparable situations, but these methods may be used only after the Census Bureau has exhausted other more certain means by which to conduct the actual

⁷ Thus, it has been determined that there is no room for estimating by statistical sampling a State’s population. *See Utah v. Evans*, 536 U.S. 452, 464-73 (2002).

enumeration authorized by the Constitution. *See Id.*, 536 U.S. at 476-77.

Third, Congress is authorized to conduct a census only once every 10 years. While Congress has some discretion as to the “manner” of the actual enumeration, it has absolutely no discretion to conduct any census for apportionment purposes other than the required decennial one. The 10-year period was selected as “the only effectual means by which the relative power of the several States could be justly represented.” 1 J. Story, Commentaries on the Constitution, § 644, p. 471 (5th ed. 1891).

Fourth, Congress is authorized to conduct the decennial census for the purpose of apportioning Representatives in the the House “among the several States **according to their respective numbers**, counting the whole number of persons in each State, excluding Indians not taxed.” 14th Amendment, Sec. 2 (emphasis added). While this provision significantly amended the original text of Article I, Section 2, Clause 3 to ensure that the “whole number of persons in each State” was counted, not just the “whole number of free persons,” the amendment did not change the original purpose of the mandated census: “that comparative state **political** power in the House would reflect comparative **population**, not comparative wealth....” *See Utah v. Evans*, 536 U.S. at 477 (emphasis added).

To accomplish this comparative representational purpose, the census count should not include a person who just happens to be found within a particular

State's boundaries on census day. Thus, a tourist or other temporary visitor would not be "in" a State within the meaning of the Constitution's apportionment provision. Rather, the function of the prepositional phrase, "of persons in each State," would require a person to be "in" one State in a way that sets him apart from a person "in" another State. The word "in" serves the function of distinguishing a person whose political identity and affiliation would characterize that person as a Minnesotan, for example, as contrasted with a person whose political identity and affiliation would make him a New Yorker. To be "in" a State, for the purpose of the decennial census, then, is to determine whether a person is to be numbered — in the political sense — among the people of a particular State, to the end that the "House of Representatives **shall** be composed of members chosen every second year by **the People** of the several States." U.S. Constitution, Art. I, Sec. 2, Cl. 1 (emphasis added).

B. Congress Is Not Authorized to Include in the Decennial Census a Person Who Only Lives Geographically in a State, but Is Not a Constituent Part of "the People" of the Several States.

As the Supreme Court observed in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the reference to "the people" in Article I, Section 2, Clause 1 is one of six "select parts of the Constitution," in which "'the people' seems to have been a term of art...." *Id.* 494

U.S. at 265.⁸ So employed, the Court continued, “the people’ ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* To illustrate the legal significance of the term, the Court cited United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904), and restated the ruling of that case as follows: “[An] **excludable alien** is not entitled to First Amendment rights, because ‘he does **not** become **one of the people** to whom these things are secured by our Constitution by an attempt to **enter forbidden by law.**” Verdugo-Urquidez, 494 U.S. at 265 (emphasis added). Indeed, as the Court stated further in Turner v. Williams:

To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they **do not belong as citizens or otherwise.** [*Id.*, 194 U.S. at 292 (emphasis added).]

In direct conflict with this ruling, the Census Bureau erroneously states that the Constitution empowers it to count in the decennial census as one of

⁸ See also discussion of “the people” in the 2nd Amendment in Gun Owners of America, *et al. amicus curiae* brief (pp. 9-12) in District of Columbia v. Heller, 554 U.S. 570 (2008); <http://www.lawandfreedom.com/site/constitutional/DCvHellerAmicus.pdf>.

the people of the several States “everyone living in this country, regardless of immigration or citizenship status.” 2010 Census FAQs, Q. 2, *supra*.

The Census Bureau asserts that it is “committed” not only to “counting every person,” but “counting every person in the **correct place**.” 2010 Census Residence Rules, Item 1 (emphasis added). In justification of this mission, the Bureau recognizes:

The fundamental reason the decennial census is conducted is to fulfill the Constitutional requirement (Article I, Section 2) to apportion the seats in the U.S. House of Representatives among the states. Thus, for a fair and equitable apportionment, it is crucial that people are counted in the **right place** during the 2010 Census. [*Id.* (emphasis added).]

According to the Bureau, the “right place” is a person’s “usual residence,” that is, “the place where a person lives and sleeps most of the time.” *Id.*, Item 2. Remarkably, by this definition, one’s “usual residence” would trump one’s “voting residence or legal residence.” *Id.* Thus, college students “living away from their parental home,” are “[c]ounted at the on-campus or off-campus residence where they live and sleep most of the time,” regardless of whether (i) they may be registered to vote at the address of their parents; (ii) they claim their legal residence their family home; or (iii) they pay out-of-state tuition to the college that they attend. *See id.*, Item 8.

Similarly, the Census Bureau **counts foreign students** “at the on-campus or off-campus residence where they live and sleep most of the time,” even though such students’ legal residence is in a country other than the United States. *Id.*, Item 8. Remarkably, if an **American student** is living and studying abroad, he is **not counted** in the census at all. *Id.* Even more remarkably, foreign nationals living and sleeping most of the time within the geographic boundaries of a particular State are counted, even if they unlawfully entered the United States or, after lawful entry, remained unlawfully on American soil. *Id.*, Item 14.

In short, the Census Bureau’s rules of residence are not tailored to count only those persons who are legally residing in the United States. Instead, the Bureau has chosen to count persons whose legal residence is outside the United States and is including them in the part of the polity of the State in which they are living and sleeping even if their legal residence is outside of the United States. Contrary to the Bureau’s claim, its Residence Rules do not count foreign nationals in their “right” place and, in failing to do so, the Bureau counts such nationals as if they are part of the people of the several States, in violation of the constitutional principle that limits the people to citizens and others who rightfully “belong” to the political communities of the several States. See Turner v. Williams, 194 U.S. at 292.

C. The 2010 Census Count, Made without regard to Immigration or Citizenship Status, Undercuts State Citizenship as Defined by the Fourteenth Amendment.

According to the first sentence of the 14th Amendment, any persons who are “born or naturalized in the United States and subject to the jurisdiction thereof” are by definition citizens “of the State wherein they reside.” Thus, citizenship in the national government is “paramount and dominant,”⁹ that is, “every citizen of the United States is ... without doubt a citizen” of the State in which he resides. *Id.*, § 113, p. 326.

In disregard of the fact that state citizenship is subordinate to, and derivative from, federal citizenship, the Census Bureau conducts the decennial census — the purpose of which is to apportion representatives according to the State’s “respective numbers” — without regard for “immigration or citizenship” status. But the respective number of lawful residents of any State depends almost exclusively upon the immigration status of those residents. See T. Cooley, General Principles of Constitutional Law, *supra*, pp. 244-45. By ignoring a person’s “immigration or citizenship” status, the Bureau’s decennial count undercuts the integrity of the State’s political identity, counting bona fide residents who are State citizens, as defined by the Fourteenth Amendment, to be no different from

⁹ C. Burdick, The Law of the American Constitution, § 108, p. 318 (New York: 1922).

unlawful residents who are not State citizens by that same definition. In so doing, the Bureau skews the apportionment formula for determining the number of representatives allocated to each State, favoring those States which have a larger portion of unlawful residents relative to their sister States.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Leave to File a Bill of Complaint should be granted.

Respectfully submitted,

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