No. 98-404

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., APPELLANTS

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the instant case, which involves a suit filed by the United States House of Representatives challenging the Secretary of Commerce's current plan for the year 2000 census, presents a justiciable controversy satisfying the requirements of Article III of the Constitution.

2. Whether the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, which requires Congress to conduct an "actual Enumeration" of the population, prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census. The United States House of Representatives was the plaintiff in the district court and is an appellee in this Court. The following were intervenor-defendants in the district court: Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson; Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis Guitierrez; John Conyers; Jose Seerano; Cynthia McKinney; Charles Rangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee; Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Cudahy, California; City of Long Beach, California; City of Long Beach, California; City of San Bernardino, California; City of Detroit, Michigan; City of Bell, California; City of Huntington Park, California; City of San Jose, California; City of Stamford, Connecticut; City of

Oakland, California; County of Santa Clara, California; County of San Bernardino, California; County of Alameda, California; County of Riverside, California; State of New Mexico; National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California, Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim; Adeline M.L. Yoong; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra; U.S. Conference of Mayors; League of Women Voters of Los Angeles; Robert Menendez; Ed Pastor; Silvestre Reyes; Ciro Rodriquez; and Carlos Romero-Barcelo. Pursuant to Rule 18.2 of the Rules of this Court, they are deemed parties in this Court.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-67a) is not yet reported.

JURISDICTION

The judgment of the district court (App., *infra*, 66a-67a) was entered on August 24, 1998. A notice of appeal (App., *infra*, 68a-69a) was filed on August 25, 1998. The jurisdiction of this Court is invoked under the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at App., *infra*, 70a.

2. Sections 141 and 195 of Title 13, United States Code, are reproduced at App., *infra*, 70a-74a.

3. Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2480-2483, is reproduced at App., *infra*, 75a-80a.

STATEMENT

This case involves a statutory and constitutional challenge to the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000. In the proceedings below, the District Court for the District of Columbia held that the Department's plan was inconsistent with the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), and was therefore unlawful. App., *infra*, 1a-67a. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482.

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he 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" (the Census Clause). *Ibid.* See also Amend. XIV, § 2 ("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.").

2. Pursuant to the Census Clause, Congress has provided in the Census Act 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). The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported by the Secretary to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within one week after the beginning of the first Session of Congress following the census, the President must transmit to 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 the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455 (1992). Within 15 days after receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996).

The Census Act provides that the Secretary may conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Act further states that "[e]xcept for the determination of population for purposes of apportionment of

Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

3. Each of the decennial censuses conducted in the United States is believed to have undercounted the country's actual population. *Wisconsin* v. *City of New York*, 517 U.S. 1, 6 (1996). The 1970, 1980, and 1990 censuses are estimated to have undercounted the population by 2.7%, 1.2%, and 1.6%, respectively. *Id.* at 6-7, 20. The Census Bureau has also concluded that members of certain groups—in particular, members of racial and ethnic minorities—are more likely to be missed in the census than are other United States residents, a phenomenon known as a "differential undercount." See *id.* at 7; App., *infra*, 3a-4a.

In preparing for the 1990 census, the Commerce Department devoted extensive consideration to the possibility of using large-scale statistical sampling to address the undercount and differential undercount. The methodology considered by the Department involved an intensive postenumeration survey (PES) of particular representative geographical areas. By comparing the data obtained from the PES with the "raw" census figures for the same geographical areas, and by extrapolating the results of that comparison across the country as a whole, the Department produced adjusted census figures for each of the States and their political subdivisions. See *City of New York*, 517 U.S. at 8-10. For a variety of reasons, however, the Secretary ultimately determined that the unadjusted rather than the adjusted counts should be used as the official census figures. See *id.* at 10-12; 56 Fed. Reg.

33,582 (1991).[1] This Court upheld that decision against constitutional challenge in *City of New York*. See 517 U.S. at 24.

4. Shortly after the Secretary decided against adjustment of the 1990 census figures, Congress passed the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. 141 note). The Act directed the Secretary to contract with the National Academy of Sciences to study "means by which the Government could achieve the most accurate population count possible." *Id.* § 2(a)(1), 105 Stat. 635. The Academy was instructed to consider, *inter alia*, "the appropriateness of using sampling methods, in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data, including a review of the accuracy of the data for different levels of geography (such as States, places, census tracts and census blocks)." *Id.* § 2(b)(1)(C), 105 Stat. 635. The Academy established three panels, all of which "concluded that traditional census methods needed to be modified in response to societal changes, and that statistical sampling techniques would both increase the census' accuracy and lower its cost." App., *infra*, 4a.

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[1] In explaining his decision against adjustment of the 1990 census figures, the Secretary did not assert that an adjustment would violate either the Constitution or the Census Act. To the contrary, he stated that "[w]hile not free from doubt, it appears that the Constitution might permit a statistical adjustment, but only if it would assure an accurate population count," 56 Fed. Reg. at 33,605; and he observed that "[w]hile judicial opinion is unsettled on the question * * *, the majority of courts considering this issue have ruled that [13 U.S.C. 195] permits an adjustment if the adjustment method makes the census more accurate," *id.* at 33,606.

In 1997, Congress passed a bill that would have amended 13 U.S.C. 141(a) to provide that, "[n]otwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States." H.R. 1469, 105th Cong., 1st Sess., Tit. VIII(b)(1), at 65. The President vetoed that bill. See 33 Weekly Comp. Pres. Doc. 846 (June 9, 1997) (veto message). The President's veto message explained that he regarded the sampling prohibition as objectionable because "[w]ithout sampling, the cost of the decennial census will increase as its accuracy, especially with regard to minorities and groups that are traditionally undercounted, decreases substantially." *Id.* at 847. Shortly thereafter, Congress enacted legislation directing the Department of Commerce "within thirty days of enactment of this Act to provide to the Congress a comprehensive and detailed plan outlining its proposed methodologies for conducting the 2000 decennial Census and available methods to conduct an actual enumeration of the population." Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217.

Pursuant to that statutory directive, the Department of Commerce subsequently forwarded to Congress a detailed report describing the methods by which it planned to conduct the 2000 census. See Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress—The Plan for Census 2000* (Aug. 1997) (*Report to Congress* or *Report*). The *Report to Congress* described a variety of new mechanisms—*e.g.*, an improved master address file, new outreach methods, and new technologies designed to detect and eliminate multiple responses from the same household—that the Census Bureau intended to use in the initial phase of

the census. *Id.* at 19-22. The *Report* also confirmed the Census Bureau's intention to make use of statistical sampling techniques that the Bureau had concluded would increase the accuracy of the 2000 census while reducing its cost. See *id.* at 23-32.[2] The *Report* stated that "[a]ll significant departures from the methodologies used in previous censuses have been endorsed by the [National Academy of Sciences], the Bureau's advisory committees, and the scientific community." *Id.* at x. It observed as well that "[t]he Plan for Census 2000 has received strong support from professional statisticians and demographers—experts are convinced that

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[2] Two forms of statistical sampling are at issue in this litigation. First, the Commerce Department intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, approximately 65% of all U.S. households returned the census forms provided to them by mail. Census Bureau enumerators visited non-responding households as many as six times before relying on other means to attempt to ascertain the number of persons residing there. For the 2000 census, the Commerce Department plans to secure information from a randomly selected sample of non-responding households, and to infer the likely number of persons living in other non-responding units based on the sample data. *Report to Congress* at 26-29; App., *infra*, 6a-7a.

Second, after the initial phase of the census, the Commerce Department plans to conduct a survey of approximately 750,000 housing units furnishing a representative sample of a wide variety of demographic groups, defined by such categories as race, age, urban vs. rural place of residence, and status as a homeowner or renter. By comparing the results of that survey to those of the initial phase of the census, the Department can assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. By extrapolating the results of the sample, the Bureau will determine population figures for States and political subdivisions nationwide. *Report to Congress* at 29-32; App., *infra*, 7a-9a.

the introduction of a limited use of scientific sampling in Census 2000 will result in a more accurate, less costly census." *Ibid.*

After receiving the *Report to Congress*, Congress enacted the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440. Section 209(b) of that Act provides that

> [a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

111 Stat. 2481. Section 209(c)(2) states that the *Report to Congress*, together with the Commerce Department's Census 2000 Operational Plan, "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 111 Stat. 2482. Section 209(d) identifies "either House of Congress" as "an aggrieved person" within the meaning of Section 209(b). 111 Stat. 2482. Section 209(e)(1) states that any civil action brought pursuant to the Act shall be heard by a three-judge district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*

5. The plaintiff in this case (appellee in this Court) is the United States House of Representatives. The House filed suit pursuant to the judicial review

provision of Section 209(e)(1), contending that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act and Article I, Section 2, Clause 3 of the Constitution. The Department of Commerce, the Census Bureau, and two individual Commerce Department officials (collectively Commerce Department) were named as defendants. The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. The House moved for summary judgment. The district court denied the Commerce Department's motion to dismiss, as well as motions to dismiss filed by four groups of intervenor-defendants, and granted the House's motion for summary judgment. App., *infra*, 1a-67a.

a. The district court first concluded that the House possessed a cognizable stake in the controversy, explaining that the House had "properly alleged a judicially cognizable injury through [1] its right to receive information by statute and through [2] the institutional interest in its lawful composition." App., *infra*, 16a. With respect to the first claim of injury, the court observed that the President is required by 2 U.S.C. 2a(a) to "transmit to the Congress a statement showing the whole number of persons in each State * * * as ascertained under the * * * decennial census of the population." App., *infra*, 16a. The court stated that "[i]f statistical sampling in the apportionment census violates the Census Act or the Constitution, Congress will not receive information that it is entitled to by statute." *Id.* at 17a. The court concluded that Congress's "fail[ure] to receive census information to which it is entitled as a matter of law" would effect a "con-

crete and particularized" injury to the House. *Id.* at 20a.

With respect to the second claim of injury, the House contended that an unlawfully conducted census "would necessarily result in the unlawful composition of any House elected and seated pursuant to the resulting apportionment." App., *infra*, 20a. The district court acknowledged that the House will continue to be composed of 435 Representatives regardless of the manner in which the 2000 census is conducted. *Id.* at 21a. Relying primarily on this Court's decision in *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972), however, the district court held that "a legislative body has a judicially cognizable interest in matters affecting its composition so as to satisfy Article III, whether or not the challenged conduct will ultimately have an effect on the size of the body." App., *infra*, 22a.

The district court also held that the current House of Representatives for the 105th Congress could properly assert the interests of the House of Representatives that will convene during the 107th Congress in the year 2001, when the President's apportionment statement is transmitted to Congress. App., *infra*, 22a-26a. The court concluded as well that the threatened injury was sufficiently immediate to satisfy constitutional requirements. *Id.* at 28a-37a.

b. On the merits, the district court held that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act. The court first determined that 13 U.S.C. 195, as originally enacted in 1957, unambiguously prohibited the use of sampling in the congressional apportionment process. App., *infra*,

48a-49a.[3] The court concluded that the 1976 amendments to the Census Act did not eliminate that proscription. It noted that the Commerce Department in 1980 "took the position that statistical sampling in connection with the apportionment enumeration remained prohibited." *Id.* at 50a. The court also believed that the text of Section 195 in its current form is most naturally read to forbid the use of statistical sampling for apportionment purposes. *Id.* at 50a-54a. Finally, the court examined the legislative history of the 1976 amendments and found no indication that Congress had intended to alter existing law regarding the use of sampling in connection with the apportionment process. *Id.* at 54a-59a.

The district court also rejected the Commerce Department's argument that Section 141(a) affirmatively authorizes the use of sampling in determining the population for purposes of apportioning Representatives. App., *infra*, 59a-64a. Even assuming that Section 141(a) might otherwise be read to authorize sampling for apportionment purposes, the court held, Section 195 is "more specific[ally]" directed to the issue of sampling and is "therefore controlling to the extent that the two provisions conflict." *Id.* at 61a. The court concluded that "while § 141 permits sampling techniques and surveys in the conduct of the decennial census, that general grant is subject to the more specific 'Use of Sampling' directive in § 195, which * * * explicitly proscribes the use of sampling for apportion-

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[3] As enacted in 1957, Section 195 provided that "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195 (1958); see App., *infra*, 48a.

ing representatives among the states." *Id.* at 62a. The court also found no evidence in the legislative history of Section 141(a) suggesting that Congress intended that provision to authorize the use of sampling in the apportionment of Representatives. *Id.* at 62a-64a.

c. Because the district court concluded that the Secretary's plan for the 2000 census violated the Census Act, it declined to address the question whether the plan was consistent with Article I, Section 2, Clause 3 of the Constitution. App., *infra*, 64a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress has vested this Court with direct appellate jurisdiction over district court decisions in suits challenging the Commerce Department's plan for the year 2000 decennial census. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This case falls squarely within the Court's appellate jurisdiction under that statutory provision. The district court erred both in holding that this suit presents a justiciable case or controversy under Article III of the Constitution, and in holding that the use of statistical sampling in determining population figures for the apportionment of Representatives among the States would violate the Census Act.

1. A definitive ruling by this Court regarding the legality of the Commerce Department's plan for the 2000 census would have significant practical advantages. The Framers of our Constitution, however, did not empower the federal courts to issue advisory opinions. Article III empowers the federal courts to resolve only those disputes that present actual "Cases"

or "Controversies." The present suit does not satisfy that fundamental constitutional requirement.

a. The district court erred in holding (App., *infra*, 18a) that the House of Representatives had alleged "an 'informational injury' sufficiently concrete so as to satisfy the irreducible constitutional minimum of Article III." The 107th Congress will take office in January 2001. Within one week of the beginning of the first regular session of that Congress, the President must "transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the * * * decennial census of the population, and the number of Representatives to which each State would be entitled." 2 U.S.C. 2a(a). Nothing in the Commerce Department's plan for the 2000 census suggests, and the House does not contend, that the President will fail to transmit to Congress the number of persons in each State "as ascertained under the * * * decennial census." Rather, the gravamen of the House's claim of harm is that the (allegedly unlawful) manner in which the Secretary intends to conduct the census will inevitably affect the character of the data provided to Congress pursuant to Section 2a(a), thereby depriving the House of data to which it believes itself to be statutorily entitled.

To treat that alleged harm as a judicially cognizable "informational injury" would permit Congress to give itself a cognizable interest in the outcome of *any* Executive Branch decision, simply by requiring executive officials to report that decision to Congress. Whenever the Executive Branch is required by statute to inform Congress of its activities, the manner in which those activities are performed will affect the character and/or quantity of the information provided to the

legislature.[4] To permit such an "injury" to serve as the predicate for a judicial determination of the legality of the underlying action would vest Congress with a substantial institutional role in the execution of the laws, in violation of fundamental separation-of-powers principles. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986).[5]

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[4] The district court attempted to cabin the effect of its decision by asserting that "the information sought by the House here is necessary to perform a constitutionally mandated function." App., *infra*, 17a. Contrary to the court's suggestion, however, under the existing statutory scheme neither House of Congress plays any role in the apportionment process after the transmittal by the President to Congress (see 2 U.S.C. 2a(b) (Supp. II 1996)) of "the whole number of persons in each State" and "the number of Representatives to which each State would be entitled." Rather, "[i]t shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the census figures from the President], to send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996). The figures transmitted by the President are binding upon the Clerk. See *ibid.* ("Each State shall be entitled * * * to the number of Representatives shown in the statement required by subsection (a) of this section"); *Franklin* v. *Massachusetts*, 505 U.S. 788, 798 (1992) ("It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives."); *id.* at 799 ("it is the President's personal transmittal of the report to Congress that settles the apportionment"); *id.* at 824 (Scalia, J., concurring in part and concurring in the judgment) (noting "the Clerk's purely ministerial role" in the apportionment process).

[5] The Commerce Department has not yet been provided with the funds necessary to complete the 2000 census, and it will therefore be able to carry out that task only if Congress enacts new appropriations measures. Compare *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992) (particularly when "the acts

b. The district court also erred in holding that the House of Representatives "has a judicially cognizable interest in matters affecting its composition" sufficient to bring this suit within the requirements of Article III. App., *infra*, 22a. Regardless of the manner in which the 2000 census is conducted, the 107th and subsequent Houses will continue to be composed of 435 Members and will continue to exercise the same constitutional powers. Whatever effect the census and resulting apportionment process may have on individual Members (or aspiring Members)—and any such effect is entirely speculative at the present time—it will impose no injury on the House as a collective body.[6]

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necessary to make the injury happen are at least partly within the plaintiff's own control," the Court "ha[s] insisted that the injury proceed with a high degree of immediacy"). Moreover, both the propriety and the legality of statistical sampling have been the subject of extensive debate within the political Branches. It cannot be said with any certainty that a majority of the 107th House will share the current House's opposition to the use of statistical sampling in connection with the 2000 decennial census. The current House is therefore an inappropriate representative of the future legislative bodies that will allegedly suffer injury if the census is ultimately conducted in accordance with the Secretary's plan.

[6] In reaching the contrary conclusion, the district court principally relied (see App., *infra*, 20a-22a) on this Court's decision in *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972). The court's reliance on that decision was misplaced. In *Beens*, the Minnesota State Senate sought to appeal from a federal district court judgment holding the state legislature to be malapportioned and directing the adoption of a new apportionment plan—one that would have reduced from 67 to 35 the number of state senators. *Id.* at 188-193. The Court held that "the senate is an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal in a case of this kind." *Id.* at 194.

2. The district court also erred on the merits in holding that the Census Act precludes the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States. The Act directs the Secretary to "take a decennial census of population as of the first day of April of [the census] year, * * * in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). Because no other provision of law authorizes the Secretary to conduct the "actual Enumeration" required by Article I, Section 2, Clause 3, it is apparent that the "decennial census" mandated by Section 141(a) is to be used in apportioning Representatives among the States. Cf. *City of New York*, 517 U.S. at 19 (citing Section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary.").

Other features of the statutory scheme reinforce that conclusion. Thus, Section 141(b) refers to "[t]he tabulation of total population by States *under subsection (a)*

Beens makes clear that a state legislative body suffers a cognizable injury as a result of an order directing that the body's composition be changed. The present case, however, is distinguishable in important respects. As we explain above, the decision whether to use sampling in conducting the 2000 census can have no effect on the number of Representatives that will sit in the 107th or any subsequent Congress. The House, moreover, has not initiated this litigation to defend the manner in which it is currently constituted. Rather, the House claims that it will suffer a judicially cognizable injury if the Commerce Department's conduct of the 2000 census causes it to be unlawfully constituted in the future. Finally, the instant case was filed by a *federal* legislative entity, whose capacity to sue in order to vindicate the general public and governmental interest in enforcement of applicable law is subject to constitutional separation-of-powers limitations that do not apply to state entities like the appellant in *Beens*.

of this section as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(b)(emphasis added). In addition, 2 U.S.C. 2a(a) requires the President to "transmit to the Congress a statement showing the whole number of persons in each State, * * * *as ascertained under the* * * * *decennial census* of the population, and the number of Representatives to which each State would be entitled" (emphasis added). Taken together, the relevant statutory provisions manifest a clear congressional intent that the Secretary be permitted to employ "sampling procedures and special surveys" in conducting the "decennial census of population," which census will be used to determine the state-level population figures that are employed in the apportionment process.

The district court concluded (App., *infra*, 50a-59a) that the Commerce Department's plan for the 2000 census was barred by 13 U.S.C. 195, which states that "*[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States*, the Secretary *shall*, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title" (emphasis added). The court's reliance on that provision was misplaced. The underscored language makes clear that Section 195's generally applicable mandatory directive to the Secretary —*i.e.*, that statistical sampling "shall" be used if its use is considered "feasible"—does not apply to the apportionment process. That language does not, however, speak to the question whether the Secretary *may* employ sampling for apportionment purposes if he deems that course to be appropriate. That question is (as we explain above) directly addressed by Section 141(a),

which states that the Secretary is authorized to use "sampling procedures and special surveys" in conducting the "decennial census of population."[7]

3. The House of Representatives also contended in the district court that the Secretary's plan for the 2000 census violates the constitutional requirement that Representatives be apportioned among the States on the basis of an "actual Enumeration," Art. I, § 2, Cl. 3—a requirement that the House construes as mandating a "headcount" (House Sum. Judg. Mem. 47, 51) of individuals "reckoned singly" (*id.* at 55). Although the district court declined to address that claim in light of its ruling on the statutory question (see App., *infra*, 64a), this Court may wish to resolve the constitutional issue if it concludes that the suit satisfies the requirements of Article III and that the Secretary's plan for the 2000 census is consistent with the Census Act.

The constitutional requirement that Congress provide for an "actual Enumeration" of the population does not foreclose the use of statistical sampling mechanisms that the Commerce Department has concluded will enable it more accurately to determine the "respective Numbers" of "the several States." Since at least 1577, the word "enumeration" has been understood to mean

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[7] Indeed, the district court's reading of Section 195 renders Section 141(a)'s reference to "sampling procedures" altogether superfluous. In the district court's view, Section 195 prohibits the use of sampling in determining the population figures to be used in apportionment, and requires its use (where feasible) in all other programs where the Secretary acts pursuant to Title 13. So construed, Section 195 deals comprehensively with the use of sampling in all Title 13 activities. If that is what Section 195 means, then Section 141(a)'s express authorization of the use of "sampling procedures" in connection with the "decennial census of population" is without practical significance.

"[t]he action of ascertaining the number of something; *esp*. the taking [of] a census of population; a census." 3 *The Oxford English Dictionary* 227 (1933). The Secretary's plan for the 2000 census indisputably constitutes a means "of ascertaining the number of" persons within each State. The Census Clause does not require that the relevant numbers be determined through any particular methodology.[8] To the contrary, it vests

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[8] Article I, Section 9, Clause 4 of the Constitution provides that "[n]o capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The phrase "Census or Enumeration herein before directed to be taken" can only be understood to refer to the "actual Enumeration" mandated by Article I, Section 2, Clause 3. Article I, Section 9, Clause 4's reference to a "Census or Enumeration" strongly indicates that the Framers understood the word "enumeration" to be synonymous with "census"—*i.e.*, the requirement that an "Enumeration" be conducted does not dictate the use of any particular methodology in determining the total population of each State.

The fact that the Census Clause refers to an "actual" enumeration does not suggest that the determination of state-level population figures—the only constitutionally mandatory use of the census—must be based exclusively on a "headcount" (see p. 18, *supra*) of identified individuals. Rather, the word "actual" was used to distinguish the permanent basis for apportioning the House from the temporary allocation of Representatives set forth in the Census Clause. See Art. I, § 2, Cl. 3 (stating that until the first "enumeration" has been conducted, "the State of New Hampshire shall be entitled to chuse three [Representatives], Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three"). Read in the context of the Census Clause as a whole, the reference to an "actual Enumeration" means only that the apportionment of Representatives must be based on a systematic effort to determine the actual number of persons within each State.

Congress with extremely broad discretion, providing that the census shall be conducted "in such Manner as [Congress] shall by Law direct." Art. I, § 2, Cl. 3. See *City of New York*, 517 U.S. at 19 ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and "there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides").

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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