No. 140, Original

In The Supreme Court of the United States

STATE OF LOUISIANA and
JAMES D. CALDWELL, Attorney General,

Plaintiffs,

v.

JOHN BRYSON, Secretary of Commerce,
ROBERT GROVES, Director, United States
Census Bureau, and KAREN LEHMAN HAAS,
Clerk, United States House of Representatives,

Defendants.

Plaintiffs' Reply Brief

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PLAINTIFFS' REPLY BRIEF

Defendants, although arguing that the Apportionment Clauses must be read broadly to require that all persons be counted, acknowledge that "foreign visitors . . . who happen to be in the United States on Census Day" are not and have never been counted for apportionment purposes. BIO 3. Yet that formulation describes the "non-immigrant foreign nationals" who are, as a matter of law, but temporary visitors in our country and whose exit is legally certain. That the Census has counted such individuals since Congress established this status in 1921, and that it continued to do so as their numbers rose to levels sufficient to alter apportionment, does not and cannot justify violation of the States' right to representation proportionate to their numbers of lawful inhabitants and of their citizens' rights to equal representation and voting strength. Unless and until these violations are remedied, the Federal Government stands in breach of its compact with the States and guarantees to its citizens.

Disregarding the gravity of the injury suffered by Louisiana and similarly-situated States, Defendants would bar the courthouse doors to all apportionment challenges but for those brought with their acquiescence. BIO 8-9 & n.1. This Court, however, has never been so callous, recognizing "the necessity of auxiliary precautions," *The Federalist No. 51* (J. Madison), including judicial review, to "preserve[ ] the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011). Those

values, essential to our federalism and to protecting individual liberties, *id.*, are uniquely threatened by Federal actions that alter the balance of representation among the States in favor of those which accede to Federal preferences. Because this Court's engagement is necessary to provide effective relief to Louisiana and its citizens, Plaintiffs' motion should be granted.

I. Plaintiffs' Complaint Raises Substantial Issues Regarding the Nature of Our Representative Government

A. Counting Non-Immigrant Foreign Nationals Violates The Constitution's Apportionment Clauses

The Constitution directs that seats in the House of Representatives "shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. The drafting history, structure, and underlying political theory of the constitutional text demonstrate that the terms "numbers" and "whole persons" refer to individuals with a permanent legal residence within a State, or "inhabitants," and were intended to encompass members of a political community. *See generally* Charles Wood, *The Census, Birthright Citizenship, and Illegal Aliens*, 22 Harv. J. L. & Pub. Pol. 465, 477-79 (1999); *Franklin v. Massachusetts*, 505 U.S. 788, 805-06 (1992) (discussing the first enumeration act and meaning of "inhabitant"). Reflecting this meaning,

the act authorizing the first Census directed officials to count "the number of the *inhabitants* within their respective districts." 1 Stat. 101 (1790) (emphasis added). By limiting enumeration to a State's inhabitants, the Framers intended that those counted "should be *bona fide* members of the State, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer." *Cases of Contested Elections in Congress* 415 (1834).

Indeed, as Defendants concede, BIO 3, in no Census have the terms "numbers" and "whole persons" been construed so liberally as to reach all "persons," including tourists and other visitors, physically present within a State on Census Day. This constitutional practice rebuts Defendants' contention that the "persons" subject to enumeration under the Apportionment Clauses are the same as those "persons," including the unlawfully present, that the Court has held are reached by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. BIO 26. In fact, in the 2010 Census, Defendants themselves declined to read the Apportionment Clauses so broadly. *See* U.S. Census Bureau, How We Count America, http://2010.census.gov/2010census/about/how-we-count.php (foreign visitors are "[n]ot counted in the census"); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Due Process Clause protects "all persons within [U.S.] territorial jurisdiction").

Non-immigrant foreign nationals, including the unlawfully present, are not *bona fide* "inhabitants" of any State, and so stand outside of the States' political

communities, because they lack the ability to establish permanent legal residence. This is a matter of federal law, enacted under Congress's power to establish rules of naturalization, and like other foreign visitors, such individuals may not be counted for apportionment purposes. Defendants offer no support for their pinched reading of the Naturalization Clause, under which Congress may bar certain aliens from the country entirely but is powerless to exclude them from the apportionment count. BIO 27-28. This position is illogical: it rewards, with additional representation, locales that act to frustrate enforcement of immigration law.

Finally, the Census Bureau's current practice of counting non-immigrant foreign nationals is a relatively recent phenomenon and does not, as Defendants imply, date to the first enumeration. BIO 26. The Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2, 42 Stat. 5, 5 (1923), was the first law to establish comprehensive quotas, ending the era of open immigration into the United States. John Powell, *Encyclopedia of North American Immigration* 88 (2005). The longstanding and unchallenged practice of counting lawfully resident aliens for apportionment purposes provides no support for Defendants' decision to break with tradition by counting certain classes of foreign visitors.

B. Counting Non-Immigrant Foreign Nationals Violates the One-Person-One-Vote Principle

Defendants' inclusion of non-immigrant foreign nationals in States' apportionment populations denies Plaintiff Caldwell equal protection of the laws. A "basic principle of representative government" is that "the weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). This principle is plainly violated where manipulation of the apportionment count causes the reapportionment of House seats from States with few non-immigrant foreign nationals to those with many, thereby resulting in severe, avoidable disparities in the number of voters per district. *See* Ex. 3.

Even accepting *arguendo* Defendants' assumption that the Court's one-person-one-vote jurisprudence requires equal strength of representation, not equal vote weight, BIO 30, the counting of non-immigrant foreign nationals for apportionment purposes still violates Plaintiff Caldwell's rights. In particular, Plaintiffs' exhibits demonstrate the severe population disparities, and thus disparities in strength of representation, caused by Defendants' actions. *See* Ex. 1 ¶9 (discussing disparities in populations per district); Ex. 2 (reporting populations per district for all States). Defendants cannot evade this point by simply assuming their mistaken interpretation of the Apportionment Clauses as requiring

that all persons, including some foreign visitors, be included within district populations. Just as courts properly disregard foreign travelers in assessing one-person-one-vote violations, so must they disregard all individuals who are foreign visitors under immigration law. *Cf. Burns v. Richardson*, 384 U.S. 73, 90-91, 95-96 (1966) (upholding raw population disparities between districts of over 100 percent where districts' populations, net of "aliens, transients, short-term of temporary residents, or persons denied the vote for conviction," were roughly equal).

That the Court does not require precise equality of vote strength and representation does not, as Defendants suggest, license their gross and arbitrary deviations from the ideal. *See* BIO 30. The Court has consistently held that an individual's right to vote "is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living [elsewhere]." *Reynolds*, 377 U.S. at 569. The readily-avoidable deviations from the ideal at issue in this case far exceed those that the Court has found to be excessive. Ex. 3 (reporting deviations from the ideal); *e.g., Karcher v. Daggett*, 462 U.S. 725 (1983) (0.7 percent variance). Moreover, the practices that caused these avoidable deviations

are not, as required, "consistent with constitutional norms." *Id.* at 740.[1]

II. Plaintiffs' Standing Is Secure

Defendants assert the requirements of standing as an absolute barrier to any claim challenging the object of the apportionment count. Any statistics, they argue, save Census data itself, are incapable of demonstrating injury "with the requisite degree of confidence." BIO 23. Further, any injury due to defects in counting – no matter how plain – could not be redressed where the Census has simply failed to collect the relevant data. BIO 23-24. And these points hold true whether a challenge is brought before or after Census Day. BIO 19, 23. Under Defendant's logic, challenges to the apportionment count are per

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[1] *Department of Commerce v. Montana*, 503 U.S. 442 (1992), and *Wisconsin v. City of New York*, 517 U.S. 1 (1996), do not undermine this point. *See* BIO 30. Neither holds that the one-person-one-vote principle of *Wesberry v. Sanders*, 376 U.S. 1 (1964), is inapplicable to the apportionment of House seats, only that Congress "was due more deference than the States in this area." *Wisconsin*, 517 U.S. at 14-15. Where inequality could be apprehended and addressed in several ways, Congress was not limited to a single constitutionally permissible choice of apportionment method. *Id.* at 15. Here, by contrast, Defendants' choice to count non-immigrant foreign nationals only drives up disparities. The Court has subsequently recognized that improper apportionment may cause "vote dilution." *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999).

se non-justiciable, no matter how great its deviation from constitutional requirements.

But it cannot be in our federalist system that the States are powerless to enforce the terms of their compact with the Federal Government when that Government seeks to strip them of their rightful powers on an arbitrary basis and to impose a disability on their citizens. As this Court observed only last term, "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond*, 131 S.Ct. at 2364. When that allocation is upset, and their peoples' rights and freedom thereby threatened, the States' standing to bring suit is both plain and consistent with this Court's precedents.

A. Plaintiffs Have Adequately Alleged an Injury Traceable to Defendants' Flawed Apportionment Count

Plaintiffs have standing on precisely the same basis as the plaintiffs in *Franklin* and *Utah*, two post-Census challenges to apportionment:

> Both [plaintiffs] brought their lawsuits after the census was complete. Both claimed that the Census Bureau followed legally improper counting methods. Both sought an injunction ordering the Secretary of Commerce to

> recalculate the numbers and recertify the official result. Both reasonably believed that the Secretary's recertification, as a practical matter, would likely lead to a new, more favorable, apportionment of Representatives.

Utah v. Evans, 536 U.S. 452, 460-61 (2002) (citing *Franklin*, *supra*). In neither *Franklin* nor *Utah* did the Court suggest that parties challenging apportionment bear a special burden in pleading the elements of standing. Defendants' attack on Plaintiffs' showing is premature, if not entirely misplaced.[2]

In fact, the Federal Government's own figures prove Plaintiffs' standing. According to the Government, 10.8 million "unauthorized immigrants" were present in the United States in 2010, with nearly 50 percent present in the three States – California, Texas, and Florida – that Plaintiffs allege gained seats due to Defendants' actions, while Louisiana has relatively few. Michael Hoefer, et al., Dep't of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, at 3-4, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf. Under the equal proportions method used to apportion seats,

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[2] The district court decisions in *FAIR v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), and *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989), which Defendants cite repeatedly, are substantially abrogated by *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), *Franklin*, and *Utah*.

Louisiana would retain its seventh House seat were these "unauthorized immigrants" excluded from the apportionment count. Ex. 1, ¶¶6-8.

Finally, Plaintiffs' proffered figures are sufficiently precise to demonstrate injury under this Court's precedents. In *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999), the Court found standing premised on a professor's affidavit that, based on non-apportionment data, concluded that the State of Indiana would lose a seat due to the Bureau's proposed method of statistical sampling in the subsequent Census. The Court dismissed the Federal Government's objections, manifest in declarations by Census Bureau statistical experts criticizing the plaintiffs' evidence, because neither demonstrated that, under their preferred approaches, Indiana would not lose its seat. *Id.* at 331. In this instance, Defendants' objections are even less substantial, having been drafted by lawyers rather than demographers and failing even to raise a fact issue regarding Plaintiffs' alleged injury. BIO 21-23.[3]

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[3] For the same reasons, Defendants' contention that "plaintiffs' estimates fail on their own terms" for excluding lawfully present non-immigrant foreign nationals. BIO 19, also fails. Defendants, despite having access to non-public data regarding the distribution of such individuals, *Hoefer*, *supra*, at 6, do not even allege that their distribution affects apportionment. In fact, the publicly available data supports Plaintiffs' position. *See* Bryan Baker, Dep't of Homeland Security, *Estimates of the Resident Nonimmigrant Population of the United States: 2008*, at 3, http://www.dhs.gov/xlibrary/assets/statistics/

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B. This Court May Redress Plaintiffs' Injuries

That Plaintiffs' injuries may be lawfully redressed cannot seriously be in doubt after *Franklin* and *Utah*. As in any case, the availability of relief ultimately depends on the evidence that may be adduced in discovery and other proceedings. But in addition to redress premised directly on such factual findings, at least three additional remedies are available.

First, the Court may order Defendants to conduct a new apportionment count that, consistent with the Constitution's requirements, excludes non-immigrant foreign nationals, as a predicate to reapportionment. The Constitution imposes a nondiscretionary duty that the Federal Government undertake an "actual enumeration . . . within every . . . term of ten years, in such manner as [Congress] shall by law direct." U.S. Const. art. I, § 2, cl. 3. Such duties are few in the Constitution, but the Court has not been reluctant to enforce them when breached. *E.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (enforcing Presentment Clause). If the Court were to find that the Census Bureau has failed to carry out this duty consistent with the Constitution's requirements, it could, as in any other case involving

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publications/ois_ni_pe_2008.pdf (non-immigrant population concentrated in California, New York, Texas, and Florida).

a nondiscretionary duty, order that it be done in a lawful manner.

Second, it is within the Court's powers to order an equitable reapportionment that excludes non-immigrant foreign nationals. As the Court recently observed in response to the Federal Government's argument that relief was unavailable with respect to certain constitutional claims, "equitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally" and, accordingly, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138, 3151 n.2 (2010); *see Brown v. Plata*, 131 S.Ct. 1910, 1944 (2011) ("breadth and flexibility are inherent in equitable remedies"); *id.* at 1953 (Scalia, J., dissenting) (extolling "single act" remedies). If the Government's point is that an Apportionments Clause claim "should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so." *Free Enterprise Fund*, *supra*.[4]

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[4] Despite Defendants' claims, BIO 24, the statutory bar on sampling is directed at the Secretary of Commerce and does not bar equitable reapportionment *by the Court*. *See* 13 U.S.C. § 195. It would be a perverse result for a provision enacted to enforce the constitutional requirement of an "actual enumeration" to

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Third, Plaintiffs also seek declaratory relief, which may be applied prospectively. If the Court declares unlawful the inclusion of non-immigrant foreign nationals in the apportionment count, Defendants will have the flexibility to decide how best to respond to that ruling within the limits of the Constitution.[5]

III. The Court Should Exercise Its Original Jurisdiction

Plaintiffs' Complaint presents a substantial question of "vital importance" to all States worthy of this Court's original jurisdiction. *South Carolina v. Regan*, 465 U.S. 367, 382 (1984). While seven States, spread across several judicial circuits, would be directly affected by resolution of this matter, all are susceptible to unlawful immigration and may feel the effects of a decision. And cases, such as this one, that implicate the nature and proper extent of participation in the electoral process are in the heartland of this Court's traditional exercise of its original jurisdiction. *E.g.*, *Oregon v. Mitchell*, 400

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stand as a barrier to remedying any and all other constitutional defects in enumeration.

[5] For example, they might "impute" unauthorized status to individuals who identify as foreign-born and are not present in visa and immigration records. Defendants' assertion that adding a citizenship question to the Census may be ineffective cannot defeat Plaintiffs' standing at this stage, BIO 24, particularly where Plaintiffs have not so limited their request for relief.

U.S. 112 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Moreover, the Court is well-situated to resolve Plaintiffs' claims. While there may be fact issues to resolve at a later stage of this litigation – an undertaking that may be put to a Special Master – at the outset stands a substantial question of constitutional law particularly suited to the Court's special competence. As such, Plaintiffs concur in Defendant's suggestion that the Court permit dispositive motions to resolve expeditiously the legal issues presented by this litigation. BIO 31.

Plaintiffs' sole alternative, proceeding in district court, is not adequate. Even if Plaintiffs are ultimately victorious, it will not be before years of appeals and, all but inevitably, a hearing before this Court. The injury that Louisiana, four similarly-situated states, and their combined millions of citizens will suffer in the interim is grave and irreparable. To require the States to endure such delay to obtain their rightful constitutional entitlement offends their dignity. And to require that millions of their citizens continue to endure partial disenfranchisement for a moment longer than necessary cheapens the Constitution's guarantees of representative government.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' Brief, the Court should grant Plaintiffs' Motion for Leave to File a Complaint.

Respectfully submitted,

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