

No. ____, 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' Motion For Leave To File A Complaint,
Complaint, And Brief In Support Of Motion**

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MOTION FOR LEAVE TO FILE A COMPLAINT

Pursuant to Sup. Ct. Rule 17, the State of Louisiana, through its Attorney General, and James D. Caldwell, Attorney General, in his individual capacity, ask leave of the Court to file a complaint against John Bryson, Secretary, United States Department of Commerce, Robert Groves, Director of the United States Census Bureau, and Karen Lehman Haas, Clerk, United States House of Representatives, to declare that the inclusion of non-immigrant foreign nationals in the population figures used to apportion seats in the United States House of Representatives

is unconstitutional and to enjoin Defendants to recalculate and submit new apportionment figures excluding such individuals. This Motion is accompanied by a Complaint and supporting brief.

Respectfully submitted,

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COMPLAINT

The State of Louisiana and James D. Caldwell, Plaintiffs, allege as follows:

1. This is an action for declaratory and injunctive relief which challenges Defendants' decision to count foreign nationals who are unlawfully or temporarily present in the United States ("non-immigrant foreign nationals") in calculating the apportionment of seats in the United States House of Representatives ("House"). That decision deprives the State of Louisiana of an additional Member of Congress to which the State is entitled and dilutes the strength

of votes cast by individual Louisiana voters, among them James D. Caldwell.

PARTIES

2. Plaintiff State of Louisiana (“Louisiana”) was admitted to the Union on April 30, 1812, as the eighteenth State, and brings this suit in its capacity as sovereign and as *parens patriae* on behalf of its citizens.

3. Plaintiff James D. Caldwell is Attorney General of the State of Louisiana, a citizen of the State of Louisiana and the United States, and a registered voter in Louisiana’s fifth congressional district. He brings this suit in his official and individual capacities.

4. Defendant John Bryson is Secretary of the United States Department of Commerce, the agency of the United States that is responsible for the administration of the decennial Census, through the United States Census Bureau, *see* 13 U.S.C. § 141, and is named as a party in his official capacity. He is a citizen of the State of California.

5. Defendant Robert Groves is Director of the United States Census Bureau, and is named as a party in his official capacity. He is a citizen of the State of Michigan.

6. Defendant Karen Lehman Haas is Clerk, United States House of Representatives, and is

named as a party in her official capacity. She is a citizen of the State of Maryland.

JURISDICTION

7. The original jurisdiction of this Court over controversies between a State and citizens of another State is invoked under Article III, Section 2, Clause 2, of the United States Constitution and 28 U.S.C. § 1251(b)(3). The presence of an additional plaintiff does not affect the Court's jurisdiction. *See, e.g., Arizona v. California*, 460 U.S. 605 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981).

APPORTIONMENT AND THE CENSUS

8. Article I, Section 2, Clause 3, of the United States Constitution, as modified by the Fourteenth Amendment, 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," provided that "each state shall have at least one Representative."

9. Article I, Section 2, Clause 3, of the United States Constitution directs that every ten years an "actual Enumeration" shall be made for the purpose of apportionment "in such manner as [Congress] shall by law direct."

10. Pursuant to that authority, Congress enacted the Census Act, 13 U.S.C. § 1 *et seq.* The Census Act provides that the Secretary of Commerce “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. . . .” 13 U.S.C. § 141(a). It further directs that “[t]he tabulation of total population by States . . . 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.” 13 U.S.C. § 141(b). The President must then “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). Within 15 days, the Clerk of the House of Representatives must then “send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section.” 2 U.S.C. § 2a(b).

11. Defendants conducted the 2010 Census and caused certificates of apportionment to be transmitted to the States in January 2011.

THE 2010 APPORTIONMENT

12. The 2010 Census apportionment figures count the “residents” of the States, to which are added certain segments of the overseas population, such as U.S. Armed Forces personnel. Census forms were addressed “TO RESIDENT AT [a particular address]” and instruct recipients to “[c]ount all people, including babies, who live and sleep here most of the time.” U.S. Census Bureau, 2010 Census Form 1, http://2010.census.gov/2010census/pdf/2010_Questionnaire_Info.pdf. The Census form, and other Census instruments used for apportionment purposes, contain no means to identify a person’s status as a citizen or lawful permanent resident of the United States.

13. As a result of Defendants’ decision to count all “residents,” regardless of citizenship or immigration status, the 2010 Census apportionment figures include millions of individuals who are non-immigrant foreign nationals and who are not, as a matter of federal law, permanent residents of any State.

14. Because the population of non-immigrant foreign nationals is not distributed uniformly among the States, the inclusion of these individuals in apportionment figures alters the apportionment of seats in the House of Representatives among the States. States containing large populations of such individuals are apportioned House seats at the expense of States containing relatively few. Defendants’ decision to count non-immigrant foreign

nationals for apportionment purposes will cause at least five States to lose House seats to which they are entitled, and at least three States to gain seats to which they are not entitled. *See* Declaration of Troy Blanchard, Exhibit (“Ex.”) 1, ¶8; Ex. 2.¹

15. Louisiana is among the States that will lose a House seat due to the inclusion of non-immigrant foreign nationals in the apportionment count. As shown in Ex. 2, had Defendants excluded such individuals from the 2010 Census apportionment count, Louisiana would have been apportioned seven House seats. Defendants, however, calculate that Louisiana is due only six.

**Count I: U.S. Constitution,
Article I, Section 2, Clause 1**

16. Representatives are chosen “by the People of the several States,” U.S. Const. art. I, § 2, cl. 1, a phrase which this Court has interpreted to require that, “as nearly as is practicable, one man’s vote in a congressional election is to be worth as much as another’s.” *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). This requirement is satisfied when congressional districts contain, as nearly as possible, the same number of voters.

¹ Exhibits referenced herein are appended to the accompanying Brief in Support of Motion for Leave to File a Complaint.

17. The reapportionment of House seats from States with few non-immigrant foreign nationals to those with many causes significant disparities in the number of voters per district. Because non-immigrant foreign nationals are prohibited from voting in federal elections, the eligible voting population in States containing large numbers of such individuals is proportionally smaller than in States containing few. Accordingly, the average congressional district in a State containing few non-immigrant foreign nationals contains a greater population of eligible voters than in a State containing many. *See* Ex. 3.

18. Because relatively few non-immigrant foreign nationals reside in Louisiana, its voters suffer such a disparity. Under Defendants' apportionment of House seats, the average U.S. House district in Louisiana will contain 748,160 citizens or lawful permanent residents, versus an average of 656,452 citizens or lawful permanent residents for districts in California, a State which has gained House seats due to its large population of non-immigrant foreign nationals. Ex. 3.

19. Defendants' inclusion of non-immigrant foreign nationals in the 2010 Census apportionment figures has thereby deprived Plaintiffs of their rightful equal and proportionate representation in the House of Representatives and Electoral College, in violation of Article I, Section 2, Clause 1, of the United States Constitution.

**Count II: U.S. Constitution, Fifth Amendment
and Fourteenth Amendment, Section 1**

20. Paragraphs 1-19 are realleged and incorporated by reference.

21. Section 1 of the Fourteenth Amendment guarantees the individual citizens of the United States “equal protection of the laws,” a guarantee which this Court has held applies to the laws and actions of the Federal government through the Fifth Amendment. This clause embodies the principle of “one person, one vote,” under which “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).

22. The reapportionment of House seats from States with few non-immigrant foreign nationals to those with many affects the relative weight of votes cast in both types of States. Because the average congressional district in a State containing few non-immigrant foreign nationals contains a greater population of eligible voters than in a State containing many, the average vote cast in the former State is worth less, in terms of electoral power, than the average vote cast in the latter.

23. The votes cast by Louisiana citizens are diluted in this very manner. Ex. 4. Due to the difference in eligible voters per district, the average Louisianan’s vote for a U.S. Representative is worth nearly 14 percent less than the average Californian’s. Ex. 3. An apportionment that did not include non-immigrant foreign nationals would feature significantly reduced

disparities, and achieve near-equality, in vote strength between States. *See* Ex. 1 ¶9; Ex. 3.

24. Defendants' inclusion of non-immigrant foreign nationals in the 2010 Census apportionment figures has diluted the strength of Plaintiff James D. Caldwell's vote in House elections in violation of the guarantee of equal protection under the law inherent in the Fifth Amendment's Due Process Clause.

Count III: U.S. Constitution, Article I, Section 2, Clause 3, and Fourteenth Amendment, Section 2

25. Paragraphs 1-19 and 21-24 are realleged and incorporated by reference.

26. The terms "numbers" and "whole persons," as used in Article I, Section 2, Clause 3, as modified by Section 2 of the Fourteenth Amendment, refer to individuals with a permanent legal residence within a State, or "inhabitants," and were intended to encompass a political community or polity. This is reflected in, *inter alia*, the text of the act authorizing the first Census in 1790, which directed officials to count "the number of the inhabitants within their respective districts." An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 2, § 1, 1 Stat. 101 (1790). In no Census have the constitutional terms "numbers" and "whole persons" been construed so liberally as to reach all "persons," including tourists and corporate persons, physically present within a State at the time the data is gathered. Only

in the Twentieth Century, due to changes in immigration laws, did these terms come to be thought, albeit incorrectly, to include non-immigrant foreign nationals who, as a matter of federal law, lack a permanent legal residence within any State.

27. By counting non-immigrant foreign nationals in calculating the apportionment of House seats, Defendants have exceeded their lawful discretion under Article I, Section 2, Clause 3, of the United States Constitution and Section 2 of the Fourteenth Amendment and thereby deprived Plaintiffs of their rightful representation in the House of Representatives and Electoral College.



PRAYER FOR RELIEF

Plaintiffs pray that the Court require Defendants to answer Plaintiffs' Complaint and that, after due proceedings, the Court enter a decree declaring that Defendants' decision to count non-immigrant foreign nationals in calculating the apportionment of House seats violates the Constitution of the United States.

Plaintiffs further pray that the Court enter an injunction requiring Defendants Bryson and Groves to adjust the 2010 apportionment count to exclude such individuals, to recalculate a new apportionment of seats in the House of Representatives, and to submit that apportionment calculation to the President for transmittal to the Clerk of the House and, from the Clerk, to the States, and further requiring

Defendant Haas to recall such certifications as she may have hitherto issued to the several States.

Respectfully submitted,

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**Brief In Support Of Motion
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QUESTIONS PRESENTED

1. Whether the Apportionment Clauses of Article I and the Fourteenth Amendment prohibit the counting of non-immigrant foreign nationals for purposes of apportioning seats in the United States House of Representatives.

2. Whether the counting of such persons for apportionment purposes, which leads to disparities in the number of voters per House district and deprives citizens of States containing few such persons of their right to equal and proportionate representation in Congress and the Electoral College, violates the requirement of Article I, Section 2, Clause 1, that Representatives be chosen “by the people of the several states.”

3. Whether the counting of such persons for apportionment purposes, which dilutes the strength of a voter’s ballot in States containing few such persons, denies that voter equal protection under the law as guaranteed by the Fifth Amendment.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Article III, Section 2, Clause 2, of the United States Constitution and 28 U.S.C. § 1251(b)(3).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the two constitutional provisions concerning the Census and apportionment of House seats. Article I, Section 2, Clause 3, of the United States Constitution provides, in relevant part:

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons. . . . The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

Section 2 of the Fourteenth Amendment to the United States Constitution provides:

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President

and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.



STATEMENT OF THE CASE

The primary purpose of the decennial Census of the U.S. population is the apportionment of seats in the House of Representatives (“House”) among the States, “according to their respective numbers.” U.S. Const. art. I, § 2, cl. 3. The 2010 Census will determine the apportionment of House seats in the 113th Congress, which will commence in 2013, and the four subsequent Congresses. *See* 2 U.S.C. § 2a(a). That apportionment, in turn, determines the apportionment of electors in the Electoral College for the next three presidential elections. U.S. Const. art. II, § 1, cl. 2.

In conducting the 2010 Census and apportionment, the Census Bureau determined to count the “residents” of the States according to their “usual residence,” defined “as the place where a person lives

and sleeps most of the time.”, U.S. Census Bureau, How We Count America, <http://2010.census.gov/2010census/about/how-we-count.php>. Under this approach, the Census counts, for purposes of establishing apportionment populations, people who live and sleep “most of the time” within a particular State. *Id.* Accordingly, 2010 Census forms were addressed “TO RESIDENT AT [a particular address]” and instructed recipients to “[c]ount all people, including babies, who live and sleep here most of the time.” U.S. Census Bureau, 2010 Census Form 1, http://2010.census.gov/2010census/pdf/2010_Questionnaire_Info.pdf. To the sums of residents present at the time of enumeration, the Census Bureau adds certain segments of the overseas population, such as U.S. Armed Forces personnel.

In conducting the 2010 Census apportionment count, the Census Bureau made no attempt to identify respondents’ citizenship or immigration status or to exclude any individuals on the basis of those statuses. Instead, all individuals claiming “usual residence” within a State were counted. Indeed, counting “undocumented residents” for apportionment purposes is the Census Bureau’s express policy. U.S. Census Bureau, Frequently Asked Questions, <http://www.census.gov/population/apportionment/about/faq.html#Q16>.

As a result of this policy, the 2010 Census apportionment figures include millions of individuals who are, under federal law, unlawfully present in the United States. *See* Declaration of Troy Blanchard, Ex. 1, ¶6. Under federal law, these “undocumented”

individuals are subject to involuntary deportation at any time. *See* 8 U.S.C. § 1227(a)(1)(B). Such individuals also suffer other legal constraints, such as the inability to enter into lawful employment contracts, 8 U.S.C. § 1324a(a)(1)(A), that affect the durability of their residence within any State. Approximately 11 million such individuals are resident within the United States, a number large enough to affect the apportionment of the House. Ex. 1 ¶¶6, 8. These individuals comprise the bulk of the class of “non-immigrant foreign nationals” – a class which also includes holders of student visas and guest workers – present in the United States and included in the 2010 Census apportionment count.

Apportionment is calculated by the “method of equal proportions,” which operates on State apportionment counts. 2 U.S.C. § 2a(a). First, each State is assigned one House seat. *See* U.S. Const. art I, § 2, cl. 3. Second, a “priority value” is calculated for each State based on its apportionment count. Third, the remaining 385 seats are assigned to States based on these priority values, with higher-priority States receiving greater numbers of seats. In this way, States with larger apportionment counts receive additional seats at the expense of smaller States. *See* Ex. 1 ¶3.

The counting of non-immigrant foreign nationals has served to inflate the Census apportionment populations of States containing a relatively high proportion of such individuals, conferring on those States additional House seats. California, Florida, and Texas have each been apportioned one or more additional

seats due to the counting of their large populations of non-immigrant foreign nationals. Ex. 1 ¶8. Those additional seats have come at the expense of Louisiana, Missouri, Montana, North Carolina, and Ohio – States with relatively small populations of non-immigrant foreign nationals. *Id.*

This transfer of seats among States creates large disparities in the weight of votes cast in the affected seats. For example, under the 2010 Census apportionment, the average House district in California contains 656,453 lawful residents (that is, resident citizens plus lawful permanent residents). Ex. 3. The average Louisiana district contains 748,160 – nearly 14 percent more individuals than in the average California district – and the average Montana district contains 984,416, or 50 percent more. *Id.* These disparities significantly dilute the strength of votes cast in States containing few non-immigrant foreign nationals. Ex. 1 ¶10, 11.

A “lawful apportionment” that excludes non-immigrant foreign nationals from State apportionment counts would largely ameliorate these unconstitutional disparities. Specifically, such an apportionment would bring the average district size in all eight affected States nearer to the “ideal” size at which all districts in the Nation would contain the same number of lawful residents. *See* Ex. 3.



REASONS FOR GRANTING PLAINTIFFS’ MOTION FOR LEAVE TO FILE A COMPLAINT

I. Plaintiffs’ Motion For Leave To File An Original Complaint Should Be Granted

The Court should grant Plaintiffs leave to file an original complaint because this case raises profound legal questions about the nature and extent of participation in our representative institutions. Whether foreign nationals unlawfully or temporarily present in the United States (“non-immigrant foreign nationals”) may constitutionally be counted for apportionment purposes has consequences of immediate and “vital importance” to every State in the Union. In particular, adjudication within the Court’s original jurisdiction is called for in this case in order to avoid a scenario in which lower courts reach conflicting decisions on a question affecting the apportionment of seats in the House of Representatives. This case presents no impediments to the Court’s exercise of its original jurisdiction.

A. Plaintiffs’ Complaint Raises A Question Of Great Constitutional Weight And Of Vital Importance To All The States

It has long been this Court’s practice to “incline to a sparing use” of its original jurisdiction, and to reserve its exercise for claims of “appropriate . . . seriousness and dignity.” *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972).

The resolution of the question presented in this case will determine the allocation of at least five seats in the House of Representatives and stands directly to impact the boundaries of the districts represented by more than a third of the House of Representatives.² See Ex. 1 ¶8. In addition, Plaintiffs' Complaint necessarily presents fundamental questions about the nature of our representative government, particularly regarding who is a member of the American political community and therefore entitled to representation in the House and Electoral College. For these reasons, the Complaint raises questions of more than sufficient "seriousness and dignity" to warrant consideration within the original jurisdiction of this Court. See *City of Milwaukee*, 406 U.S. at 93.

The Court has found it appropriate to exercise its original jurisdiction where a complaint presents a question of "vital importance" to numerous States. *South Carolina v. Regan*, 465 U.S. 367, 382 (1984) (exercising discretion to hear original action raising question of "vital importance to all fifty States").

This is such a case. The history of our founding makes clear that there can be few interests more vital to a State than the extent of its representation in Congress. The Court has recognized as much. See

² Eight states, at a minimum, face representational consequences as a result of Defendants' inclusion of non-immigrant foreign nationals in the Census apportionment count. These states have a cumulative total of 160 Members of Congress, which is more than a third of the House of Representatives. See Ex. 2.

Utah v. Evans, 536 U.S. 452, 462-63 (2002) (recognizing states' standing to sue over representative consequences of apportionment). *See also Massachusetts v. Mossbacher*, 785 F. Supp. 230, 239 n.7 (D. Mass. 1992) (noting that a state suffers a further injury, in that loss of representation in Congress means "a diminution in the strength of its Electoral College delegations" pursuant to U.S. Const. art. II, § 1, cl. 2), *rev'd on other grounds, Franklin v. Massachusetts*, 505 U.S. 788 (1992). Although not every State will gain or lose representation as a result of the counting of non-immigrant foreign nationals in the 2010 Census, at least five will lose, including Plaintiff State of Louisiana, and at least three will gain. Ex. 1 ¶8. The question presented in Plaintiffs' Complaint is thus of "vital importance" to a minimum of at least eight States. This is true, not only because the size of the impacted States' congressional delegations is at issue, but also because any change therein will need to be addressed through redistricting.

In fact, the question presented in Plaintiffs' Complaint should properly be seen as one of vital importance to *all* States. All States are susceptible to varying degrees of unlawful immigration and, if Defendants are not enjoined from their present policy, will be "benefitted" or injured accordingly with regard to the extent of their share of representation in Congress. Unlawful immigration did not end with the 2010 Census but will remain a demographic fact of life for the indefinite future, impacting different States in different ways over time. *See generally*

Jeffrey Passel & D’Vera Cohn, Pew Hispanic Ctr., *Unauthorized Immigrant Population: National and State Trends, 2010* (2010), available at <http://pewhispanic.org/files/reports/133.pdf> (hereinafter “Passel & Cohn”). As such, all States have a vital interest in the outcome of this litigation.

This case is also appropriate for adjudication within the Court’s original jurisdiction because it raises an important question going to the nature and proper extent of participation in the electoral process. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), for example, this Court exercised its non-exclusive original jurisdiction to resolve a dispute concerning the ability of States to regulate the age of participation in state elections.³ The Court similarly exercised its original jurisdiction to consider a case relating to the Constitution’s guarantees of political participation in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Here, Plaintiffs’ effort to avoid the unconstitutional diminution and dilution of their representation in Congress raises questions of perhaps even greater significance for the functioning and nature of our democratic processes than were at stake in *Mitchell*. In short, Plaintiffs raise exactly the kind of issues upon which this Court has announced its intent to

³ The result in *Mitchell* was superseded by the 26th Amendment, see U.S. Const. amend. XXVI, but the case nevertheless remains a good example of the kind of dispute warranting consideration within the Court’s original jurisdiction.

concentrate its exercise of original jurisdiction. *See Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 497-498 (1971) (Supreme Court’s “special competence” is in dealing with cases that raise “serious issues of federal law”).

B. Plaintiffs’ Complaint Puts States’ Sovereign Interests In Opposition

Further, Plaintiffs’ Complaint is appropriate for adjudication within the Court’s original jurisdiction because it presents a clash between the sovereign interests of multiple States. Plaintiffs’ action is in significant part aimed at preserving Louisiana’s relative share of sovereignty and power within our federal union, as manifested through representation in the House of Representatives. Though Plaintiffs’ Complaint is formally brought against federal official defendants, the relief sought inescapably impacts the sovereign interests of such States as gain representation in the House of Representatives at Louisiana’s expense. Indeed, it is foreseeable that one or more of those States may intervene to protect their current – and unconstitutional – degree of over-representation in Congress. *Cf. Evans*, 536 U.S. at 459 (noting intervention by North Carolina to defend its entitlement to an additional seat in Congress as a result of challenged Census methodology).

Given the clash of States’ sovereign interests underlying this action, Plaintiffs’ Complaint parallels the type of sovereignty disputes – over territory or

water rights – regularly heard within this Court’s original jurisdiction. *E.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838); *Nebraska v. Wyoming*, 534 U.S. 40 (2001); *Virginia v. Maryland*, 540 U.S. 56 (2003); *Arizona v. California*, 547 U.S. 150 (2006).

C. This Court Is The Most Appropriate Forum For Plaintiffs’ Complaint

The questions raised by Plaintiffs’ Complaint must be resolved comprehensively and as quickly as practicable. Permitting the questions presented in Plaintiffs’ Complaint to be addressed in the first instance at the District Court level would risk plunging the electoral process into disarray. Accordingly, there is no *adequate* alternative forum. *Cf. United States v. Nevada*, 412 U.S. 534, 538 (1973) (“We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim.”).

Apportionment of House seats is a “zero-sum” process. *See* 2 U.S.C. § 2a(a) (capping the House of Representatives at 435 members).⁴ The impact of Defendants’ counting of non-immigrant foreign nationals is thus not conveniently limited to the geographical

⁴ *See also Whelan v. Cuomo*, 415 F. Supp. 251 (E.D.N.Y. 1976) (explaining and upholding Congress’s power to limit the number of members of the House of Representatives).

jurisdiction of any District Court or State. Instead, the impact of Defendants' policy falls upon at least eight States in six judicial circuits, which contain twenty-one distinct federal District Courts and one hundred and sixty House districts. Any judicial determination of the constitutionality *vel non* of Defendants' inclusion of non-immigrant foreign nationals in States' apportionment baselines will also affect districting *within* many and perhaps all States, even if it does not lead to a State's loss of representatives.⁵

Plaintiffs submit that this Motion should be considered in light of the urgent public concern over the implications of unlawful immigration, coupled with the absence of firmly settled law in this area. While the inclusion of non-immigrant foreign nationals in the Census has been the subject of prior litigation, those cases were brought before this Court recognized the standing of States and individuals to bring such claims. *E.g.*, *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989); *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564 (D.D.C.

⁵ In congressional districting, state legislatures seek to divide a fixed number of seats among a population unevenly distributed across the state's area. If Census figures do not properly and constitutionally reflect the distribution of voters within a state, they may lead state legislatures to demarcate boundaries between districts other than in conformity with the Constitution's requirement that districts be drawn so as to make each voter's vote of, as nearly as possible, equal weight. *See generally* *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

1980), *appeal dismissed*, 447 U.S. 916 (1980).⁶ Due to the lack of guidance from the Court in this area, decisions are highly unlikely to be uniform across the Nation. Plaintiffs are confident of the merits of their position but recognize that their claims present difficult and politically charged legal questions.

Thus, while one or more District Courts have jurisdiction over Plaintiffs' Complaint, leaving these issues to the various District Courts would risk conflicting results and legal uncertainty crippling to the electoral process. Conflicting decisions as to the constitutionality of Defendants' conduct could quickly create a situation in which States would be unsure of the numbers of their representatives in Congress and the lawfulness of their congressional districts.

Due to the zero-sum nature of apportionment, there is no way to resolve, for example, Louisiana's claims without also implicating the size of the House delegation representing each of the other States gaining or losing seats in the House of Representatives as a result of Defendants' inclusion of non-immigrant foreign nationals in the Census's apportionment baselines. Candidates for Congress might be forced to campaign under uncertainty as to the extent – or

⁶ These cases were dismissed because, in sharp contrast to the present case, plaintiffs could “do no more than speculate as to which states might gain and might lose representation.” *See Ridge*, 715 F. Supp. at 1313 (citing *FAIR*, 486 F. Supp. at 570).

existence – of their districts. Conflicting decisions would create a logjam that could only be resolved in this Court.

Such disorder would compound the problems of redistricting that would necessarily follow. Drawing the boundaries of a State’s congressional districts in light of census data is among the most constitutionally vexing tasks facing state governments and routinely gives rise to litigation reaching this Court. *E.g.*, *Branch v. Smith*, 538 U.S. 254 (2003) (litigation over Mississippi’s post-census redistricting); *Bush v. Vera*, 517 U.S. 952 (1996) (litigation over Texas’s post-census redistricting); *Shaw v. Hunt*, 517 U.S. 899 (1996) (North Carolina); *Karcher v. Daggett*, 462 U.S. 725 (1983) (New Jersey); *White v. Regester*, 412 U.S. 755 (1973) (Texas); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (Connecticut).

Unsettled law as to both a State’s number of House seats and the constitutionality of counting non-immigrant foreign nationals toward apportionment (and by likely extension towards districting) of House seats would make the redistricting process even more contentious. As noted *supra*, the eight States known to be impacted by Defendants’ counting of non-immigrant foreign persons have some 160 House districts among them, all of which may have to

be redrawn following a decision on the merits.⁷ These extreme circumstances stand in sharp contrast to those in *Evans*, a State challenge to Census methodology, which was first brought at the district court level. See *Utah v. Evans*, 182 F. Supp. 2d 1165 (D. Utah, 2001), noting probable jurisdiction, 534 U.S. 1112 (2002). *Evans* implicated the entitlement to only a single House seat as between Utah and North Carolina. See *Evans*, 182 F. Supp. 2d at 1167 (stressing that, besides Utah and North Carolina, “no other state’s apportionment would have been affected”).

Due to the potential impact of the issues raised here, it is far from certain Plaintiffs’ claims could be comprehensively resolved at the District Court level, and through the usual appeals process, without causing wholesale disruption of the electoral process. Among other consequences, three of the Nation’s most populous States—California, Florida, and Texas—would face the prospect of at-large House elections. 2 U.S.C. § 2a(c)(5). Consideration of these issues in an original action presents the best chance to avoid electoral chaos.

For all these reasons, and inasmuch as the issues raised by Plaintiffs’ Complaint may be finally and

⁷ Even in States which neither gain nor lose seats in Congress as a result of the Census’ inclusion of non-immigrant foreign nationals, the question of whether such persons should be counted for apportionment purposes would be closely related to that of whether such persons should be counted for districting purposes *within a State*.

comprehensively resolved only by the Court, Plaintiffs respectfully urge the Court to exercise its original jurisdiction to avoid the risk of inconsistent District Court outcomes crippling the electoral process. This is not a case where the usual presumption in favor of beginning adjudication before the lower courts in the first instance should or can apply. The Supreme Court is uniquely placed to comprehensively “quiet title” to five seats in the House of Representatives.⁸

D. Plaintiffs Have Standing

Plaintiffs’ standing to challenge the constitutionality of census counting methods is established.⁹ The Court has held that both States and individuals have standing to bring suit to challenge a census counting method based on its “representative consequences” and to seek “a new, more favorable apportionment of

⁸ District Court suits challenging either apportionment or districting fall under 28 U.S.C. § 2284 and may be directly appealed to this Court under 28 U.S.C. § 1253 so long as some form of injunctive relief was granted or denied. As such, to grant Plaintiffs’ leave to file an original complaint would be less to prejudge the result of a petition for *certiorari* than to act in anticipation of this Court’s probable jurisdiction.

⁹ Plaintiffs raise a justiciable controversy. *Department of Commerce v. Montana*, 503 U.S. 442, 458 (1992) (“[T]he interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary.”); *Franklin*, 505 U.S. at 801 (“Constitutional challenges to apportionment are justiciable.”).

representatives.” *Evans*, 536 U.S. at 463; *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (individual standing).¹⁰

E. The Presence Of An Individual Plaintiff Is Consistent With The Court’s Original Jurisdiction

The presence of Plaintiff James D. Caldwell in his individual capacity does not adversely affect this Court’s jurisdiction.

This Court has repeatedly allowed private parties to participate in original actions. In *Maryland v. Louisiana*, 451 U.S. 725 (1981), seventeen corporate parties were allowed to intervene, despite that their claims, standing alone, would not have satisfied original jurisdiction. The Court in that case endorsed a special master’s finding that “it is not unusual to

¹⁰ To the extent that the Court may be concerned about the redressability of Plaintiffs’ injury, see *Evans*, 536 U.S. at 511 (Scalia, J., dissenting) (arguing that a plaintiff State’s apportionment injuries were not redressable because “no court has authority to direct the President to take an official act”), Plaintiffs do not seek any prohibited relief. Rather, Plaintiffs seek injunctive and declaratory relief against other executive branch officials and the Clerk of the House of Representatives. The Court has indicated that the Clerk of the House may be the object of declaratory and injunctive orders. See *Powell v. McCormack*, 395 U.S. 486, 517-18 (1969) (declaratory relief available against employees of Congress); *Franklin*, 505 U.S. at 824 (Scalia, J., dissenting) (role of the Clerk of the House in apportionment is “purely ministerial”).

permit intervention of private parties in original actions.” *Id.* at 745 n.21. So too the Court recently allowed intervention by several private parties in a riparian dispute between States. *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010).

The Court has also allowed private parties to participate in original actions pitting States against the federal government. *E.g.*, *United States v. Wyoming*, 331 U.S. 440 (1947) (a suit by the United States against a State and an oil company that had pumped oil from federal lands). *See also Arizona v. California*, 460 U.S. 605 (1983) (United States and an Indian tribe as plaintiffs).

Here, Plaintiff Caldwell’s claims are complementary to those advanced by Plaintiff State of Louisiana. The Equal Protection jurisprudence supporting Plaintiff Caldwell’s constitutional claim applies a standard functionally identical to that identified in the Court’s exposition of Article I, Section 2, Clause 1. *Compare Reynolds*, 377 U.S. at 567 (“all voters . . . stand in the same relation regardless of where they live”) *with Wesberry*, 376 U.S. at 7-8 (“as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”). The Court should therefore hear his claims within its supplemental jurisdiction. *Cf.* Eugene Gressman, et al., *Supreme Court Practice* 617 (9th ed. 2007) (noting that the Court exercises “supplemental jurisdiction” with some regularity in “controversies” between States within its original jurisdiction).

II. Plaintiffs' Complaint Is Meritorious

Plaintiffs' Complaint states a meritorious claim under the Constitution. Defendants' inclusion of non-immigrant foreign nationals in the Census baselines used for apportionment of the House of Representatives is unconstitutional.

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

Properly construed, the Constitution's Apportionment Clauses limit the object of the apportionment count to individuals with permanent legal residences in a State, or "inhabitants," which was the term used in drafts of the Constitution prior to non-substantive revision by the Committee of Style. Therefore, unlawfully or temporarily present foreign nationals, who are inherently unable to establish permanent legal residency within a State, may not be counted for apportionment purposes.

1. The Original Meaning Of The Apportionment Clauses Allows Only Persons With Permanent Legal Residences In A State, Or "Inhabitants," To Be Counted For Apportionment Purposes

Both Article I, Section 2, Clause 3, of the United States Constitution and Section 2 of the Fourteenth Amendment establish proportional representation in

the House of Representatives among the “several States.” In this, the constitutional text expressly recognizes the States as preexisting political communities and mandates that the objects of apportionment be the members of those communities. Conversely, it also recognizes that other groups who “were not treated as citizens,” such as “Indians not taxed,” stood outside of the States’ political communities and were therefore improper objects of apportionment. See 2 Joseph Story, *Commentaries on the Constitution* § 635 (1833). This concept of political community underlies the meaning of apportionment “according to their respective numbers” and is manifest in the word the Framers initially chose to implement that concept, “inhabitants.” See generally Charles Wood, *The Census, Birthright Citizenship, and Illegal Aliens*, 22 Harv. J. L. & Pub. Pol. 465, 477-79 (1999).

Throughout the Constitutional Convention of 1787, the Framers referred consistently to the States’ “inhabitants” as the objects of apportionment. At the outset, Edmund Randolph’s Virginia Plan, which became the basis for the Great Compromise that established the House, proposed a “National Legislature” to be proportioned on “the number of free inhabitants.” 1 *The Records of the Federal Convention of 1787* 20, 23 (Max Farrand ed., 1937) (hereinafter “Farrand”).

Building on that proposal, the Committee of the Whole resolved “that the rights of suffrage in the first branch of the National Legislature ought . . . [to be] in

proportion to the whole number of [] free citizens and inhabitants. . . .” *Id.* at 236. This principle was preserved in the set of resolutions forwarded to the Committee of Detail, 2 *Farrand* 130, and those reported by that Committee. These stated plainly that the Congress “shall . . . regulate the number of representatives by the number of inhabitants” of the States. *Id.* at 178. That text remained in the final draft referred to the Committee of Style. *Id.* at 566.

The Committee of Style’s substitution of “numbers” and “the whole number of free persons” for “inhabitants” was not intended to work any substantive change. The function of the committee was merely “to revise the stile of and arrange the articles which had been agreed to,” and it “had no authority . . . to make alterations of substance . . . , nor did it purport to do so.” *Powell v. McCormack*, 395 U.S. 486, 538-39 (internal quotation marks omitted).

Indeed, the Framing generation regarded the text as unaltered. Thus James Madison explained in *The Federalist No. 54* (James Madison) that “the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants” and, in *The Federalist No. 58* (James Madison), that first among the “unequivocal objects” of the Census was “to readjust, from time to time, the apportionment of representatives to the number of inhabitants.” The act authorizing the first Census in 1790 directed officials to count “the number of the inhabitants within their respective districts.” An Act Providing for

the Enumeration of the Inhabitants of the United States, ch. 2, § 1, 1 Stat. 101 (1790).

Significantly, the Framers understood “inhabitant” to require a stronger relationship to a State than mere presence or residence. Particularly illuminating is the debate over a motion to replace the word “resident” with “inhabitant” in the section setting qualifications for members of the House. James Madison seconded the motion, explaining that “both were vague, but the latter [‘inhabitant’] least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business.” 2 *Farrand* 217. By contrast, “resident” would exclude legislators serving in the nation’s capital. *Id.* at 218. While “resident” required merely physical presence, “inhabitant” required a different and more permanent connection.

The nature of that connection is made clear by contemporaneous definitions and usage. Webster’s 1828 dictionary, which the Court regularly consults to elucidate original constitutional meaning,¹¹ defines an “inhabitant” as:

A dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as

¹¹ *E.g.*, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162-63 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008); *Davis v. Washington*, 547 U.S. 813, 823-24 (2006).

distinguished from an occasional lodger or visitor.

1 N. Webster, *American Dictionary of the English Language* (1828). Likewise, to “dwell” is to “abide as a permanent resident” or “to have habitation for some time or permanence.” *Id.*

The *Oxford English Dictionary* defines “inhabitant” as “a permanent resident,” in support of which definition it cites U.S. Const. art. I, § 2 (qualifications for representatives), and a case concerning a disputed 1824 election resolved by the House of Representatives. The case was a challenge to the qualifications of John Bailey which compelled the House Committee of Elections to inquire into the meaning of “inhabitant” as used in the Constitution. The Framers, “by striking out ‘resident,’ and inserting ‘inhabitant,’ as a stronger term, intended more clearly to express their intention that the persons to be elected should be completely identified with the State in which they were to be chosen.” *Cases of Contested Elections in Congress* 415 (Clarke and Hall, eds., 1834). The use of “inhabitant” therefore required that Representatives “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.” *Id.* This requirement, in turn, was essential to “sustain the distinctive character of the several States as component parts of the General Government” and as a check against the nationalizing tendency. *Id.* at 413. Mere residency was insufficient to achieve these ends.

Thus, the Framers used the word “inhabitant” in the Constitution’s original drafts to denote a degree of permanence and stability of residence within a State for representational purposes. Such a status corresponds to membership within a State’s political community – *i.e.*, the “People” of a State. *See generally Wood, supra*, at 479. In no Convention draft or debate was it suggested that broader terms such as “residence” or “presence” would capture the appropriate population, nor that the stylistic change from “inhabitant” to “Persons” was substantive.

Finally, the text of Section 2 of the Fourteenth Amendment strongly reaffirms apportionment’s link to political community. Accordingly, Section 2’s first sentence parallels the language and structure of Article I’s Apportionment Clause, making no apparent change save the excisions.¹² The subsequent sentence, however, takes the additional step of making explicit the link to political community by reducing States’ apportionment population in proportion to the percentage of male citizens aged 21 or older denied the franchise. In this way, the Amendment’s drafters confirmed that the proper objects of the apportionment count are not merely resident but those

¹² Further, the act authorizing the 1870 and 1880 Censuses, like those before them, continued to identify “inhabitants” as the object of the count. *See* 21 Rev. Stat. (2nd ed.) §§ 2175, 2176 (1878); An Act To Provide for Taking the Tenth and Subsequent Censuses, Pub. L. No. 45-195, § 7, 20 Stat. 473, 475 (1879).

who are attached to it with greater permanence and force – *i.e.*, inhabitants.¹³

The structure and history of Section 2 reinforce this point. The provision was clearly designed to ensure that the newly freed slaves would be counted for apportionment purposes. At the same time, Section 2 also attempted to prevent the former States of the Confederacy from increasing their representation in the House of Representatives and the Electoral College while denying the vote to former slaves who were now citizens of the United States. In this way, Section 2 prohibited States from exploiting for political gain in the national government those whom they had excluded from their political communities.

2. Unlawfully Or Temporarily Present Foreign Nationals Lack A Permanent Legal Residence In Any State And May Not Be Counted For Apportionment Purposes

Non-immigrant foreign nationals are not *bona fide* “inhabitants” of any State because they lack the ability to establish a permanent legal residence and thus stand outside of the States’ political communities.

¹³ Representative Roscoe Conkling, a drafter of the Amendment, stated that the drafting committee “adhered to the Constitution as it is, proposing to add to it only as much as is necessary to meet the point aimed at,” the eradication of Article I’s references to servitude. Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

This is a matter of federal law, enacted under Congress's power to establish rules of naturalization. *See* U.S. Const. art. I, § 8, cl. 4. Accordingly, like foreign travelers, such individuals may not be counted for apportionment purposes.

Under federal law, the sojourn of an unlawfully present foreign national is marked by instability and uncertainty. He may not be lawfully employed, for example, and may therefore be dismissed from work at any time, for any reason, without legal recourse. 8 U.S.C. § 1324a(a)(1)(A). Overriding all is the fact that the very *presence* of such individuals is unlawful, rendering them subject to criminal penalties and deportation. 8 U.S.C. § 1227(a)(1)(B).

Thus, an unlawfully present foreign national's link to the United States, and to any particular State, is inherently tenuous. Statistical analysis of the growth and migration of the population of such individuals demonstrates this instability. For example, nearly 8 percent of those unlawfully present in 2007 exited the country in 2008 and 2009. *Passel & Cohn, supra*, at 9. The same time period witnessed dramatic migration of such individuals within and between States. *Id.* at 14-16.

This instability is a function of federal law. Congress may make rules "covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents," *Elkins v. Moreno*, 435 U.S. 647, 664 (1978), and, in so doing, may bar certain classes of

aliens from establishing domicile within the United States. *Id.* at 666. Under the comprehensive Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), as amended, 8 U.S.C. § 1101 *et seq.*, “nonimmigrant aliens can generally be viewed as temporary visitors to the United States,” absent some statutory classification allowing otherwise. *Id.* at 665-66. In this respect, unlawfully present foreign nationals are in the same position as foreign travelers: their exit being *legally* certain, they cannot, as a matter of law, establish domicile in a State and therefore cannot become inhabitants for apportionment purposes.¹⁴

That the U.S. Census Bureau treats non-immigrant foreign nationals differently than travelers is a matter of historical happenstance, and not revealing of constitutional practice. Only gradually, long after the Framing of Article I and the Fourteenth Amendment, did Census policy come to embrace a distinction between the non-immigrants and foreign travelers, who have never been counted. The Constitution, of course, contains no restrictions on

¹⁴ The same is true of foreign nationals lawfully but temporarily present in the United States on “non-immigrant visas,” who are therefore also not proper objects of the apportionment count. This includes holders of student visas and guest workers. To be sure, no evidence suggests that the numbers of such individuals present in the United States and in particular States currently affect apportionment. Nonetheless, such individuals are not, for constitutional purposes, “inhabitants,” and their presence should not be counted with respect to the apportionment of House seats.

citizenship. Nor did federal law until 1875, with the passage of an act to prohibit the immigration of persons for purposes of slavery or prostitution and of persons convicted of certain crimes. An Act Supplementary to the Acts in Relation to Immigration, Pub. L. No. 43-141, 18 Stat. 477 (1875). The Emergency Quota Act of 1921 was the first to establish comprehensive quotas, ending the era of open immigration into the United States. Pub. L. No. 67-5, § 2, 42 Stat. 5, 5 (1923); see John Powell, *Encyclopedia of North American Immigration* 88 (2005). Even with the passage of restrictive immigration laws, the population of unlawfully present individuals grew slowly, until the late 1960s, with the implementation of the 1965 Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965). See James Edwards, *Two Sides of the Same Coin: The Connection Between Legal and Illegal Immigration* 2 (2006). Only since the 1960 or 1970 Census has the population of “unauthorized migrants” been large enough to have a marked impact on apportionment figures. See Jeffrey Passel & Robert Suro, Pew Hispanic Ctr., *Rise, Peak and Decline: Trends in U.S. Immigration 1992-2004* 13 (2005), <http://pewhispanic.org/files/reports/53.pdf>.

The Census Bureau’s claim that its policy of counting the unlawfully present for apportionment purposes embodies longstanding constitutional practice is therefore disingenuous. See U.S. Census Bureau, Congressional Apportionment: Historical Perspective, <http://www.census.gov/population/apportionment/about/history>.

html; *Wood, supra*, at 466 n.2 (listing Census policy statements). In historical context, its present policy conflicts with the exclusion of foreign travelers from apportionment. The Court should not be “persuaded by arguments that explain the debasement of citizens’ constitutional right to equal franchise based on exigencies of history or convenience.” *Bd. of Estimate v. Morris*, 489 U.S. 688, 703 n.10 (1989).

3. The Apportionment Clauses Must Be Read *In Pari Materia* With The Constitution’s Other Protections Of Equal Representation

The Constitution’s two Apportionment Clauses – Article I, Section 2, Clause 3, and Section 2 of the Fourteenth Amendment – guarantee equality of representation more directly than any other constitutional provision and are, indeed, the only express statements of this principle in the constitutional text. It would therefore be anomalous in the extreme if the Apportionment Clauses were interpreted to undercut the protections of voting equality arising from other, less specific constitutional provisions, in particular the Article I requirement that Representatives be chosen “by the people of the several States” and the Equal Protection Clause and Fifth Amendment, by authorizing the dilution of the voting power of citizens who inhabit States with few non-immigrant foreign nationals. *See Wesberry*, 376 U.S. at 7-8 (U.S. Const. art. I, § 2, cl. 1, requires that, “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”); *Reynolds*,

377 U.S. at 563 (Equal Protection Clause bars “[w]eighting the votes of citizens differently”).

Yet Defendants embrace this anomaly, treating the Apportionment Clauses as an exception to the principle of equality of representation. While *Wesberry*, *Reynolds*, and other cases have recognized the right of qualified voters “to vote and to have their votes counted,” *Wesberry*, 376 U.S. at 17, Defendants read the Apportionment Clauses to mandate the abrogation of this right through dilution caused by the counting, for apportionment purposes, of individuals who are not proper inhabitants, but at best unlawful residents. *See, e.g.*, U.S. Census Bureau, Supporting the 2010 Census: A Toolkit for Reaching Immigrants 25, http://2010.census.gov/partners/pdf/Immigrant_Overview.pdf (“As mandated by the Constitution, every person living in the United States must be counted – both citizens and noncitizens.”); *Wood*, *supra*, at 466 n.2.

But it cannot be that the “uppermost principle” of the delegates to the Constitutional Convention – “that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress,” *Wesberry*, 376 U.S. at 10 – should be undermined by provisions that, on their faces, guarantee that very right.

Rather, these clauses can and therefore must be read *in pari materia*, so as to give full effect to each. Even were such an interpretation not required by the text of the Apportionment Clauses alone, they are

perfectly susceptible to a reading that limits the apportionment count to inhabitants alone, thereby eliminating disparities in the weight of votes cast in different States. Unlike Defendants' looser interpretation, this reading is consistent with and actually furthers the commands of the Equal Protection Clause and Article I, Section 2, Clause 1, of the United States Constitution. It is therefore compelled.

B. Counting Non-Immigrant Foreign Nationals For Apportionment Violates Article I, Section 2, Clause 1

The Supreme Court has held that the Secretary of Commerce's conduct of the Census must be "consistent with the constitutional language and the constitutional goal of equal representation" to be deemed constitutional. *Wisconsin v. City of New York*, 517 U.S. 1, 19-20 (1996) (quoting *Franklin*, 505 U.S. at 804). Defendants' insistence upon including non-immigrant foreign nationals in Census counts is directly contrary to the language and goal of Article I, Section 2, Clause 1.¹⁵

¹⁵ Many non-voters, of course, are counted by the Census, and Plaintiffs take no exception to counting of such non-voters as legally-present children and prisoners, because they are inhabitants of their States, are distributed roughly evenly across the country, and may become voters once they satisfy the requisite qualifications. By the same token, lawful permanent residents are inhabitants and are also eligible to become voters in due course.

The effect of Defendants' conduct of the Census is to violate the Supreme Court's settled interpretation of Article I, Section 2, Clause 1, that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 7-8.

Notwithstanding this fundamental constitutional principle, the inescapable consequence of Defendants' policy is that a congressional district in a State with relatively fewer non-immigrant foreign nationals contains a greater population of eligible voters than does a district in a State with relatively more non-immigrant foreign nationals. Ex. 1 at ¶9. Thus, under Defendants' current apportionment of House seats, the average U.S. House district in Louisiana will contain 748,160 inhabitants, versus an average of 656,452 inhabitants for districts in California, the State which has gained the most House seats due to the large number of non-immigrant foreign nationals now within its borders. *See id.*; Ex. 2. As a result, a Louisiana voter's vote is not "worth as much," *Wesberry*, 376 U.S. at 7-8, as a California voter's. Defendants' policy of including non-immigrant foreign nationals in the 2010 Census apportionment figures thereby deprives Plaintiffs of their rightful representation in the House of Representatives, in violation of Article I, Section 2, Clause 1, of the United States Constitution.

This conclusion is not altered by this Court’s observation that *Wesberry*’s strict “mathematical” approach to districting does not transpose perfectly onto interstate apportionment. *See generally Department of Commerce v. Montana*, 503 U.S. 442 (1992); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Wisconsin v. City of New York*, 571 U.S. 1 (1996). *Franklin*, *Montana*, and *Wisconsin* pose no obstacle to applying *Wesberry*’s core principle of equal representation here because they merely recognize that *Wesberry* must be adapted to interstate apportionment by granting Congress discretion as to the *means* by which it conducts the count for apportionment purposes. *E.g.*, *Wisconsin*, 517 U.S. at 20 (upholding the Secretary’s discretion to select a statistical adjustment method privileging “distributive accuracy” over “numerical accuracy”); *Franklin*, 505 U.S. at 806 (upholding the Secretary’s discretion over method for allocating military personnel serving abroad for census purposes); *Montana*, 503 U.S. at 452 n.36 (upholding Congress’ discretion to choose among various statistical methods for apportioning seats in Congress).

In this case, however, Plaintiffs do not contest the methodological discretion of Congress or of the Census Bureau. They complain, not about the *method* of counting, but about the *object* counted. None of *Wisconsin*, *Franklin*, or *Montana* addressed the deliberate counting of non-immigrant foreign nationals towards representational baselines. Those cases concerned only whether one method or another could constitutionally be used to count such individuals as

were to be counted. The *status* of the persons counted never entered into the Court's analysis.

Rather, Plaintiffs assert that Defendants' policy is an unconstitutional violation of the command of Article I, Section 2, Clause 1, that the People of the United States choose their representatives, have as equal as possible a say in doing so, and thereby enjoy equal and proportional representation. Though Defendants have discretion to count voters in any manner "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 505 U.S., at 804 and *Wisconsin*, 517 U.S. at 19-20, they may not constitutionally count individuals who are not members of the American political community for apportionment purposes and thereby dilute the votes and representation of a substantial minority of the People of the United States.

C. Counting Non-Immigrant Foreign Nationals Towards A State's Apportionment Violates The Fifth Amendment's Guarantee Of Equal Protection Under The Law

Defendants' inclusion of non-immigrant foreign persons in States' apportionment baselines denies Plaintiff Caldwell equal protection of the laws by diluting the strength of his vote for a Representative in the House and denying him equal and proportionate representation in the House.

This Court has consistently held that districting plans which give unequal voting power to voters in

different districts violate the Fourteenth Amendment's Equal Protection Clause. In the seminal case of *Reynolds*, 377 U.S. at 563, for example, the Court stated that “[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.” The Court continued: “With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live,” *id.* at 565, and “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 in other parts of the State,” *id.* at 568. A “basic principle of representative government,” the *Reynolds* Court explained, is that “the weight of a citizen’s vote cannot be made to depend on where he lives.” *Id.* at 567. See also *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977) (“[I]n voting for their legislators, all *citizens* have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight”) (emphasis added); *Bd. of Estimate*, 489 U.S. at 701 (“relevant inquiry” in redistricting cases under the Equal Protection Clause “is whether the vote of any citizen is approximately equal in weight to that of any other citizen”). See also *Chapman v. Meier*, 420 U.S. 1, 24 (1975) (“All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group.”); *Bartlett v.*

Strickland, 129 S. Ct. 1231, 1239 (2009) (acknowledging “the one-person, one-vote principle of the Equal Protection Clause” as established in *Reynolds*).

Defendants’ insistence on counting non-immigrant foreign nationals in congressional apportionment baselines directly violates this principle by making voters’ votes anything but equal from one State to the next. See Ex. 1 ¶10. While the *Reynolds* line of cases has always been applied in determining the constitutionality of intrastate districting, its rationale and rule apply equally to the federal government.¹⁶ An individual voter’s share in democratic participation is no less unconstitutionally diluted because the counting of non-immigrant foreign nationals in another State gives that States’ voters’ votes proportionally greater weight, than if a state legislature had drawn unequal districts for political or discriminatory reasons. As such, Defendants have unconstitutionally denied Plaintiff Caldwell – and all other Louisiana citizens – equal protection of the laws.



¹⁶ Cf. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (citing cases in support of the proposition that “the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable”).

CONCLUSION

The Court should exercise its original jurisdiction and decide this important case. Apportionment pits State against the federal government, and State against State, in much the manner of the border and boundary issues that the Court regularly considers under its original jurisdiction. Moreover, delay in resolution of this challenge risks electoral disorder and confusion, whether from conflicting decisions by lower courts or simply insufficient time for States to undertake redistricting following a decision that upsets the *status quo*.

The text, history, and structure of the Constitution's Apportionment Clauses demonstrate their overriding purpose of aligning the apportionment of House seats and electors with the States' political communities. The Court has long recognized the principle that citizens' votes are due "equal weight," and the Apportionment Clauses, while reinforcing that principle, extend it to guarantee equal weight of representation to the States and their lawful residents, or inhabitants. Defendants' practice to the contrary is irreconcilable with the constitutional text and its purpose and denies the Plaintiffs, as well as other States and millions of Americans, their rightful equal and proportionate representation in Congress and the Electoral College.

For all these reasons, the Court should grant the Plaintiffs' Motion for Leave to File a Complaint.

Respectfully submitted,

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Exhibit 1

DECLARATION OF TROY C. BLANCHARD, PH.D.

I, Troy C. Blanchard, Ph.D., under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. My name is Troy C. Blanchard, and I am an Associate Professor in the Department of Sociology at Louisiana State University, Research Fellow in the Social Science Research Center at Mississippi State University, and Research Associate in the Center for Economic Studies at the United States Census Bureau. I am the author or co-author of twenty peer-reviewed articles in the fields of demography and sociology, as well as numerous book chapters and policy reports. I was awarded my doctorate in Sociology from Louisiana State University in 2001.

The Census Apportionment Process

2. The central purpose of the Decennial Census of the U.S. population is to provide a basis for apportioning congressional seats to states. The 2010 Census apportionment population for each state is based on the sum of persons considered residents and persons living overseas. Residents are defined as “those persons ‘usually resident’ in that state (where they live and sleep most of the time)” on April 1, 2010.¹ The overseas population is based on “a count

¹ U.S. Census Bureau, Congressional Apportionment, <http://www.census.gov/population/apportionment/>.

of overseas U.S. military and federal civilian employees (and their dependents living with them) allocated to the state, as reported by the employing federal agencies.”²

3. In the apportionment process, each state is automatically assigned one congressional seat based on the constitutional mandate that each state have at least one representative in the U.S. House of Representatives. The remaining 385 seats are apportioned based on calculations by the U.S. Census Bureau using the equal proportions method. This method assigns each state a priority value that is calculated by dividing the population of each state by the geometric mean of its current and next seats.³ Using this method, the key factor determining the number of seats assigned to a state is the count of persons used for apportionment.

Estimating The Impact Of Undocumented Immigrants

4. To assess the impact of the undocumented immigrant population on the apportionment process, I began by estimating the lawful inhabitant population of each state. To do this, for each state, I subtracted an estimate of the undocumented population

² *Id.*

³ U.S. Census Bureau, Congressional Apportionment: How It's Calculated, <http://www.census.gov/population/apportionment/about/how.html>.

from the 2010 Census count to obtain an estimate of the “inhabitant population.” The inhabitant population includes U.S. citizens and documented non-citizens of the U.S., such as persons in the U.S. on student visas or green cards.

5. For estimates of the undocumented population, I relied on a 2011 report, based on 2010 data, from the Pew Hispanic Center.⁴ The Pew estimate utilizes a residual method of estimation using data from the U.S. Census Bureau Current Population Survey (CPS) March Supplement and counts of legal immigrants from the Department of Homeland Security. The CPS is a monthly survey of approximately 50,000 households used to assess a wide variety of demographic and labor force trends. Although the CPS asks respondents to identify whether they are immigrants and citizens, the CPS and other federal data sources do not ask immigrant respondents to identify their status as an undocumented immigrant. To obtain the number of undocumented immigrants, counts of immigrants from the CPS are compared to counts of legal immigrants from 1980 to the present from DHS.⁵ The Pew Center compares these estimates with

⁴ Jeffrey S. Passel & D’Vera Cohn, Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010* (2011), <http://pewhispanic.org/files/reports/133.pdf>.

⁵ Prior to the existence of the Department of Homeland Security, these data were maintained by the Immigration and Naturalization Service.

death certificate data, Mexican government data, and survey data to account for omissions and undercount.

6. The residual method used by the Pew Hispanic Center yields results similar to the technique used in the 2010 Estimates of the Unauthorized Population calculated by DHS.⁶ The DHS estimates are based on a similar methodology that utilizes U.S. Census Bureau American Community Survey data. The DHS report notes:

Trends in the unauthorized population reported by DHS are consistent with the most recent estimates by the Pew Hispanic Center. These estimates show 11.2 million unauthorized immigrants living in the United States in March 2010 and 11.1 million in March 2009 (Passel and Cohn, 2011).⁷

DHS does not release estimates of the undocumented population for each state, but given the consistency of DHS estimates with the estimates used in this analysis, it is unlikely that analysis of the DHS estimates would yield different findings regarding the apportionment of congressional seats to the state of Louisiana.

⁶ Michael Hoefler, Nancy Rytina & Bryan C. Baker, Department of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in The United States: January 2010* (2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

⁷ *Id.*

7. To assess the impact of the undocumented immigrant population on the apportionment process, the method of equal proportions was used to perform two apportionments, one with and one without the inclusion of the undocumented immigrant population. To replicate the 2010 apportionment methodology, I utilized the table of multipliers published by the U.S. Census Bureau.⁸ In the first apportionment – that including the undocumented immigrant population – the priority values that I calculated using Census data were identical to those produced by the U.S. Census Bureau.⁹ This confirmed the correctness of my implementation of the method of equal proportions.

Results

8. Results from the apportionment analysis appear in accompanying tables. The first table, “2010 Apportionment Populations and Apportionment of House Seats,” shows that the inclusion of the undocumented immigrant population in the apportionment count causes Louisiana to lose a House seat. Four other states also lose a seat apiece due to the

⁸ U.S. Census Bureau, Apportionment: Table of Multipliers using the Method of Equal Proportions, <http://www.census.gov/population/apportionment/data/files/atable.txt>.

⁹ U.S. Census Bureau, 2010 Census Apportionment Priority Values, <http://www.census.gov/population/apportionment/data/files/Priority%20Values%202010.pdf>.

inclusion of undocumented immigrants in the apportionment population. Three states gain seats: California (two seats), Texas (two), and Florida (one).

9. The second table, “Population Per District,” reports the average size per district for each state. It shows that the inclusion of undocumented immigrants in the apportionment population causes and exacerbates disparities in the number of lawful inhabitants per district. For example, California has, on average, 656,453 inhabitants per district under the current Census apportionment, while Louisiana has 748,610. Excluding undocumented immigrants from the apportionment population reduces this disparity, changing California’s and Louisiana’s average district sizes to, respectively, 682,196 and 641,280. For all eight states where the number of districts shifts due to the exclusion of undocumented immigrants from the apportionment population, the shift causes the average district size to more closely approach the ideal size of a congressional district, reducing disparities in average district size.¹⁰

10. The third table, “Change In Vote Weight Due To Counting Of Undocumented Foreign Nationals,” reports changes in the voting power for selected states. I found that the inclusion of the undocumented

¹⁰ The ideal district size is that which would prevail if all congressional districts, in all states, contained the same number of lawful inhabitants. The ideal size is 684,560 lawful inhabitants, which is obtained by dividing the lawful apportionment population by the number of congressional districts.

immigrant population *reduces* the power of votes cast by Louisianans in House elections by 14.29 percent. Thus, the power for the average district in Louisiana is diluted by the inclusion of the undocumented immigrant population.

Conclusions

11. Based on the analysis that I have described here, the inclusion of undocumented immigrants in the apportionment of congressional seats adversely affects a number of states, including Louisiana. This conclusion is reached using a reliable state-level estimate of the undocumented population produced by the Pew Hispanic Center. My apportionment findings are based on the Method of Equal Proportions using the U.S. Census Bureau table of multipliers and have been calibrated to the U.S. Census Bureau's priority values for each state. The findings provide strong evidence that the inclusion of undocumented immigrants dilutes the representation of Louisiana residents.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Troy C. Blanchard, Ph.D.

Executed on: November 7, 2011

Exhibit 2: 2010 Apportionment Populations and Apportionment of House Seats

	Census Apportionment Population	Apportionment	Undocumented Population	Inhabitant Population*	Apportionment Using Inhabitant Population
Alabama	4,802,982	7	120,000	4,682,982	7
Alaska	721,523	1	10,000	711,523	1
Arizona	6,412,700	9	400,000	6,012,700	9
Arkansas	2,926,229	4	55,000	2,871,229	4
California	37,341,989	53	2,550,000	34,791,989	51
Colorado	5,044,930	7	180,000	4,864,930	7
Connecticut	3,581,628	5	120,000	3,461,628	5
Delaware	900,877	1	25,000	875,877	1
Florida	18,900,773	27	825,000	18,075,773	26
Georgia	9,727,566	14	425,000	9,302,566	14
Hawaii	1,366,862	2	40,000	1,326,862	2
Idaho	1,573,499	2	35,000	1,538,499	2
Illinois	12,864,380	18	525,000	12,339,380	18
Indiana	6,501,582	9	110,000	6,391,582	9
Iowa	3,053,787	4	75,000	2,978,787	4
Kansas	2,863,813	4	65,000	2,798,813	4
Kentucky	4,350,606	6	80,000	4,270,606	6
Louisiana	4,553,962	6	65,000	4,488,962	7
Maine	1,333,074	2	10,000	1,323,074	2
Maryland	5,789,929	8	275,000	5,514,929	8
Massachusetts	6,559,644	9	160,000	6,399,644	9
Michigan	9,911,626	14	150,000	9,761,626	14
Minnesota	5,314,879	8	85,000	5,229,879	8
Mississippi	2,978,240	4	45,000	2,933,240	4
Missouri	6,011,478	8	55,000	5,956,478	9
Montana	994,416	1	10,000	984,416	2
Nebraska	1,831,825	3	45,000	1,786,825	3
Nevada	2,709,432	4	190,000	2,519,432	4
New Hampshire	1,321,445	2	15,000	1,306,445	2
New Jersey	8,807,501	12	550,000	8,257,501	12
New Mexico	2,067,273	3	85,000	1,982,273	3
New York	19,421,055	27	625,000	18,796,055	27

* Census apportionment population net of the undocumented population.

North Carolina	9,565,781	13	325,000	9,240,781	14
North Dakota	675,905	1	10,000	665,905	1
Ohio	11,568,495	16	100,000	11,468,495	17
Oklahoma	3,764,882	5	75,000	3,689,882	5
Oregon	3,848,606	5	160,000	3,688,606	5
Pennsylvania	12,734,905	18	160,000	12,574,905	18
Rhode Island	1,055,247	2	30,000	1,025,247	2
South Carolina	4,645,975	7	55,000	4,590,975	7
South Dakota	819,761	1	10,000	809,761	1
Tennessee	6,375,431	9	140,000	6,235,431	9
Texas	25,268,418	36	1,650,000	23,618,418	34
Utah	2,770,765	4	110,000	2,660,765	4
Vermont	630,337	1	10,000	620,337	1
Virginia	8,037,736	11	210,000	7,827,736	11
Washington	6,753,369	10	230,000	6,523,369	10
West Virginia	1,859,815	3	10,000	1,849,815	3
Wisconsin	5,698,230	8	100,000	5,598,230	8
Wyoming	568,300	1	10,000	558,300	1

Source: Calculations by Troy C. Blanchard, Ph.D., based on data from the 2010 Census and from Jeffrey Passel & D'Vera Cohn, Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010* (2011)

Exhibit 3: Population Per District

	Census Apportionment		Inhabitant Apportionment	
	Inhabitants Per District	Deviation From Ideal District	Inhabitants Per District	Deviation From Ideal District
Alabama	668,997	-2.27%	668,997	-2.27%
Alaska	711,523	3.94%	711,523	3.94%
Arizona	668,078	-2.41%	668,078	-2.41%
Arkansas	717,807	4.86%	717,807	4.86%
California	656,453	-4.11%	682,196	-0.35%
Colorado	694,990	1.52%	694,990	1.52%
Connecticut	692,326	1.13%	692,326	1.13%
Delaware	875,877	27.95%	875,877	27.95%
Florida	669,473	-2.20%	695,222	1.56%
Georgia	664,469	-2.93%	664,469	-2.93%
Hawaii	663,431	-3.09%	663,431	-3.09%
Idaho	769,250	12.37%	769,250	12.37%
Illinois	685,521	0.14%	685,521	0.14%
Indiana	710,176	3.74%	710,176	3.74%
Iowa	744,697	8.78%	744,697	8.78%
Kansas	699,703	2.21%	699,703	2.21%
Kentucky	711,768	3.97%	711,768	3.97%
Louisiana	748,160	9.29%	641,280	-6.32%
Maine	661,537	-3.36%	661,537	-3.36%
Maryland	689,366	0.70%	689,366	0.70%
Massachusetts	711,072	3.87%	711,072	3.87%
Michigan	697,259	1.86%	697,259	1.86%
Minnesota	653,735	-4.50%	653,735	-4.50%
Mississippi	733,310	7.12%	733,310	7.12%
Missouri	744,560	8.76%	661,831	-3.32%
Montana	984,416	43.80%	492,208	-28.10%
Nebraska	595,608	-12.99%	595,608	-12.99%
Nevada	629,858	-7.99%	629,858	-7.99%
New Hampshire	653,223	-4.58%	653,223	-4.58%
New Jersey	688,125	0.52%	688,125	0.52%
New Mexico	660,758	-3.48%	660,758	-3.48%
New York	696,150	1.69%	696,150	1.69%

North Carolina	710,829	3.84%	660,056	-3.58%
North Dakota	665,905	-2.73%	665,905	-2.73%
Ohio	716,781	4.71%	674,617	-1.45%
Oklahoma	737,976	7.80%	737,976	7.80%
Oregon	737,721	7.77%	737,721	7.77%
Pennsylvania	698,606	2.05%	698,606	2.05%
Rhode Island	512,624	-25.12%	512,624	-25.12%
South Carolina	655,854	-4.19%	655,854	-4.19%
South Dakota	809,761	18.29%	809,761	18.29%
Tennessee	692,826	1.21%	692,826	1.21%
Texas	656,067	-4.16%	694,659	1.48%
Utah	665,191	-2.83%	665,191	-2.83%
Vermont	620,337	-9.38%	620,337	-9.38%
Virginia	711,612	3.95%	711,612	3.95%
Washington	652,337	-4.71%	652,337	-4.71%
West Virginia	616,605	-9.93%	616,605	-9.93%
Wisconsin	699,779	2.22%	699,779	2.22%
Wyoming	558,300	-18.44%	558,300	-18.44%

Source: Calculations by Troy C. Blanchard, Ph.D., based on data from the 2010 Census and from Jeffrey Passel & D'Vera Cohn, Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010* (2011)

Exhibit 4: Change In Vote Weight Due To Counting Of Undocumented Foreign Nationals

	Inhabitants Per District – Census Apportionment	Inhabitants Per District – Inhabitant Apportionment	Change In Voting Power Due To Counting Undocumented Foreign Nationals
California	656,453	682,196	3.92%
Florida	669,473	695,222	3.85%
Louisiana	748,160	641,280	-14.29%
Missouri	744,560	661,831	-11.11%
Montana	984,416	492,208	-50.00%
North Carolina	710,829	660,056	-7.14%
Ohio	716,781	674,617	-5.88%
Texas	656,067	694,659	5.88%

Source: Calculations by Troy C. Blanchard, Ph.D., based on data from the 2010 Census and from Jeffrey Passel & D’Vera Cohn, Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010* (2011)