No. 98-564

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether the instant challenge to 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 Secretary's plan for the 2000 census violates either Article I, Section 2 of the Constitution, or Section 2 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William Jefferson Clinton, President of the United States; 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 appellees, who were plaintiffs in the district court, are Matthew Glavin; Robert Barr; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresanta; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn; and Cobb County, Georgia.[1]

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[1] In the district court, appellees filed two motions for leave to file an amended complaint naming additional plaintiffs. The first motion sought leave to add Delaware County, Pennsylvania, and DuPage County, Illinois, as plaintiffs. Appellees subsequently sought leave to add Bucks County, Pennsylvania. The district court did not rule on either motion. Although the district court's opinion refers at one point to Delaware County as though it were a plaintiff, see J.S. App. 11a, the list of plaintiffs included at the beginning of the court's opinion does not include any of those three counties, see *id.* at 1a.

On October 6, 1998, after the district court had issued its opinion and order, appellees filed in that court a motion to clarify that their earlier motions for leave to file an amended complaint had been granted. The district court has not ruled on the motion to clarify. Thus, while the government has never opposed the appellees' request to add the three counties named above as additional plaintiffs in this case, it does not appear that those counties are properly regarded as parties at the present time.

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 Serrano; 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 San Bernardino, California; City of Detroit, Michigan; City of Bell, California; City of Gardena, 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; State of Texas; 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 Rodriguez; John Conyers, Jr.; and Carlos Romero-Barcelo. Pursuant to Rule 18.2 of the Rules of this Court, they are deemed parties in this Court.[2]

[2] Four groups of litigants—Richard A. Gephardt, et al.; the Legislature of the State of California, et al.; the City of Los Angeles, et al.; and the National Korean American Service & Education Consortium, Inc., et al.—moved for leave to intervene as defendants in the district court. The district court's opinion and order did not directly address the question whether the motions for intervention had been granted. See J.S. II n.1. On October 15, 1998, however, the district court issued an order granting the motions to intervene.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-22a) is not yet reported.

JURISDICTION

The opinion and order of the district court were entered on September 24, 1998. A notice of appeal (J.S. App. 37a-39a) was filed on September 25, 1998. The Court noted probable jurisdiction on October 9, 1998. J.A. 134. The jurisdiction of this Court rests on Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2482.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced as an appendix to the brief: Article I, Section 2, Clause 3 of the United States Constitution; Section 2 of the Fourteenth Amendment to the United States Constitution; 2 U.S.C. 2a (1994 & Supp. II 1996); 13 U.S.C. 141 and 195; and 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.

STATEMENT

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.* In addition, Section 2 of the Fourteenth Amendment provides that "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. The Census Act states 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). Congress has also established the mechanism to be used in apportioning Repre-

sentatives among the States after the census has been completed. 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). Under the apportionment law, "[e]ach State shall be entitled * * * to the number of Representatives shown in the statement" transmitted by the President. 2 U.S.C. 2a(b) (Supp. II 1996). Within 15 days after receiving that statement, the Clerk of the House of Representatives 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 authorizes the Secretary of Commerce to 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).[3] 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.

"[T]he sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), § 209(a)(2), 111 Stat. 2481. The decennial census

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[3] The Bureau of the Census and its Director assist the Secretary in the performance of his duties under the Census Act. See 13 U.S.C. 2, 21.

has historically been used, however, to collect a variety of information in addition to the state-level population figures that are used in apportioning Representatives. "The Federal Government considers census data in dispensing funds through federal programs to the States, and the States use the results in drawing intrastate political districts." *Wisconsin* v. *City of New York*, 517 U.S. 1, 5-6 (1996). In order to facilitate the latter use of census data, the Census Act provides for the collection of population figures for geographical subdivisions within the States. 13 U.S.C. 141(c). The Act requires that "[t]abulations of population" for substate areas "shall be completed by [the Secretary] as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State." *Ibid.*

3. Each of the decennial censuses conducted in the United States is believed to have undercounted the country's actual population. *City of New York*, 517 U.S. at 6. 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 demographic groups-–including children under 18, renters (particularly in rural areas), and members of racial and ethnic minorities–-are more likely to be missed in the census than are other persons, a phenomenon known as a "differential undercount." See Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress–-The Plan for Census 2000*, at 2-3 (Aug. 1997) (*Report to Congress* or *Report*) (98-404 J.A. 48-49)[4]; *City of New York*, 517 U.S. at 7; J.S. App. 2a.

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[4] References to "98-404 J.A." are to the joint appendix filed in No. 98-404, *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*.

In preparing for the 1990 census, the Commerce Department devoted extensive consideration to the possibility of using 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).[5] This Court upheld that decision against constitutional challenge. See *City of New York*, 517 U.S. at 24.

4. Much of the factual background of this case is set forth in the government's brief in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404. As that brief explains, the Department of Commerce has concluded that the use of statistical sampling mechanisms in the conduct of the 2000 decennial census will increase the accuracy of the census while reducing its cost. As directed by statute, see Pub. L. No. 105-18, Tit. VIII, 111

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[5] In explaining his decision against adjustment of the 1990 census figures, the Secretary did not take the position 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.

Stat. 217, the Department forwarded the *Report to Congress*, which set forth the methods by which it plans to conduct the 2000 census. See 98-404 J.A. 34-147.

The *Report to Congress* described a variety of new mechanisms that the Census Bureau intends to use in order to improve its ability to obtain responses from individual residents in the initial phase of the census. 98-404 J.A. 73-80. It explained, for example, the Bureau's plan to develop a new Master Address File (MAF) superior to the address list used in the 1990 census. *Ibid.*[6] It described new outreach methods, including plans to make census forms available in public places such as malls, stores, and schools; and increased availability of forms in languages other than English. *Id.* at 77-79. The *Report* also explained the Census Bureau's plan to introduce new technologies designed to detect and eliminate multiple responses from the same household, thereby ensuring that the increased availability of census forms will not lead to overcounting of persons identified on more than one questionnaire. *Id.* at 79.

The *Report to Congress* explained, however, that such techniques alone would not be sufficient to obtain the most accurate population counts feasible. The *Report* therefore 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 98-404 J.A. 81-98. Two forms of statistical sampling are at issue in this litigation.

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[6] Development of the MAF has been facilitated by the Census Address List Improvement Act of 1994, Pub. L. No. 103-430, 108 Stat. 4393. Section 2 of the Act authorizes designated local and tribal officials to review the MAF in order to assist the Census Bureau to identify any errors or omissions. 108 Stat. 4393; 13 U.S.C. 16; see 98-404 J.A. 219-220 (Census 2000 Operational Plan). Section 4 authorizes the United States Postal Service to share address lists with the Secretary of Commerce for use in conducting any census or survey. 108 Stat. 4394; 39 U.S.C. 412(b); see 98-404 J.A. 224.

First, the Commerce Department intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, only 65% of all U.S. households (as compared to 78% in 1970) returned the census forms sent to them by mail. 98-404 J.A. 52, 88. 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 Census Bureau plans to secure information from a randomly selected sample of non-responding households for each census tract, and to determine the likely number of persons living in other non-responding units in the same tract based on the sample data. *Id.* at 88-92.[7]

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 or rural place of residence, and status as a homeowner or renter. 98-404 J.A. 92-93. By comparing the results of that survey to those of the initial phase of the census, the Department will assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. *Id.* at 94. Based on the results of the sample, the Bureau will determine population figures for States and political subdivisions nationwide. *Id.* at 94-98. The *Report to Congress* characterized that process, known as Integrated Coverage Measurement (ICM), as "the most critical" undertaking "[o]f all the innovations to improve accuracy in Census 2000." *Id.* at 92.

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[7] The Bureau's objective is to obtain actual responses from 90% of the housing units in each census tract before determining the likely number of persons living in the non-responding units. In order to achieve the 90% goal, the Bureau plans to contact a larger percentage of the households in tracts with lower mail response rates. See 98-404 J.A. 90-91.

The *Report to Congress* observed that the general methodology to be used in the ICM process had been "employed in the past two censuses to evaluate census quality." 98-404 J.A. 93. The *Report* explained, however, that "[t]he methodology has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country." *Ibid.* The *Report* noted that the sample used in the 2000 census would be much larger—750,000 housing units as opposed to 150,000—than the PES conducted in 1990 (see p. 5, *supra*). *Id.* at 94. The *Report* also explained that the ICM methodology projected for use in 2000, unlike the adjustment methodology considered in 1990, would not utilize data from one State to determine population figures in another State. *Ibid.*

After receiving the *Report to Congress*, Congress enacted the 1998 Appropriations Act. 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 Census Bureau's Census 2000 Operational Plan (see 98-404 J.A. 148-340), "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(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 plaintiffs in this case (appellees in this Court) are 16 individuals and Cobb County, Georgia. They 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; Article I, Section 2 of the Constitution; and Section 2 of the Fourteenth Amendment. President William Jefferson Clinton, the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau (collectively Commerce Department) were named as defendants.[8]

The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. Appellees moved for summary judgment. Appellees' claim of injury was substantially dependent on the proposition that particular States would be credited with a larger share of the country's population (or that particular counties would be credited with a larger share of their State's population) under a decennial census in the year 2000 that did not employ statistical sampling techniques. Appellees submitted the affidavit of Dr. Ronald E. Weber, who expressed the view that such areas can presently be identified with a reasonable degree of confidence. Dr. Weber noted that in 1992, the Census Bureau had published "a listing of Revised Net Undercount Rates ('NUR') for the 1990 census. The NUR are the factors that would have been used as

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[8] The President was not a proper defendant in this suit under Section 209(b) of the 1998 Appropriations Act, which seeks judicial review of what Section 209(c)(2) of that Act deems to be "final agency action" (the Census Bureau's *Report to Congress* and Operational Plan), and, we submit, injunctive relief was improperly entered against the President. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801, 802-803 (1992); *id.* at 825-829 (Scalia, J., concurring in part and concurring in the judgment).

multipliers to adjust the population numbers in the 1990 census." J.A. 61; see p. 5, *supra* (discussing Commerce Department's consideration, and ultimate rejection, of the use of statistically adjusted figures in the 1990 census). Dr. Weber concluded that the NUR published for the 1990 census furnished a reliable basis for predicting whether the use of sampling in the 2000 census would cause individual States or localities to be credited with a higher or lower percentage of the population than they would receive if the census were conducted without the use of sampling.[9]

Dr. Weber also asserted that he could identify those States that stand a substantial likelihood of being allocated fewer Representatives in the House of Representatives if sampling is used in the 2000 census than they would receive if sampling were not utilized. To make that determination, Dr. Weber relied on projections (the PPL-47 data set) issued by the Commerce Department in the fall of 1996 regarding the expected populations of individual States and localities as of July 2000. J.A. 62. Dr. Weber assumed that a 2000 census conducted without the use of sampling would produce state-level population figures consistent with the Department's projections. J.A. 63, 90. He then multiplied each

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[9] Dr. Weber explained:

> As nearly every analysis of the undercount in the census acknowledges, there are certain demographic characteristics which are related to the measured undercount. One of the largest components of this is race and Hispanic origin. More particularly, the main components of the NUR rely on the same demographic factors to be used pursuant to the Plan, including minority status, ethnicity, urban/rural place of residence, and owner/renter status. Therefore, areas which had high percentages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of these populations in 2000. While a variance in the minority population in these areas in 2000 might affect the degree of the measured undercount, it is unlikely to have a material effect on the direction of adjustment in these areas.

J.A. 61-62 (citation omitted).

State's population, thus determined, by the NUR derived from the 1990 census. J.A. 62, 89-90. Applying the method of equal proportions (see p. 3, *supra*) to each set of figures, Dr. Weber purported to identify those States for which there was a likelihood that their representation in the House would be affected by the choice between census methodologies. J.A. 62-63. He concluded that "it is a virtual certainty that Indiana will lose a seat" under the Bureau's plan (J.A. 65) and that "the States which stand a substantial likelihood of losing a seat are Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin" (J.A. 67). Dr. Weber apparently did not mean that all of those States were likely to lose a seat, however, for he stated in his conclusion that "[i]t is substantially likely that the state of Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, *or* Wisconsin will lose a seat in the House of Representatives" if sampling is used. J.A. 77 (emphasis added).

The government submitted its own affidavits contesting Dr. Weber's methodology and conclusions. See J.A. 92-110. One of the government's affiants, Signe Wetrogan, the Census Bureau's Assistant Division Chief for Population Estimates and Projections, "conclude[d] that no one can predict the state-by-state population of the United States as of April 1, 2000 with the exactitude required by the Method of Equal Proportions." J.A. 93. She specifically disputed Dr. Weber's assertion that Indiana would be virtually certain to lose a seat under the Census Bureau's planned sampling methodology, pointing out that he had based his prediction on outdated population data that overstated the projected population of Indiana by at least 42,000. J.A. 97-98. The government also pointed out that appellees, having moved for summary judgment on the merits, bore the burden of establishing (not merely alleging) their standing to sue. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 13 n.6, 45 (filed May 22, 1998).

6. The district court denied the Commerce Department's motion to dismiss and granted the appellees' motion for summary judgment. J.S. App. 1a-23a.

a. The district court began its discussion of standing by observing that "[i]n considering a motion to dismiss for lack of standing, the Court must accept all material allegations contained in the complaint as true and must construe all such allegations in favor of standing." J.S. App. 9a. The court then concluded that the appellees "have demonstrated that they will suffer injury as a result of the Department's plan, because they are able to calculate its effects by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000." *Id.* at 10a. It held that appellees "meet the [Article III] requirements of having a personal stake in the outcome of the controversy." *Ibid.*

The court identified four distinct categories of cognizable injuries. First, the court stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." J.S. App. 11a. Second, the court accepted the allegation "that the plan will dilute the voting strength of [appellees] at the intrastate level" because "several [appellees] reside in counties whose relative population will be diminished by operation of the Department's plan." *Ibid.* Third, the court held that appellees had properly alleged a cognizable injury in the form of loss of federal funding to the areas in which they reside. *Id.* at 11a-12a.

Finally, the district court concluded that the appellees would be injured by the Commerce Department's plan for the 2000 census because if the plan is implemented and the census is subsequently declared invalid by a reviewing court, "any elections in 2002 will have to be held on the basis of an

incorrect number of representatives and malapportioned districts which reflect the 1990 census results." J.S. App. 12a. The court considered it "virtually certain" that Georgia will be entitled to receive at least one additional congressional seat after the 2000 census (as compared to its current allotment) regardless of what census methodology is used. *Ibid.* The court stated that the appellees who are Georgia residents "will have their votes diluted if they are forced to participate in an election in 2002 in which Georgia does not have the additional seat in Congress." *Ibid.* The court also concluded that "[t]his same injury will be visited upon the county [appellees] that have enjoyed a higher rate of population growth than their states since 1990." *Ibid.*

The court further held that the alleged injuries were sufficiently immediate and certain to occur to satisfy Article III requirements, J.S. App. 7a-9a, and that those injuries were properly attributable to the Commerce Department, *id.* at 14a-15a.

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 stated that "Congress has spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment." J.S. App. 16a-17a. The court construed the opening proviso of 13 U.S.C. 195 as unambiguously prohibiting the use of sampling for apportionment purposes. J.S. App. 18a-19a. Insofar as that prohibition might conflict with the affirmative grant of authority to use sampling contained in 13 U.S.C. 141(a), the court reasoned that Section 195 is the more specific of the two provisions and should therefore prevail. J.S. App. 20a. The court concluded that "the only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment and Section 141

allows it for all other purposes." *Id.* at 21a. The district court issued an order stating that the Commerce Department was "permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment." *Id.* at 23a.

c. Because the district court concluded that the Secretary's plan for the 2000 census violates the Census Act, it declined to resolve the question whether the plan is consistent with Article I, Section 2, Clause 3 of the Constitution, or with Section 2 of the Fourteenth Amendment. J.S. App. 16a-17a & n.2, 21a.

SUMMARY OF ARGUMENT

1. Appellees cannot establish that any of the States in which they reside is likely to lose a seat in the House of Representatives as a result of the Census Bureau's plan to utilize statistical sampling in the 2000 census. To begin with, appellees cannot show that particular States will be credited with smaller shares of the population under the Bureau's plan than they would receive if the census were conducted without the use of sampling. The district court based its contrary view on the premise that the Bureau's plan for the year 2000 is essentially equivalent to the statistical adjustment methodology proposed (and ultimately rejected) for the 1990 census. The court's analysis ignores the substantial differences between the techniques (both sampling and nonsampling) projected for use in the year 2000 and the methods employed in 1990.

Even if sampling were certain to cause a particular State to be credited with a smaller share of the country's population, it would not follow that that State is likely to lose a Representative. Relying on population projections issued by the Census Bureau, appellees' affiant Dr. Ronald E. Weber purported to identify one State that was virtually certain to

lose a seat in the House of Representatives, and six other States that had a substantial likelihood of doing so. As a government declarant explained, however, that methodology was severely flawed, both because Dr. Weber failed to use the best available data, and because even the best data available at the present time are not sufficiently precise to permit a confident prediction regarding the apportionment of Representatives among the States under a census to be conducted in the year 2000.

The district court's disposition of the case is particularly untenable because the government's evidentiary submissions directly controverted Dr. Weber's methodology and conclusions. Because standing is an essential element of a plaintiff's case, the district court was authorized to enter judgment in appellees' favor only if there was no genuine dispute of material fact regarding their standing to sue. On the existing record, the district court had no basis for making that determination.

2. Appellees cannot establish standing based on the expected effects of the 2000 census on intrastate redistricting or the distribution of federal funds. Appellees' only colorable statutory or constitutional claim is that sampling may not be used for purposes of apportioning Representatives among the States. The Census Act and the Constitution plainly permit the use of sampling for other purposes, including intrastate redistricting and fund allocation. Insofar as appellees claim to suffer a diminution in intrastate electoral power, or a loss of federal largesse, their injury is not fairly traceable to the alleged violation of law. For much the same reason, appellees cannot satisfy Article III's redressability requirement, since they have made no effort to establish that the Secretary is likely to forgo the use of sampling for other purposes if he is prohibited from using sampling for apportionment.

3. The district court also held that appellees are likely to be injured by the Secretary's plan if the 2000 census is set

aside in its entirety and the 1990 census figures continue in effect. The harm they posit, however, would be traceable not to the plan itself, but to a remedial order issued in a (hypothetical) future lawsuit. In any event, that harm is highly unlikely to take place. In fashioning a remedy for a constitutional or statutory violation, a federal court exercising equitable powers should strive, to the extent possible, to replicate the conditions that would have been present if no violation of law had occurred. Because both the Constitution and the Census Act require that a census of the population be conducted at least once within every ten-year period, a judicial order mandating continued reliance on 1990 census figures would be in considerable tension with that remedial principle.

ARGUMENT

APPELLEES LACK STANDING TO BRING THIS SUIT

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). To satisfy the requirements of Article III, "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). Appellees cannot satisfy those requirements.

A. Appellees Have Failed To Identify Any State That Would Be Likely To Lose A Seat In The House Of Representatives As A Result Of The Census Bureau's Plan To Utilize Statistical Sampling In The 2000 Census

The district court stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota,

Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." J.S. App. 11a. That conclusion appears to have been based on the affidavit of Dr. Ronald E. Weber, who identified the six States listed above as "States which stand a substantial likelihood of losing a seat" if the Census Bureau's plan is implemented. J.A. 67.[10] The district court's conclusion was not justified by the record. Appellees have failed to establish that any of the States listed above is likely to be allotted fewer Representatives if the Bureau's plan is implemented than it would receive if the 2000 census were conducted without the use of sampling. The district court's holding is particularly untenable because the court granted appellees' motion for summary judgment, despite the fact that the government submitted declarations controverting Dr. Weber's methodology and conclusions.

1. The district court read Dr. Weber's declaration to assert that *all* of the States listed above would be likely to lose a Representative if sampling is utilized. Dr. Weber stated in his conclusion, however, only that "[i]t is substantially likely that the State of Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, *or* Wisconsin will lose a seat in the House of Representatives because of the Departments's Plan." J.A. 77 (emphasis added). In other words, Dr. Weber seemed to be expressing the view that there was a substantial likelihood that *one* of those States would lose a

[10] Dr. Weber also stated that "it is a virtual certainty that Indiana will lose a seat, dropping from ten seats under a traditional enumeration to nine under the Department's Plan." J.A. 65. That statement was directly controverted by one of the declarations submitted by the government. See pp. 23-24 & note 13, *infra*. One of the appellees, Gary A. Hofmeister, is a resident of Indiana. The district court did not allude to the possibility that Indiana will be allotted fewer Representatives if the Bureau's plan is implemented than the State would receive if the 2000 census were conducted without the use of sampling.

seat, but without specifying which one. Thus, the Weber affidavit does not furnish a basis for finding a substantial likelihood that the individual appellees who reside in any one of those six States would actually lose a Representative, and thereby have their votes diluted.

2. To show that a particular State would be likely to lose a Representative under the Bureau's plan, appellees would first be required to demonstrate that the State would probably be credited with a smaller percentage of the country's population if the Bureau's plan is implemented than if the census were conducted without the use of sampling. The district court concluded that appellees had met that burden "because they are able to calculate [the] effects [of the Bureau's plan] by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000." J.S. App. 10a. The court's analysis is seriously flawed.

To begin with, the district court's effort to equate the adjustment methodology used to calculate national undercount rates (NUR) for the 1990 census with the Census Bureau's plan for the year 2000 ignores the substantial differences between the two. Those differences are discussed both in the Commerce Department's 1997 *Report to Congress* and in the Declaration of John H. Thompson, the Bureau's Associate Director of the Decennial Census (J.A. 100-110), which was submitted by the government to the district court. As those documents explain, the Bureau has devised significant innovations for use in the initial phase of the census in order to increase the percentage of the population that completes and returns census questionnaires. Those include a Master Address File based, *inter alia*, on the United States Postal Service address list (see p. 6 and note 6, *supra*); a paid advertising campaign; plans to make census forms available in public places such as malls, stores, and schools; increased availability of census forms in languages

other than English; and new unduplication technologies designed to ensure that the increased availability of census forms will not lead to overcounting of persons identified on more than one questionnaire. See 98-404 J.A. 73-80 (*Report to Congress*); J.A. 103-104 (Thompson Declaration).

The *Report to Congress* also makes clear that the Integrated Coverage Measurement (ICM) operation planned for use in the 2000 census represents a substantial improvement on the adjustment methodology used in 1990. See 98-404 J.A. 93 (stating that the adjustment methodology used in the 1990 census "has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country"). The *Report* explained that the sample used in the 2000 census will be five times as large–-750,000 housing units as opposed to 150,000–-as the PES conducted in 1990. *Id*. at 94. The *Report* also noted that the ICM methodology projected for use in 2000, unlike the adjustment methodology considered in 1990, will not utilize data from one State to determine population figures in another State. *Ibid.*

Dr. Weber made no effort to compare the methods (sampling or non-sampling) used in the 1990 census with those projected for use in the year 2000. Rather, his conclusion that the 1990 NUR would likely be replicated in the 2000 census was explained as follows:

> As nearly every analysis of the undercount in the census acknowledges, there are certain demographic characteristics which are related to the measured undercount. One of the largest components of this is race and Hispanic origin. More particularly, the main components of the NUR rely on the same demographic factors to be used pursuant to the Plan, including minority status, ethnicity, urban/rural place of residence, and owner/renter status. Therefore, areas which had high percent-

> ages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of these populations in 2000. While a variance in the minority population in these areas in 2000 might affect the degree of the measured undercount, it is unlikely to have a material effect on the direction of adjustment in these areas.

J.A. 61-62 (citation omitted). Dr. Weber thus assumed that (1) any geographic area having a higher than average concentration of minority residents would likely benefit (*i.e.*, be credited with a higher share of the country's population) from the use of statistical sampling in the 2000 census, and (2) any geographic area that had a higher than average concentration of minority residents in 1990 is likely to have the same demographic characteristics in 2000. Neither of those propositions is supported by record evidence introduced in this case.

Because members of racial minority groups have historically been undercounted at a disproportionately high rate (see p. 4, *supra*), it is reasonable to suppose that, *as a general matter*, areas of the country with higher than average minority populations would benefit from the use of statistical sampling mechanisms designed in part to address the differential undercount. The results of the 1990 census, however, indicate that the correlation is significantly less precise than Dr. Weber's affidavit suggests. As the government's reply brief in *City of New York* explained, "States such as Illinois, New Jersey, and New York * * * have large minority populations, and all three would have lost population share if the proposed [statistical] adjustment had been made." Nos. 94-1614, et al. Gov't Reply Br. at 20 n.17 (*City of New York*). Two experts have determined that in the 1990 census, "[u]rban blacks ha[d] an undercount three times that of the rest of the population, according to the PES; but 55% of them live[d] in states that would lose

population share if the adjustment were implemented." D. Freedman & K. Wachter, *Rejoinder*, 9 Stat. Sci. 527, 537 (1994). Appellees made no effort to quantify the degree to which States with high minority populations would actually have benefitted from the adjustment proposed for the 1990 census.

Moreover, neither Dr. Weber's affidavit nor any other evidentiary materials submitted by appellees supports the assertion that, "[t]herefore, areas which had high percentages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of those populations in 2000." J.A. 61-62. Appellees presented no evidence regarding the racial demographics—past or present—of the States in which they reside. For that reason, Dr. Weber's use of the word "[t]herefore" at the beginning of the sentence quoted above is particularly inexplicable. The statement that "areas which had high percentages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of those populations in 2000" may or may not be true, but it does not follow in any way from the preceding statements in Dr. Weber's affidavit or from any other evidence in the record.

3. As Dr. Weber recognized, if the 1990 census figures had been statistically adjusted in accordance with the 1992 NUR, and the method of equal proportions had been applied to the adjusted state-level population totals, only one State (Wisconsin) would have lost a seat in the House of Representatives (as compared to the apportionment of Representatives that actually occurred using the unadjusted figures). J.A. 66. Thus, even if the individual appellees could demonstrate a likelihood that each of the States in which they reside would be credited with a smaller share of the country's population under the Census Bureau's plan for the 2000 census, it would not follow that any of those States is likely to lose a Representative. In purporting to identify States that, in his view, stand a substantial likelihood of

having their allotment of seats in the House of Representatives affected by the choice between census methodologies, Dr. Weber relied on a set of figures (the PPL-47 data set) issued by the Commerce Department in the fall of 1996, which projected the numbers of people that would reside in each State on July 1, 2000. J.A. 62. Dr. Weber assumed that a census conducted without the use of sampling would produce state-level population figures identical to those projected numbers. J.A. 63, 90. He then multiplied each State's population (so determined) by that State's "adjustment multiplier" (a reciprocal factor of the State's NUR) as derived from the 1990 PES. J.A. 89-90 & n.1. Dr. Weber applied the method of equal proportions (see p. 3, *supra*) to both sets of state-level population figures. J.A. 62-63. On that basis he concluded that "it is a virtual certainty that Indiana will lose a seat," and that six other States "stand a substantial likelihood of losing" one, if the Census Bureau's plan is implemented. J.A. 65, 67.

The government submitted the Declaration of Signe I. Wetrogan (J.A. 92-99), the Census Bureau's Assistant Division Chief for Population Estimates and Projections, who discussed the errors in Dr. Weber's analysis. While Ms. Wetrogan did not suggest that Dr. Weber had improperly applied the method of equal proportions in performing his calculations, she did explain that the data on which Dr. Weber had relied were substantially flawed. Ms. Wetrogan first explained that the PPL-47 projections for the year 2000 are not the best available data, since those projections were based on the Bureau's July 1, 1994, population estimates, which had already been superseded at the time that Dr. Weber executed his affidavit.[11] Ms. Wetrogan also empha-

[11] As the Wetrogan declaration explains, the Census Bureau produces both population estimates and population projections. "Estimates use a variety of existing sources to come to a reasoned conclusion about the population of a given governmental unit at some specified point in the

sized that even if the best available data had been used, the populations of individual States in the year 2000 could not be forecast with the degree of precision necessary to predict with confidence the apportionment of Representatives under the method of equal proportions.[12] Ms. Wetrogan directly took issue with Dr. Weber's assertion that Indiana is "a

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past." J.A. 93. "Projections use the latest available national and state estimates as the starting point, and then project the population in the future based on assumptions about fertility, mortality and internal and international migration trends." J.A. 94.

As explained above, Dr. Weber based his analysis on the PPL-47 projections, issued in October 1996, for the expected population of the various States as of July 1, 2000. The PPL-47 projections were themselves based on Census Bureau estimates of the population as of July 1, 1994. J.A. 95. The PPL-47 data set also included projections for the population as of July 1, 1997. See J.A. 97. By the time that Dr. Weber executed his affidavit, however, the Bureau had released population estimates for July 1, 1997, which differed in substantial respects from the earlier PPL-47 projections for the same date. J.A. 95-96. Ms. Wetrogan explained that "[h]ad Dr. Weber incorporated the 1997 estimates into his projections he would have produced very different results. Significant population shifts among states occurred in the 1994-1997 time period that would have significantly changed Dr. Weber's projections." J.A. 96. Those shifts "include[d] a sizeable increase in California's population, as that State pulled out of an economic downturn, and the shift in population trends in the New England states." *Ibid.*

[12] Ms. Wetrogan explained:

> By saying that Dr. Weber used outdated and incomplete information to prepare his projections I do not mean to imply that there **are** numbers that Dr. Weber or anyone else could have used to prepare exact projections for the year 2000. The most important point I wish to make in this Declaration is that projections are inherently imprecise and subject to change. Projections are useful planning tools but they are not exact. As discussed above, significant population change occurred in the 1994-1997 time period. These trends could continue at the same rate in the 1997-2000 time period, they could halt, or they could accelerate. Wholly different migration trends could develop. The Census Bureau prepares projections for planning purposes but it cannot predict exact population totals.

virtual certainty" to lose a seat under the Census Bureau's plan, explaining that the Bureau's current projections of Indiana's population in the year 2000 are substantially lower than the outdated projections on which Dr. Weber relied.[13]

4. Dr. Weber's conclusion that specified States were likely to lose Representatives under the Census Bureau's plan was based on his determinations that (a) a census conducted without the use of sampling would likely produce state-level population figures closely approximating those contained in the PPL-47 projections for July 1, 2000, and (b) the uses of sampling contemplated by the Bureau's plan would affect the relative population shares of the various States in substantially the same manner as the adjustment methodology devised in connection with the 1990 census. As the foregoing discussion makes clear, the declarations submitted by the government directly controverted each of those assertions. The government also pointed out that appellees, having moved for summary judgment on the merits, bore the burden of establishing their standing to sue. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 13 n.6, 45 (filed May 22, 1998).

The district court's opinion contains no reference to the government's evidentiary submissions or to appellees' burden at the summary judgment stage. Rather, the court focused on appellees' *allegations* and appeared to believe that in order to reach and resolve the merits of appellees' statutory and constitutional challenge to the census, it only had to

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J.A. 96-97. She concluded that "[n]o one can predict state populations three years from now with the exactitude required by the method of equal proportions." J.A. 97.

[13] Ms. Wetrogan explained that the Census Bureau "now estimate[s] Indiana's population for 1997 to have been significantly below our projection for 1997 in PPL-47. We have produced eight different projections of Indiana's population in 2000 * * * . In each of these eight projections Indiana's population total would be at least 42,000 people less than was projected in PPL-47." J.A. 97-98.

dispose of the government's motion to dismiss the complaint for lack of standing. Thus, the court began its discussion of the standing issue by observing, correctly, that "[i]n considering a motion to dismiss for lack of standing, the Court must accept all material allegations contained in the complaint as true and must construe all such allegations in favor of standing." J.S. App. 9a.[14]

Later in its opinion, the court did state that the appellees "have demonstrated that they will suffer injury as a result of the Department's plan, because they are able to calculate its effects by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000." J.S. App. 10a. The court also stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." *Id.* at 11a.

The import of the latter two statements is unclear. In context, it appears that the court was merely identifying the manner in which appellees had amplified their allegations of injury, and explaining why (in the court's view) their complaint withstands the government's motion to dismiss. In other words, the court may simply have meant that, if the

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[14] See also J.S. App. 9a ("in the context of a motion to dismiss * * * courts 'presume that general allegations embrace those specific facts that are necessary to support [each] claim'") (quoting *Bennett* v. *Spear*, 520 U.S. 154, 168 (1997)); J.S. App. 9a ("General factual allegations of injury * * * may suffice."); *id.* at 10a (referring to "allegations" and "claims" of vote dilution; individuals have standing to "allege" vote dilution); *id.* at 11a ("Plaintiffs allege threatened injury in the form of loss of federal funds."); *id.* at 14a-15a ("[A]llegations of decreased federal and state funding is fairly traceable to population counts reported in the decennial census."); *id.* at 15a ("Redressability focuses on whether judicial intervention will provide an adequate remedy for a plaintiff's alleged injuries.").

appellees' allegations were taken as true, appellees were likely to suffer injury in fact in the form of diminished representation in Congress. Conceivably, the district court may have actually compared Dr. Weber's affidavit with the government's declarations and concluded that the former was more credible, although as noted above the court did not even mention the government's declarations.

Neither of those determinations, however, would provide an adequate basis for the district court's decision to enter summary judgment in appellees' favor. "The party invoking federal jurisdiction bears the burden of establishing" that it satisfies the standing requirements of Article III. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And "[s]ince they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [the elements of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Ibid.* Appellees were therefore entitled to summary judgment only if there was no genuine dispute of material fact regarding their standing to sue. Because the government's declarations directly controverted Dr. Weber's methodology and conclusions, the district court erred in holding that appellees had established standing based on a likelihood of diminished representation in Congress.[15]

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[15] The government pointed out in the district court that Dr. Weber appears to lack the qualifications to testify as an expert witness under Federal Rule of Evidence 702 concerning the subject matter of his affidavit, see Defendants' Reply Memorandum in Support of Motion to Dismiss at 15 (filed May 22, 1998), but the district court made no ruling as to his qualifications. Dr. Weber is neither a statistician nor a demographer. Rather, he claims expertise in "U.S. state political behavior and public policy-making," and he has apparently served as a consultant and expert witness in a number of federal redistricting and voting rights cases. J.A. 57-58. Dr. Weber also claims to have "extensive experience

B. Appellees Cannot Establish Standing Based On The Expected Effects Of The 2000 Census On Intrastate Redistricting Or The Distribution Of Federal Funds

The district court also found that appellees had established standing to sue based on the anticipated effect of the Bureau's plan for the 2000 census on intrastate redistricting and on the distribution of federal funds. See J.S. App. 11a-12a. That holding too was erroneous.

1. As an initial matter, with respect to intrastate redistricting and federal fund distribution, appellees could establish injury in fact resulting from the use of sampling in the 2000 census only if they established that the States or substate areas in which they reside will likely be credited with a smaller percentage of the population than those regions would receive if sampling were not utilized. For the reasons stated in Part A above, appellees have not demonstrated a likelihood of such a loss, and their claim of injury

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using U.S. Bureau of the Census data to develop redistricting plans for local and state governments and providing assistance in obtaining preclearance of redistricting plans pursuant to Section 5 of the Voting Rights Act of 1965, as amended in 1982." J.A. 58. Dr. Weber thus appears to possess significant expertise concerning the processes by which *established* population figures are used to draw congressional and state legislative districts. Neither his curriculum vitae nor his affidavit suggests, however, that Dr. Weber possesses any expertise concerning the processes by which population figures are derived in the first instance.

Because Federal Rule of Civil Procedure 56(e) requires that affidavits either supporting or opposing a motion for summary judgment "shall show affirmatively that the affiant is competent to testify to the matters stated therein," we believe that appellees have failed even to demonstrate the existence of a genuine issue of material fact concerning their standing to sue. But even if Dr. Weber is determined to be competent to testify regarding the matters discussed in his affidavit, the district court erred in granting summary judgment for appellees in light of the government's evidentiary submissions.

based on intrastate redistricting and federal funding must fail for that reason alone.

There are additional flaws in the district court's reasoning regarding those alleged injuries. The district court's conclusion that the counties in which several of the individual appellees reside will have their relative shares of their respective States' populations reduced if sampling is used is not of constitutional significance with respect to intrastate redistricting. Members of Congress and state legislators represent people, not counties. See *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964) ("Legislators represent people, not trees or acres."). The fact that a county's relative share of the State's population might be reduced if sampling is used does not mean that the vote of any particular resident of the county will necessarily be diluted. As a result of the one-person one-vote requirement, the boundaries of a congressional or other legislative district within a State will almost never coincide precisely with those of a county. Accordingly, some persons who reside in a county for which the relative share of the State's population would be reduced if sampling is used might be placed in a district that includes all or part of one or more other counties whose relative shares of the State's overall population would be increased by the use of sampling. Thus, even a showing that the particular county in which any of the individual appellees resides will find its relative share of the State's population decreased would be insufficient to establish standing.

The district court also too readily assumed injury resulting from the loss of federal funding. No States are plaintiffs in this case, so there is no claim of injury based on the loss of funds to a State as a result of the use of sampling. Appellees did submit affidavits of officials of Delaware County, Pennsylvania, and Cobb County, Georgia, which listed federal grant programs through which those Counties received federal funds and under which (the affidavits asserted) population is a determining factor in the allocation

of grants. See J.A. 80-82, 86-88. The government, however, submitted declarations of knowledgeable officials in the federal agencies responsible for those programs stating that, for five of the programs, federal law either does not use population at all, or that it is only one of a number of factors used, in the federal agencies' allocation of grants. See Gov't Exhs. 15-19. And although the States' relative shares of the Nation's population provide the basis for allotment of funds under the sixth program identified by appellees (the Social Service Block Grant (SSBG) program authorized by Title XX of the Social Security Act, 42 U.S.C. 1397), the declaration of the federal official responsible for that program explained that the SSBG program does not require that a State distribute funds within the State on the basis of population. See Gov't Exh. 19. See generally Defendants' Reply Memorandum in Support of Motion to Dismiss at 27-36 (filed May 22, 1998).[16]

2. Moreover, in order to satisfy the standing requirement of Article III, it is not sufficient that a plaintiff demonstrate injury (or a likelihood of injury) in fact. The plaintiff must establish in addition that his injury is "fairly traceable to the challenged action of the defendant" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-561 (ellipsis, brackets, and internal quotation marks omitted). Appellees cannot meet those requirements.

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[16] Appellees also submitted the affidavit of an official of DuPage County, Illinois, that listed current grants to the County as of March 1998. J.A. 83-85. The affidavit stated that some of the listed items include federal and state grants for which the population of the county is a determining factor in the calculation of the amount of the grant received. J.A. 83. The affidavit did not identify which grants fell in that category, however, or aver that the County's share of funds (either as to a particular program, or overall) would be reduced if sampling is used in the 2000 census. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 29 n.11 (filed May 22, 1998).

Even under their own legal theory, neither the Census Act nor the Constitution prohibits the use of sampling in determining the population figures that will be used in intrastate redistricting or in the distribution of federal funds. Rather, the gravamen of appellees' legal claim is that the Act and the Constitution forbid the use of sampling-derived figures to determine the number of Representatives to which each State is entitled. Neither appellees' claimed diminution in intrastate electoral power, nor the asserted loss of federal funds to the States or counties in which they reside, is "fairly traceable" to the use of sampling in the apportionment of Representatives among the States. Appellees have made no effort, moreover, to show that those injuries would be redressed by a district court order directing that sampling not be used in the apportionment process.

a. The Census Act specifically authorizes the Secretary to employ "sampling procedures" in the conduct of the "decennial census of population." 13 U.S.C. 141(a). The district court held that Section 141(a)'s authorization to use sampling has been withdrawn, for purposes of apportioning Representatives among the States, by 13 U.S.C. 195. Section 195 states: "Except 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."

Though the parties to this case disagree as to the proper interpretation of Section 195's opening proviso, it is undisputed that the Census Act authorizes the Secretary to utilize sampling for purposes other than the apportionment of Representatives among the States. See J.S. App. 21a (district court concludes that "Section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes"). Consistent with that understanding, the district court did not bar all use of sampling in the 2000 census, but instead enjoined the Commerce Department only "from

using any form of statistical sampling, including their program for non-response follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment." *Id*. at 23a.

The sole constitutional function of the census is to determine the "respective Numbers" of "the several States" so that the reapportionment of Representatives may be effected in accordance with Article I, Section 2 Clause 3. See 1998 Appropriations Act, § 209(a)(2), 111 Stat. 2481 (congressional apportionment is "the sole constitutional purpose of the decennial enumeration"). For that reason, the only information that the census is constitutionally required to produce is the "whole number of persons in each State." U.S. Const. Amend. XIV, § 2. Although the Census Act directs the Secretary to determine population figures for substate areas, see 13 U.S.C. 141(c), the Constitution does not require federal officials to prepare such data at all, much less to employ a particular methodology in doing so. The Constitution similarly does not require either that federal financial assistance to States or localities must be distributed on the basis of population, or that the population must be determined in any particular manner in the event that Congress elects to allocate funds on that basis.

In short, neither the Census Act nor the Constitution can plausibly be thought to bar the use of statistical sampling in deriving the population figures that will be employed in intrastate redistricting or the distribution of federal funds. Rather, the only colorable challenge to the Bureau's plan for the 2000 census–-and the only challenge the district court upheld–-is the claim that sampling may not be used for the apportionment of Representatives among the States. Insofar as appellees claim to suffer a diminution in intrastate electoral power, or a loss of federal largesse, their injury is not "fairly traceable" to the alleged violation of law. Cf. *Lewis* v. *Casey*, 518 U.S. 343, 357-358 & n.6 (1996) (even where a plaintiff is injured by one aspect of a government

program, the reviewing court lacks authority to enjoin other aspects of the program that do not cause the plaintiff harm).

b. For much the same reason, appellees cannot satisfy Article III's redressability requirement with respect to any claim of injury that is not based on the apportionment of Representatives among the States. Under the terms of the district court's order, the Census Bureau remains free to utilize statistical sampling for all purposes other than the apportionment of Representatives among the States. See J.S. App. 23a. Indeed, regardless of the meaning that is ascribed to Section 195's opening proviso, the rest of Section 195 unambiguously *requires* the Secretary to utilize sampling for purposes other than apportionment "if he considers it feasible."

If the district court's holding is affirmed on the merits, the Census Bureau will be required to conduct a decennial census, without the use of sampling, to determine the state-level population figures that will be used in apportioning Representatives among the States. Such a ruling, however, would not prevent the Secretary from using sampling for other purposes in the conduct of the decennial census. Appellees have offered no basis on which this Court could find that it is "likely, as opposed to merely speculative," *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted), that the Secretary would conclude that it is not "feasible" to use sampling for other purposes. Appellees have therefore failed to establish that their alleged injury based on intrastate redistricting and federal funding is redressable by a favorable judicial decision.

C. Appellees Cannot Establish Standing Based On Speculation That The 2000 Census Will Be Set Aside In Its Entirety If Sampling Is Utilized

The district court also concluded that "[t]he Department's failure to conduct a proper enumeration may injure [appellees] where in the absence of population figures that comply

with federal law, any elections in 2002 will have to be held on the basis of an incorrect number of representatives and malapportioned districts which reflect the 1990 census results." J.S. App. 12a. The court stated that Georgia will be "virtually certain" to receive an additional seat in the House of Representatives (as compared to its current allotment) under the 2000 census, regardless of how that census is conducted. *Ibid.* The court believed that the appellee Georgia residents "will have their votes diluted if they are forced to participate in an election in 2002 in which Georgia does not have the additional seat in Congress." *Ibid.* The court also stated that residents of substate areas whose populations are expected to increase between 1990 and 2000 at a rate greater than that for other substate areas will suffer analogous injuries with respect to intrastate redistricting and distribution of federal funds if the 2000 census is invalidated and 1990 census figures continued to be used for those purposes. *Id.* at 12a-13a.

The injuries hypothesized by the district court would not be the result of the use of sampling in and of itself. The appellee Georgia residents, for example, do not contend that their State will be credited with a smaller share of the country's population if sampling is utilized in the 2000 census than if the census is conducted without the use of sampling. Indeed, the PES undertaken in conjunction with the 1990 census determined that the State of Georgia had an undercount in excess of the national average, see J.A. 115, and Georgia would therefore have *gained* population share if the proposed statistical adjustment had been implemented. Rather, the appellee Georgia residents contend that they are likely to be injured by a judicial order, entered in a hypothetical future lawsuit, requiring that the results of the 2000 census must be ignored in reapportioning Representatives among the States for the 2002 elections. Neither appellees nor the district court has identified any case suggesting that such an injury may be regarded as "fairly traceable," for

purposes of Article III standing, to the conduct of the defendant challenged in *this* lawsuit.

Moreover, even if such a theory could under some circumstances satisfy Article III requirements, it is untenable as a basis for standing in the instant case. The district court's analysis rests on the implicit premise that if the decennial census for the year 2000 is conducted in accordance with the Census Bureau's current plan, and if a reviewing court subsequently declares the use of sampling to have been unlawful, the appropriate remedy will be to set the census aside in its entirety and mandate continued reliance on the 1990 population figures. The district court offered no basis for that conclusion, and the remedy it posits is a most improbable one. In fashioning a remedy for a constitutional or statutory violation, a federal court exercising equitable powers should strive, to the extent possible, to replicate the conditions that would have been present if no violation of law had occurred. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 87 (1995); *Milliken* v. *Bradley*, 433 U.S. 267, 280-282 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 769-770 (1976). Because both the Constitution and the Census Act require that a census of the population be conducted at least once within every ten-year period, see U.S. Const. Art. I, § 2, Cl. 3; 13 U.S.C. 141(a), a judicial order mandating continued reliance on 1990 census figures would be in considerable tension with that remedial principle, even if a reviewing court were to conclude that the use of sampling for purposes of apportionment was contrary to law.

Thus, if Georgia's population has grown so substantially that the State is "virtually certain" to gain a seat in the House of Representatives under any 2000 census methodology, there is no reason to assume that the district court in a hypothetical suit filed after completion of the 2000 census would deny the State that additional seat by requiring continued use of 1990 census figures across the board in apportioning Representatives among the States for the 2002

congressional elections. Appellees' claim of harm is even less tenable with respect to intrastate redistricting and allocation of federal funds. Because neither the Census Act nor the Constitution is alleged to prohibit the use of sampling for purposes of redistricting or fund distribution, see pp. 30-31, *supra*, it is particularly farfetched to suppose that a federal court would enjoin the use for those purposes of census figures determined in accordance with the Bureau's current plan.

* * * * *

On the merits, the district court held that 13 U.S.C. 195 prohibits the use of sampling for the purpose of apportioning Representatives among the States, and that the Census Bureau's plan for the 2000 census is therefore contrary to law. For the reasons stated at pages 25-39 of our opening brief in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404, that holding was erroneous. Our opening brief in that case also explains (at 39-49) that the use of sampling in the conduct of the decennial census is fully consistent with the requirement of Article I, Section 2, Clause 3 of the Constitution that apportionment of Representatives be based upon an "actual Enumeration" of the population. If this Court concludes that appellees in the instant case have standing to sue, the judgment of the district court should be reversed for the reasons stated in our brief in No. 98-404.

CONCLUSION

The judgment of the district court should be vacated, and the case should be remanded with instructions that the complaint be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be reversed for the reasons stated at pages 25-49 of the Commerce Department's brief in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404.

Respectfully submitted.

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