No. 98-404

In the Supreme Court of the United States

OCTOBER TERM, 1998

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

BRIEF FOR THE APPELLANTS

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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 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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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-67a) is not yet reported.

JURISDICTION

The judgment of the district court (J.S. App. 66a-67a) was entered on August 24, 1998. A notice of appeal (J.S. App. 68a-69a) was filed on August 25, 1998, and the jurisdictional statement was filed on September 4, 1998. The Court noted probable jurisdiction on September 10, 1998. J.A. 33. The jurisdiction of this Court rests on 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

The following constitutional and statutory provisions are reproduced as an appendix to this brief: Article I, Section 2, Clause 3 of the United States Constitution; Section 2 of the Fourteenth Amendment; 2 U.S.C. 2a; 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 further provides 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 U.S. Const. 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. The Census Act provides that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. 141(a). The "tabulation of total population by States" 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 Representatives 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" submitted by the President. 2 U.S.C. 2a(b) (Supp. II 1996). 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." *Ibid.*[1]

The Census Act authorizes the Secretary 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). 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. 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

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[1] Until 1941, Congress's typical practice was to enact a new law each decade in order to reapportion Representatives among the States on the basis of the decennial census. The legislative debates over those apportionment laws frequently engendered disputes concerning the mathematical formula that should be used in determining the number of Representatives to be allotted to each State. See generally 91-860 Gov't Br. at 5-10 (*Montana*). Indeed, Congress failed to pass any reapportionment law at all after the 1920 census. *Montana*, 503 U.S. at 451. By the Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761-762, 2 U.S.C. 2a, Congress established the "method of equal proportions" as the formula to be used in the apportionment process. *Montana*, 503 U.S. at 451-452 & n.25. "That Act also made the reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census." *Id.* at 452 n.25; see also *Franklin* v. *Massachusetts*, 505 U.S. 788, 791-792 (1992).

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 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*) (J.A. 48-49); *City of New York*, 517 U.S. at 7; J.S. App. 3a-4a.

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).[2] This Court upheld that decision against constitutional challenge. See *City of New York*, 517 U.S. at 24.

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[2] 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

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." § 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)." § 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." J.S. App. 4a.

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 (1997). The President vetoed that bill. See Message to the House of Representatives Returning Without Approval Emergency Supplemental Appropriations Legislation, 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

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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.

"[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 passed a law 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." Emergency Supplemental Appropriations Act for Recovery From Natural Disasters, and for Overseas Peacekeeping Efforts, Including Those in Bosnia, Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217.

5. Pursuant to that statutory directive, the Department of Commerce forwarded the *Report to Congress*, which set forth the methods by which it plans to conduct the 2000 census. J.A. 34-147. The *Report* 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. J.A. 73-80. It explained, for example, the Bureau's plan to develop a new Master Address File superior to the address list used in the 1990 census. *Ibid.* 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. J.A. 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. J.A. 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 sta-

tistical sampling techniques that the Bureau had concluded would increase the accuracy of the 2000 census while reducing its cost. See J.A. 81-98. The Bureau's determination that the use of sampling was warranted was based to a significant degree on the results of the 1990 census. The *Report* observed that "[f]or the first time since the Census Bureau began conducting post-census evaluations in 1940, the [1990] decennial census was *less* accurate than its predecessor." J.A. 48.

That decline in accuracy, the *Report* emphasized, was not the result of either a lack of funding from Congress or a lack of professionalism on the part of the Census Bureau. To the contrary, the *Report* stated that the 1990 census was "the most expensive in history," J.A. 50, and was "better designed and executed than any previous census," J.A. 47. Rather, the *Report* explained, the decline in accuracy was the result of demographic and social trends that made the population significantly more difficult to count through the use of traditional methods.[3] The *Report* also stated that "[e]very indication since 1990 suggests that the census-taking environment is likely to be even more difficult in 2000 than it was in 1990." J.A. 52.

The *Report to Congress* concluded that "[d]ue to changes in American society, the most accurate census feasible can

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[3] The *Report to Congress* explained that "[t]he number of people working more than one job had increased [by 1990], along with the number of multiple-worker families, so people were home less often when enumerators visited. When people were home, they were less willing to spend time filling out a census form." J.A. 51. It also noted that "Americans were inundated with junk mail, mail that obscures important documents such as census forms"; that "[m]ore Americans lived in housing that was remote or inaccessible"; and that "[m]ore Americans were becoming alienated from society in general and more mistrustful of government in particular." *Ibid.* The *Report* identified "[t]he sharp decline in the rate that people return their census questionnaires"—from 78% in 1970 to 65% in 1990—as "a clear example of how the changes in society directly affect the operation of the census." J.A. 52.

no longer be taken by traditional physical enumeration methods alone. The introduction of a limited use of sampling is necessary for an accurate and cost-effective census in 2000." J.A. 45.[4] 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." J.A. 42. It also observed that "[t]he Plan for Census 2000 has received strong support from professional statisticians and demographers--experts are convinced that the introduction of a limited use of scientific sampling in Census 2000 will result in a more accurate, less costly census." J.A. 42-43; see also J.A. 83-85.

Two forms of statistical sampling are at issue in this litigation. First, the Census Bureau 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 provided to them by mail. 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 in them. J.S. App. 6a. For the 2000 census, the Bureau plans to secure information from a randomly selected sample of non-responding households in each census tract, and to determine the likely number of persons living in other non-responding units based on the sample data. J.A. 88-92.[5]

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[4] The *Report* estimated that use of traditional techniques alone would result in an error rate of at least 1.9% for all geographic levels from the national level to the census tract level. J.A. 44. The Bureau projected that a census conducted in accordance with its own plan would have a substantially smaller error rate at all geographic levels. *Ibid.*

[5] The Bureau's objective is to obtain responses through either mail response or NRFU from 90% of the housing units in each census tract. In order to achieve that goal, the Bureau plans to contact a larger percentage of the households in tracts with lower mail response rates. See J.A. 90-91.

Second, after the initial phase of the census, the Census Bureau 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 homeowner or renter. J.A. 92-93. By comparing the results of that survey to those of the initial phase of the census, the Bureau can assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. J.A. 94. Based on that survey, the Bureau will determine population figures for States and political subdivisions nationwide. J.A. 94-98; J.S. App. 7a-9a.

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

> Any 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). *Ibid.* Section 209(e)(1) states that any civil action brought pur-

suant to the Act shall be heard by a three-judge district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*[6]

8. 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) of the 1998 Appropriations Act, 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 Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau (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 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 of Representatives' motion for summary judgment. J.S. App. 1a-67a.

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[6] In his signing statement for the 1998 Appropriations Act, the President observed that

> in providing for a right of action to challenge the use of sampling before completion of the 2000 Census, the Act does not, nor could it, modify the "immutable requirements" of Article III of the Constitution regarding ripeness and standing to sue. Representatives of my Administration informed the Congress while it was considering the census provisions of their doubts whether the right to sue in the Act satisfies Article III requirements. Opponents of sampling in the 2000 Census will have the opportunity to attempt to persuade the courts that it does, but the Department of Justice is obligated to challenge any suits that fail to meet applicable justiciability requirements.

Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, 33 Weekly Comp. Pres. Doc. 1926, 1927 (Nov. 26, 1997).

a. The district court first concluded that the House of Representatives 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." J.S. App. 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." J.S. App. 16a. The district court stated that "[t]he inability to receive information which a person is entitled to by law is sufficiently concrete and particular to satisfy constitutional standing requirements." *Ibid.* (citing *Federal Election Comm'n* v. *Akins*, 118 S. Ct. 1777 (1998)). It held 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 district court stated that the House's claim of informational injury was particularly "compelling" because "the information sought by the House here is necessary to perform a constitutionally mandated function." J.S. App. 17a. The court also found the House's claim of standing to be supported by decisions holding—particularly in the context of legislative subpoenas—that "a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities." *Id.* at 18a (citing, *inter alia*, *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927)).

With respect to the second claim of injury, the House of Representatives contended that an unlawfully conducted census "would necessarily result in the unlawful composition of any House elected and seated pursuant to the resulting apportionment." J.S. App. 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." J.S. App. 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. J.S. App. 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 concluded that 13 U.S.C. 195, as originally enacted in 1957, unambiguously prohibited the use of sampling in the congressional apportionment process. J.S. App. 48a-49a.[7] 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.

Examining the text of Section 195 in its current form, the district court acknowledged that an exception to a mandatory statutory directive will not always be construed to

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[7] 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 J.S. App. 48a.

impose a prohibition. J.S. App. 51a-52a. The court stated, however, that with respect to Section 195, "[c]ommon sense and background knowledge concerning the subject matter of the exception dictates that the 'except' clause must be read as prohibitory." *Id.* at 52a. The court explained:

> In light of the special position occupied by congressional apportionment in the universe of functions entrusted to the Bureau of the Census, the most logical reading of the effect of the [1976] amendments to section 195 is that while they strengthen the call for sampling in non-apportionment information gathering, they do not have the implicit collateral effect of transforming what was formerly an absolute proscription into a matter of pure agency discretion.

Id. at 54a. The court also examined the legislative history of the 1976 amendment to Section 195 and found no indication that Congress had intended to alter prior law regarding the use of sampling in connection with the apportionment process. *Id.* at 54a-59a. The district court stated as well that the 1976 amendment to Section 195 would have been an "oblique" (*id.* at 58a) and "indirect" (*id.* at 59a) way of eliminating a pre-existing barrier to the use of sampling for apportionment purposes.

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. J.S. App. 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 apportioning 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. J.S. App. 64a.

SUMMARY OF ARGUMENT

1. The House of Representatives lacks standing to bring this suit.

a. The House cannot establish standing based on its claim of "informational injury." The gravamen of that claim is that the manner in which the Secretary intends to conduct the 2000 census will cause the House not to receive information—*i.e.*, state-level population figures derived without the use of sampling—that the House believes it is entitled to receive. This Court's decisions do not suggest, however, that Congress may vest itself with a judicially cognizable informational interest in the outcome of Executive Branch decisions simply by requiring the President to report those decisions to Congress. Nor is there any basis for the district court's conclusion that the information at issue here is necessary in order for Congress to perform its constitutional apportionment function. Congress has already discharged its constitutional obligations, by authorizing the Secretary of Commerce to conduct the decennial census, and by establishing a permanent, self-executing statutory mechanism for reapportioning Representatives among the States after the census is completed.

b. The district court also erred in holding that the potential effect of the decennial census on the makeup of the

House of Representatives gives the House standing to sue. However the 2000 census is conducted, the 108th and subsequent Houses will continue to be composed of 435 Members and will continue to exercise the same constitutional powers. Historical practice makes clear, moreover, that disputes between the political Branches regarding their constitutional prerogatives have not traditionally been regarded as properly susceptible of judicial resolution.

2. Contrary to the district court's decision, the Census Act authorizes rather than prohibits the use of statistical sampling in determining the state-level population figures to be used in apportioning Representatives. The Act directs the Secretary of Commerce to take 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 authority to use sampling granted by Section 141(a) has not been withdrawn by 13 U.S.C. 195. Section 195's opening proviso simply makes clear that the Secretary is not *required* to use sampling in determining the state-level population figures to be used for apportionment. Neither the text of Section 195 nor the overall statutory scheme suggests, however, that the proviso should be construed to prohibit the use of sampling for apportionment purposes.

The district court's statutory analysis was substantially based on its view that Section 195, as originally enacted in 1957, unambiguously prohibited the use of sampling in connection with the apportionment of Representatives among the States. The court misunderstood the original purpose and effect of Section 195. Section 195 was enacted at the request of the Department of Commerce in order to increase the Department's flexibility in conducting census activities. That Section's opening proviso made clear that the authorization to employ sampling techniques did not extend to the determination of population for apportionment purposes. The proviso did not, however, establish a new, independent legal barrier to the use of sampling in apportioning Repre-

sentatives. Because the predicate for the legislative initiative was the Commerce Department's understanding that existing law forbade the use of sampling, the effect of the opening proviso was that sampling for apportionment purposes *remained* unlawful. However, the pre-1957 Census Act provisions upon which the Commerce Department's understanding rested have been repealed or substantially amended, and the Act in its current form expressly authorizes the use of sampling in the conduct of the decennial census. The Commerce Department's plan for the 2000 census is therefore lawful.

3. The Commerce Department's plan for the 2000 census is consistent with the constitutional requirement that the apportionment of Representatives among the States must be based on an "actual Enumeration" of the population. Since at least 1577, the word "enumeration" has been understood to mean "[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). Rather than requiring that the relevant numbers be determined through a particular methodology, the Census Clause vests Congress with extremely broad discretion, providing that the census shall be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3.

The drafting history of the Census Clause further refutes the House of Representatives' claim that the Framers intended to restrict Congress's choice of census methodologies. The phrase "actual Enumeration" first appeared in the draft Constitution submitted to the Convention by the Committee of Style and Arrangement, which evidently regarded that phrase as substantively equivalent to the prior draft's directive that the "number" of each State's inhabitants "shall * * * be taken in such manner as [Congress] shall direct." The House of Representatives' interpretation of the Census Clause is also inconsistent with historical practice. From the time of the First Congress, the conduct of the decennial cen-

sus has routinely involved methodologies that cannot plausibly be characterized as a "headcount" of individuals "reckoned singly."

ARGUMENT

I. THE HOUSE OF REPRESENTATIVES LACKS STANDING TO BRING THIS SUIT

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 authorize 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 House Of Representatives' Asserted "Informational Injury" Does Not Provide A Basis For Standing

To satisfy the "case" or "controversy" requirement of Article III, a plaintiff must demonstrate, *inter alia*, that it has "suffered an 'injury in fact'–-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). In the instant case, the district court held 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." J.S. App. 17a. Because "[t]he inability to receive information which a person is entitled to by law is sufficiently concrete and particular to satisfy constitutional standing requirements," *id.* at 16a (citing *Federal Election Comm'n* v. *Akins*, 118 S. Ct. 1777 (1998)), the court concluded that the House would suffer a judicially cognizable "informational injury" if the Commerce Department's plan

for the 2000 census was put in effect. That holding was erroneous.

1. The 107th Congress will take office in January 2001. Within one week after the beginning of the first regular session of that Congress, the President will be required to "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 Census Bureau's plan for the 2000 census suggests, and the House of Representatives 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." There is consequently no likelihood that the Bureau's conduct of the decennial census will result in a violation of the statutory provision that deals specifically with the transmittal of census information to Congress.

Rather, the House of Representatives' claim of "informational injury" rests upon the fact that a census conducted in accordance with the Census Bureau's plan will inevitably produce population figures different from those that would be derived from a census performed without the use of statistical sampling. Because 2 U.S.C. 2a(a) requires the President to transmit to Congress population figures "as ascertained under the * * * decennial census," the choice between different census methodologies will in turn affect the character of the data that Congress receives. 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 cause the House not to receive information–-*i.e.*, state-level population figures derived without the use of sampling–-that it would receive if the census were performed in the manner that the House believes to be required by law.

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 an Executive Department is directed to inform Congress of its actions, its choice between substantive policy alternatives will have ancillary effects on the character of the information provided to the legislature. Where such a reporting requirement exists, a House of Congress (or Member thereof) who believes that executive officials have acted unlawfully can always plausibly claim that it (or the Member) has failed to receive information that would have been obtained if a different action had been taken. To permit such an "injury" to serve as the predicate for a House of Congress or one of its Members to obtain a judicial determination of the legality of the underlying Executive Branch conduct would vest Congress with a continuing cognizable stake and substantial institutional role in the execution of the laws. That means of effectuating Congress's policy objectives is not consistent with the fundamental separation of the powers of the political Branches under the Constitution. Compare, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986). By acting as arbiter of such intragovernmental disputes, moreover, the Judicial Branch would move outside the "restricted role for Article III courts" under the Constitution, *Raines* v. *Byrd*, 117 S. Ct. 2312, 2322 (1997), as tribunals charged with vindicating "the rights of individuals," *Defenders of Wildlife*, 504 U.S. at 576. See also *Raines*, 117 S. Ct. at 2318 (observing that the law of Article III standing "is built on a single basic idea—the idea of separation of powers") (quoting *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)); p. 24, *infra*.

2. 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 man-

dated function." J.S. App. 17a; see also *id.* at 20a (stating that the House is "injured when it cannot obtain information necessary to perform its constitutional apportionment function"). Contrary to the district court's suggestion, however, no further legislative action is required to effect a reapportionment of Representatives among the States in accordance with the 2000 census. Congress has already discharged its obligations under Article I, Section 2, Clause 3, by authorizing the Secretary of Commerce to conduct a "decennial census of population * * * in such form and content as he may determine" (13 U.S.C. 141(a)), and by establishing a permanent, self-executing mechanism (see 2 U.S.C. 2a (1994 & Supp. II 1996)) for reapportioning Representatives among the States after the decennial census has been completed. See *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 452 n.25 (1992) (Section 2a "ma[kes] the reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census"); *Franklin* v. *Massachusetts*, 505 U.S. 788, 791-792 (1992); note 1, *supra*.[8]

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[8] 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(a)) 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*, 505 U.S. at 798 ("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).

Neither the district court nor the House of Representatives has attempted to specify the type of apportionment legislation that Congress might plausibly be expected to enact if it received state-level population figures derived without the use of sampling. The reason for that omission is apparent. This lawsuit represents the current House's effort to achieve its policy objectives by means *other* than passing a law—the way the Constitution prescribes for Congress to affect the duties of persons outside the Legislative Branch. *INS* v. *Chadha*, 462 U.S. 919, 952, 954-955 (1983).[9] The House's claim of "informational injury" as a basis for bringing suit should therefore be rejected.[10]

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[9] 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 *Defenders of Wildlife*, 504 U.S. at 565 n.2 (particularly when "the acts 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").

[10] Essentially for the reasons stated in the text, the district court's reliance on *Federal Election Commission* v. *Akins*, 118 S. Ct. 1777 (1998), and *McGrain* v. *Daugherty*, 273 U.S. 135 (1927), was misplaced. The Court in *Akins* found "no reason to doubt [the plaintiffs'] claim that the information [they sought to obtain] would help them (and others to whom they would communicate it) to evaluate candidates for public office." 118 S. Ct. at 1784. Similarly in *McGrain*, the Court upheld the challenged subpoena on the basis of its determination "that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes." 273 U.S. at 177. The Court specifically noted that "neither house [of Congress] is invested with 'general' power to inquire into private affairs and compel disclosures." *Id.* at 173-174.

In the instant case, the House of Representatives seeks a judicial order directing that a particular methodology be used in conducting the 2000 census. The obvious purpose and effect of such an order is to change the character of the state-level population figures that will be certified as official by the President, and that will, through an existing, self-executing statutory mechanism, govern the reapportionment of Representatives among the States. Neither the fact that those official population figures must be transmitted to Congress before they are sent to the States, nor the theoretical possibility that Congress might choose to enact a new ap-

B. The House Of Representatives' Purported Interest In "Matters Affecting Its Composition" Does Not Satisfy The Requirements Of Article III

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. J.S. App. 22a. Regardless of the manner in which the 2000 census is conducted, the House convened during the 108th and subsequent Congresses 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.

In reaching the contrary conclusion, the district court principally relied (see J.S. App. 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 senatorial districts within the State. *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.

Beens holds 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 dif-

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portionment law when it receives those figures, suffices to give the House of Representatives standing to sue to compel Executive Branch officials to take particular actions under *existing* law.

ferent 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 convene in the 108th or any subsequent Congress. The House, moreover, has not initiated this litigation to defend the manner in which Representatives in the current House are apportioned among the States. Rather, the House claims that it will suffer a judicially cognizable injury if the Census Bureau's conduct of the 2000 census results in a different apportionment of Representatives among the States in a future Congress than if sampling had not been utilized. 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 the execution of the laws is subject to constitutional separation-of-powers limitations that do not apply to state entities like the appellant in *Beens*.[11]

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[11] As the district court emphasized (J.S. App. 21a-22a), the Court in *Beens* referred approvingly to *Silver* v. *Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964) (per curiam), aff'd mem., 381 U.S. 415 (1965). But *Silver*, like *Beens*, involved a challenge to the apportionment of a state legislative body and therefore did not pose the separation-of-powers concerns presented here. Moreover, the district court in *Silver* permitted the California State Senate to intervene as an interested party on the ground that "it would be directly affected by the decree of th[at] court." 241 F. Supp. at 579. The court's remedial decree ordered "that the California State Legislature reapportion the California State Senate consistent with this opinion." *Id.* at 586. There is no question that the State Senate was "directly affected" by that order: the existing California Senate was directed to enact legislation to correct a constitutional violation. The Commerce Department's plan for the 2000 census imposes no comparable obligation on the House of Representatives.

Nor does *Powell* v. *McCormack*, 395 U.S. 486 (1969) (cited at J.S. App. 20a), support the district court's jurisdictional holding. The Court in *Powell* held that the House of Representatives could not refuse to seat an individual who was duly elected to serve in the House and who satisfied the age, citizenship, and residence requirements set forth in Article I, Section 2, Clause 2 of the Constitution. 395 U.S. at 550. The Court stated that "[u]nquestionably, *Congress has an interest in preserving its institu-*

If the "institutional" injury alleged by the House of Representatives is an adequate basis for invoking the jurisdiction of an Article III court, executive officials would presumably have standing to challenge Acts of Congress that they believe improperly intrude upon the prerogatives of the President or the Executive Branch. Such inter-Branch disputes, however, have never been thought susceptible of judicial resolution. In *Raines* v. *Byrd*, 117 S. Ct. 2312 (1997), this Court held that the plaintiff Members of Congress lacked standing to bring a constitutional challenge to the Line Item Veto Act. The Court observed, *inter alia*, that "historical practice appears to cut against" the plaintiffs' claim of standing. *Id.* at 2321. The Court found it "evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Ibid.*; see *id.* at 2321-2322 (citing historical examples). The Court acknowledged that "[t]here would be nothing irrational about a system which granted standing in these cases," but observed that such a system "is obviously not the regime that has obtained under our Constitution to date." *Id.* at 2322. The same conclusion follows here.[12]

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tional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds." *Id.* at 548 (emphasis added). Read in context, the italicized language simply recognizes that Congress in exercising its powers of self-governance may appropriately act to protect its own "institutional integrity." Nothing in *Powell* suggests that Congress's desire to maintain "institutional integrity" constitutes a judicially cognizable interest that gives Congress (or one of its Houses) standing to sue in federal court.

[12] The current House of Representatives for the 105th Congress will not suffer either of the harms identified by the district court as proper bases for standing. The President is required by 2 U.S.C. 2a(a) to transmit state-level population figures within one week after the beginning of the first session of the 107th Congress. The House that convenes during the 108th Congress will be the first House whose membership could po-

II. THE CENSUS ACT AUTHORIZES THE CENSUS BUREAU TO EMPLOY STATISTICAL SAMPLING IN DETERMINING THE POPULATION FOR PURPOSES OF APPORTIONING REPRESENTATIVES AMONG THE STATES

The district court erred in holding that the Census Act prohibits the Secretary from employing statistical sampling techniques in determining the population for purposes of apportioning Representatives among the States. Rather than barring the use of sampling, Congress has vested the Secretary with broad discretion to conduct the decennial census "in such form and content as he may determine," and has specifically authorized "the use of sampling procedures." 13 U.S.C. 141(a). If the Court determines that the House of Representatives' suit satisfies the requirements of Article III, the judgment of the district court should be reversed.

A. The Decision Of The District Court Is Not Consistent With The Text Of The Census Act

1. *13 U.S.C. 141(a) expressly authorizes the use of "sampling procedures" in the conduct of the "decennial census of population"*

The Census 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

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tentially be affected by the results of the 2000 census. The district court's jurisdictional holding therefore rests on the proposition that the current House of Representatives may sue to vindicate the interests of successor Houses. See J.S. App. 22a-26a. Both the propriety and the legality of statistical sampling, however, have been the subject of extensive debate within Congress. It therefore cannot be said with any certainty that a majority of the House of Representatives that convenes during the 107th and/or the 108th Congress will share the current House's opposition to the use of statistical sampling in connection with the 2000 decennial census.

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 determining the population for purposes of apportioning Representatives among the States. In *Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996), this Court cited 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 the conclusion that the "decennial census of population" conducted pursuant to Section 141(a) is to be used in the apportionment process. Thus, Section 141(b) refers to "[t]he tabulation of total population by States *under subsection (a) of this section* as required for the apportionment of Representatives in Congress among the several States." 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 unambiguously authorize the Secretary 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.

As the *Report to Congress* explains, the decennial census has historically been used to collect a variety of demographic information beyond the total number of residents within each State. See J.A. 85. Consistent with its practice since 1940, the Census Bureau plans to use both a long and a short form questionnaire during the 2000 census, delivering the long form to a sample of housing units and the short form to the rest. J.A. 85-86. "[T]he long form will ask the same 7 questions that appear on the short form, plus questions on an

additional 27 subjects that are either specifically required by law to be included in the census or are required to implement other federal programs." *Ibid.* The House of Representatives argued in the district court that Section 141(a)'s reference to "sampling and special surveys" should be construed to "appl[y] only to the myriad of demographic data that the Bureau collects in conjunction with the decennial enumeration." J.S. App. 60a.

We agree that the Secretary could *choose* to conduct the 2000 census in the manner that the House suggests—*i.e.*, by determining state-level population figures solely through the use of traditional enumeration techniques, while employing sampling to collect additional demographic data. The Secretary's *authority* to employ "sampling," however, cannot reasonably be construed as limited to the collection of such supplemental information. The text of Section 141(a) contains no such limitation.[13] As Congress has recently recognized, moreover, "the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." 1998 Appropriations Act, § 209(a)(2), 111 Stat. 2481. It is implausible to suppose that Section 141(a)'s facially unqualified authorization to employ "sampling" in conducting the "decennial census of population" is subject to the implicit condition that sampling may not be used in carrying out the core function for which the decennial census is performed. That is particularly so in light of the fact that the authorization to use "sampling" is simply one aspect of Section 141(a)'s broad general grant of authority to the Secretary to conduct the decennial census "in such form and content as he may determine."

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[13] By contrast, 13 U.S.C. 141(e)(2) states unambiguously that "[i]nformation obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States."

2. *13 U.S.C. 195 does not prohibit the use of sampling in determining the population for the purpose of apportioning Representatives among the States*

The district court agreed that Section 141(a) "standing alone appears to permit statistical sampling in congressional apportionment." J.S. App. 61a. The court held, however, that 13 U.S.C. 195 unambiguously prohibits the use of sampling for purposes of apportionment; that Section 195 is the more specific of the two provisions; and that Section 195 is "therefore controlling to the extent that the two provisions conflict." J.S. App. 61a. The court's decision rests on a misreading of the statutory language.

Section 195 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 (emphasis added). The italicized 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 determination of state-level population figures used for purposes of apportionment.[14] No rule of statutory construction suggests, however,

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[14] With respect to the use of sampling for purposes other than apportionment, Section 195's language is neither wholly mandatory nor wholly non-directive. Because the Secretary is required to use sampling only "if he considers it feasible," he retains meaningful discretion to determine whether sampling should be employed in a particular instance. It is clear, however, that Section 195 was intended to impose a significant constraint on the Secretary's discretion. That is especially apparent when Section 195 in its current form is compared to the version originally enacted in 1957, which stated that the Secretary "may" use sampling for purposes other than apportionment "where he deems it appropriate." 13 U.S.C. 195 (1958); see note 7, *supra*. The Conference Report accompanying the 1976 Census Act amendments states that Section 195 as amended "differs from the [original] provisions of section 195 which grant the Secretary discre-

that activities specifically excepted from a mandatory directive are thereby prohibited. Rather, the effect of Section 195's opening proviso is to render that Section's mandatory directive inapplicable to "the determination of population for purposes of apportionment," leaving the scope of the Secretary's authority in that area to be defined by other provisions of law—specifically, by Section 141(a)'s express vesting of discretion in the Secretary to use "sampling procedures" in the conduct of the decennial census.[15]

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tion to use sampling when it is considered appropriate. The section, as amended, strengthens the congressional intent that, whenever possible, sampling shall be used." H.R. Conf. Rep. No. 1719, 94th Cong., 2d Sess. 13 (1976).

[15] The United States Code includes a variety of provisions containing the "except"/ "shall" formulation in contexts where the exception cannot reasonably be construed as prohibiting the excepted activity. See, *e.g.*, 2 U.S.C. 179n(a)(1) (Supp. II 1996); 2 U.S.C. 384(a); 5 U.S.C. 555(e); 10 U.S.C. 4621(a); 10 U.S.C. 12643(a); 12 U.S.C. 2076a; 16 U.S.C. 230d; 16 U.S.C. 832g; 30 U.S.C. 871(b). Other provisions contain an "except"/"may not" formulation in contexts where the exception cannot plausibly be construed to impose an affirmative requirement. See, *e.g.*, 5 U.S.C. 5383(c); 7 U.S.C. 7465(c)(3) (Supp. II 1996). Although the district court stated that "an exception from a command to do 'X' more often than not represents a prohibition against doing 'X' with respect to the subject matter covered by the exception," J.S. App. 52a, the court identified no provision in the Code (or in any other legal materials) in which an exception to a mandatory directive could reasonably be understood to effect a prohibition.

Conceivably there might be circumstances in which an overall statutory scheme so closely circumscribes administrative discretion as to render it implausible that a particular decision has been entrusted to Executive Branch officials. In that context, a statutory exception to a mandatory directive might reasonably be construed as a prohibition. The Census Act, however, is not such a statute. The Act does not specify the details of census administration, but instead authorizes the Secretary to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a); see *City of New York*, 517 U.S. at 19 (noting that "the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and that, in Section 141(a), "Congress has delegated its broad authority over the census to the Secretary"); *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir.) (Posner, J.) (emphasizing breadth of Census Bureau's dis-

Congress's apparent purpose in directing the Secretary to employ sampling techniques whenever feasible was to reduce the cost and burden of census activities. See S. Rep. No. 1256, 94th Cong., 2d Sess. 5 (1976) (stating, with respect to the mid-decade census, that "the use of sampling procedures and surveys is urged for the sake of economy and reducing respondent burden"); see also *id.* at 9, 12, 13. In order to achieve those savings, Congress required the Secretary to employ sampling techniques if they are feasible, even if the Secretary does not believe that sampling will improve the accuracy of the count. With respect to the apportionment of Representatives among the States, however, Congress understandably declined to impose such a directive, and thereby to interfere with the Secretary's judgment as to what measures will ensure the most accurate population figures practicable. The determination of state-level population figures accordingly remains subject to 13 U.S.C. 141(a), which authorizes the Secretary to conduct the "decennial census of population * * * in such form and content as he may determine," and which permits but does not require the use of "sampling procedures and special surveys."

Thus, we have no quarrel with the district court's observation that "the congressional apportionment function merits particularized treatment" because it occupies a "special position * * * in the universe of functions entrusted to the Bureau of the Census." J.S. App. 54a. Because the apportionment of Representatives among the States is the sole constitutional purpose of the census, it is particularly important that population counts used for that purpose be as accurate as practicable. See pp. 46-47, *infra*. Construing

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cretion), cert. denied, 506 U.S. 953 (1992). Thus, while we agree with the district court that "background knowledge" (J.S. App. 52a) is highly germane to the construction of ambiguous statutory provisions, the operative background rule here (in Section 141(a)) vests the Secretary with very broad discretion over the conduct of the decennial census, and specifically authorizes him to use "sampling."

Section 195 in accordance with its terms—*i.e.*, as exempting the apportionment process from a generally applicable directive to cut costs and lessen the burden on respondents—is fully consistent with the "special position" of congressional apportionment. Interpreting that Section to preclude the Secretary from employing sampling techniques that he has reasonably determined will enhance accuracy is not.

Congress's reasons for exempting congressional apportionment from Section 195's mandatory directive therefore do not logically support the imposition of a ban on sampling in that context. Reading Section 195 in the manner we advocate ensures that the relevant provisions of the Census Act form a coherent whole. By contrast, the construction of Section 195 adopted by the district court renders that provision flatly inconsistent with Section 141(a)'s express authorization of sampling in the conduct of the decennial census. Even if Section 195 were otherwise ambiguous, established rules of statutory construction would require that it be interpreted in a manner that preserves the internal consistency of the Act as a whole.[16]

B. The History Of The Census Act Does Not Support The District Court's Construction Of Section 195

As originally 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

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[16] "It is well established that [a court's] task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973); see also, *e.g.*, *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," as where "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

U.S.C. 195 (1958) (emphasis added); see J.S. App. 48a. The district court stated that Section 195 in its original form "proscrib[ed]" the use of sampling in connection with congressional apportionment. *Ibid.* The court then examined the legislative history of the 1976 amendment to Section 195. *Id.* at 49a-51a, 54a-56a. Finding no expression in that history of an intent to change Section 195's prior treatment of the apportionment process, and believing that replacement of the word "may" with the word "shall" would have been an "oblique" (*id.* at 58a) and "indirect" (*id.* at 59a) way of eliminating the earlier prohibition it believed was imposed by Section 195, the court concluded that the original bar remained in place. *Id.* at 56a-59a.

Even if the court had correctly understood the version of Section 195 that was enacted in 1957, there would have been no legitimate basis for deviating from the current text of Section 141(a) and the Census Act as a whole. In fact, however, the district court misconstrued the original version of Section 195. Even in its original form, Section 195 itself did not prohibit the use of sampling in connection with apportionment. Rather, Section 195 was enacted to increase the Secretary's flexibility in the conduct of the decennial census by creating a partial exemption to a pre-existing sampling prohibition rooted elsewhere in the Act. The opening proviso to Section 195 made clear that the authorization to use sampling did not extend to the apportionment of Representatives among the States, thereby leaving the pre-existing ban in place with respect to congressional apportionment. But the proviso itself has never constituted an independent, freestanding barrier to the use of sampling.

In the ensuing years, the pre-existing provisions of the Census Act that formed the backdrop for Section 195 have been repealed or substantially amended. The ban they once embodied has been replaced with Section 141(a)'s express authorization of sampling in the decennial census. Indeed, neither the House of Representatives nor the district court

has suggested that any current Census Act provision *other than* Section 195 restricts the Secretary's authority to use sampling for apportionment purposes. Nothing in logic or in the circumstances underlying Section 195's enactment suggests that Section 195—a provision intended as a partial *exemption* from a pre-existing statutory bar—should itself be regarded as an independent sampling prohibition now that the original statutory barriers have been replaced with an unqualified grant of authority to utilize sampling.

1. Section 195 in its original form was part of a larger legislative package that was introduced in the House of Representatives at the request of the Secretary of Commerce. See *Amendment of Title 13, United States Code, Relating to Census: Hearing Before the House Comm. on Post Office and Civil Service on H.R. 7911*, 85th Cong., 1st Sess. 4 (1957) (*1957 Hearing*). The Commerce Department's Statement of Purpose and Need explained (*id.* at 7-8):

> The use of sampling procedures would be authorized by the proposed new section 195. It has generally been held that the term "census" implies a complete enumeration. Experience has shown that some of the information which is desired in connection with a census could be secured efficiently through a sample survey which is conducted concurrently with the complete enumeration of other items; that in some instances a portion of the universe to be included might be efficiently covered on a sample rather than a complete enumeration basis and that under some circumstances a sample enumeration or a sample census might be substituted for a full census to the advantage of the Government. This section, in combination with [new] section 193, would give recognition to these facts and provide the necessary authority to the Secretary to permit the use of sampling when he believes that it would be advantageous to do so.

Thus, Section 195 was intended to increase the Secretary's flexibility by authorizing him to employ sampling techniques that would have been inconsistent with prior law. The Department of Commerce believed that then-existing law barred the use of sampling, and it did not propose to have that bar lifted with respect to "the determination of population for purposes of apportionment." Section 195 did not, however, *itself* impose a new, freestanding prohibition on the use of sampling in the apportionment process.[17]

The committee reports accompanying the bill that included the original Section 195 are fully consistent with the foregoing analysis. The Senate Report states that Section 195 "gives the Secretary authority to use sampling in connection with censuses except for the determination of the population for apportionment purposes. The proper use of sampling methods can result in substantial economies in census taking." S. Rep. No. 698, 85th Cong., 1st Sess. 3 (1957). The House Report discusses Section 195 in somewhat greater detail:

> Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purposes of title 13, if he

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[17] Thus, the original version of Section 195 was identical in practical effect to a hypothetical statute providing as follows: "Section 195(a): 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. Section 195(b): Subsection (a) shall not apply to the determination of population for apportionment purposes."

That an exception to an express authorization need not be construed to impose an independent prohibition may be demonstrated by considering the following hypothetical radio announcement, issued on a snowy morning: "*Except for employees at levels GS-15 and above*, federal employees in the D.C. area may remain at home today." An employee at the GS-15 level who had previously received permission to take annual leave on that day would not construe the italicized language as negating the prior authorization. Rather, the proviso would simply make clear that employees at levels GS-15 and above could not rely on the announcement itself as a source of permission to remain home from work.

> deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with apportionment of Representatives.
>
> The purpose of section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be effected through a sample survey. Accordingly, except with respect to apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.

H.R. Rep. No. 1043, 85th Cong., 1st Sess. 10 (1957) (1957 House Report). Because the predicate for the legislative initiative was the Commerce Department's understanding that then-existing law forbade the use of sampling, the effect of Section 195's opening proviso was that sampling for apportionment purposes *remained* unlawful. Nothing in the committee reports suggests, however, that Congress regarded the proviso as establishing a new, independent legal barrier to the use of sampling in apportioning Representatives.

2. As explained above, the Commerce Department's request for the enactment of Section 195 was based on its view that existing law prohibited the use of sampling. The Department and the House Committee regarded that prohibition as implicit in the statutory term "census." See *1957 Hearing* at 7; 1957 House Report at 10; see pp. 33, 35, *supra*.[18] At the time Section 195 was enacted, moreover, the

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[18] Before the 1957 Census Act amendments were enacted, 13 U.S.C. 141 required the Secretary to "take a census of population, agriculture, irrigation, drainage, and unemployment in each State, the District of Columbia, Alaska, Hawaii, and Puerto Rico" in the year 1960 and every ten years thereafter. 13 U.S.C. 141 (Supp. IV 1952). The 1957 amendments divided Section 141 into subsections (a) and (b); added the requirement that the census be taken as of April 1 of the census year; and

Census Act provided that "[e]ach enumerator shall visit personally each dwelling house in his subdivision, and each family therein, and each individual living out of a family in any place of abode, and by inquiry made of the head of each family, or of the member thereof deemed most competent and trustworthy, or of such individual living out of a family, shall obtain every item of information and all particulars required for any census or survey." 13 U.S.C. 25(c) (Supp. IV 1952). That provision would have effectively barred the use of any sampling methodology that did not involve a personal visit to every residence.[19]

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directed the Secretary to report state-level population figures to the President within eight months after the census date. 13 U.S.C. 141 (1958).

[19] It is by no means clear that the understanding of the term "census" reflected in the Commerce Department's 1957 Statement of Purpose and Need would have prohibited the use of sampling in the manner planned for the 2000 decennial census—*i.e.*, as a *supplement* to traditional enumeration techniques. The Statement of Purpose and Need explained that "[i]t has generally been held that the term 'census' implies a complete enumeration," and it used the term "sample census" in contradistinction to "full census." *1957 Hearing* at 7. A census that employed sampling techniques to enhance the accuracy of the count after good-faith efforts to contact all residents directly might well have been regarded as a "complete enumeration" or "full census." Sampling might therefore have been permissible even under pre-1957 law, so long as it was preceded by a good-faith effort to contact directly each individual living within the country.

For essentially the same reason, sampling used as a supplement to traditional enumeration techniques might also have been consistent with the purpose of former Section 25(c), which directed each enumerator to "visit personally" every residence within his subdivision. Former Section 25(c) further provided that "[i]n case no person is found at" the residence, "the census employee may obtain the required information as nearly as may be practicable from the families or persons living nearest to such place of abode who may be competent to answer such inquiries." 13 U.S.C. 25(c) (1952 Supp. IV). Even if sampling efforts were preceded by personal visits to all known residences, it might have been argued that the final sentence of former Section 25(c) implicitly precluded alternative methods of obtaining census information. Section 25's caption indicated, however, that that Section was intended to prescribe the duties of individual enumerators in the field. A requirement that individual enumerators seek to procure reliable information from competent neighbors need not have

The Census Act provisions that would previously have restricted the use of sampling, however, no longer exist in their prior form. Congress repealed former Section 25(c) in 1964, thereby eliminating the requirement that census information be collected through in-person visits to individual residences. See Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737.[20] And any restriction on sampling that Section 141(a)'s use of the word "census," standing alone, might formerly have implied was eliminated by the 1976 amendments to the Census Act. Those amendments revised Section 141(a) to authorize the Secretary to conduct the "decennial census of population"—the census used to determine the apportionment of Representatives among the States—"in such form and content as he may determine, including the

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been understood to foreclose still *further* efforts by other Census Bureau officials to supplement the enumerators' work in order to arrive at the most accurate population counts practicable. The Bureau's plan for the 2000 census does not involve efforts to "visit personally" every residence in the country, since that requirement was eliminated in 1964. See p. 37, *infra*. The Bureau will attempt, however, to distribute questionnaires by mail to all known households in the country, see p. 6, *supra*; note 20, *infra*, and will utilize sampling only as a supplement to those direct contacts.

[20] The committee reports accompanying the 1964 Act reflect an expectation that the distribution of questionnaires by mail would replace in-person visits as the predominant means of collecting census information. See S. Rep. No. 1474, 88th Cong., 2d Sess. (1964); H.R. Rep. No. 373, 88th Cong., 1st Sess. (1963). The text of the Census Act does not, however, direct the Secretary to employ any particular methodology in collecting the pertinent information. To the contrary, the Act in its current form broadly authorizes the Secretary to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a).

In any event, the Census Bureau's plan for the 2000 census includes extensive efforts to distribute questionnaires by mail to as high a percentage of the population as possible. See p. 6, *supra*. Neither the text of the 1964 Act nor the committee reports accompanying it reflect any congressional expectation regarding the nature of the follow-up efforts that will be undertaken with respect to households that do not return their questionnaires.

use of sampling procedures." 13 U.S.C. 141(a); see pp. 25-27, *supra*.[21]

3. The district court's statutory analysis was substantially driven by its belief that the 1976 amendment to Section 195, which changed the word "may" to "shall," would have been an "oblique" (J.S. App. 58a) or "indirect" (*id.* at 59a) means of eliminating the earlier prohibition on the use of sampling for apportionment purposes. But once it is understood that the earlier prohibition was imposed by other Census Act provisions that *predated* Section 195, rather than by Section 195 itself, the error in the court's analysis becomes apparent. There is nothing remotely oblique or indirect about the manner in which Congress dealt with those pre-existing barriers to sampling. Congress repealed former Section 25(c) entirely in 1964. And in 1976, when it amended Section 195 to its present form, Congress simultaneously amended Section 141–-the statutory provision dealing specifically with the decennial census of population– to vest the Secretary with express authority to utilize "sampling procedures." 13 U.S.C. 141(a).[22]

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[21] The district court's misunderstanding of Section 195's original purpose and effect may have resulted in part from the court's erroneous belief that "[p]rior to 1957, Congress did not identify any manner in which the decennial census was to be conducted." J.S. App. 48a. Based on the 1957 legislative history, the district court inferred that the Secretary was barred from using sampling in connection with the apportionment of Representatives immediately after the 1957 Act was passed. See *id.* at 48a-49a. Because the court failed to realize that the Secretary's choice of census methodologies was subject to significant pre-existing constraints, it may simply have assumed that the Secretary's inability (after the 1957 Act) to employ sampling in the apportionment context must have been the result of Section 195 itself.

[22] Although Section 195 in its original form did not itself prohibit the use of sampling for apportionment purposes, its language implied the presence of a pre-existing bar: there would have been little point in excluding apportionment from the original Section 195's authorization to use sampling if Congress had believed that sampling for apportionment purposes was already authorized. The 1976 amendment to Section 195, however, eliminated any such implication. As we explain above (see pp.

It is difficult to conceive of statutory language by which Congress could more clearly have eliminated the barriers to sampling that predated the original enactment of Section 195. The House of Representatives' statutory argument ultimately reduces to the claim that a provision designed as a partial *exemption* from a pre-existing ban should now be construed as an independent prohibition, even though the pre-existing barriers have been replaced with an affirmative authorization to use sampling. Nothing in logic or in the history of the Census Act supports that proposition.

III. THE COMMERCE DEPARTMENT'S PLAN FOR THE 2000 CENSUS IS CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENT THAT THE APPORTIONMENT OF REPRESENTATIVES AMONG THE STATES BE BASED UPON AN "ACTUAL ENUMERATION" OF THE POPULATION

The House of Representatives 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 J.S. App. 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. For the reasons stated below, the House's constitutional claim lacks merit.

30-31, *supra*), it is perfectly logical for Congress to exempt apportionment from Section 195's generally applicable mandatory *directive* to use sampling, while simultaneously vesting the Secretary with *discretion* to use sampling for apportionment purposes if he believes that course to be warranted.

A. The Text Of The Census Clause Does Not Require The Use Of Any Particular Method To Determine The Populations Of The Several States

The constitutional requirement that Congress provide for an "actual Enumeration" of the population does not foreclose the use of statistical sampling mechanisms that the Census Bureau has concluded will enable it more accurately to determine the "respective Numbers" of "the several States." *The Oxford English Dictionary* (*OED*) gives as its primary definition of the word "enumeration" "[t]he action of ascertaining the number of something; *esp.* the taking [of] a census of population; a census." 3 *OED* at 227 (1933). The *OED* states that the word "enumeration" has been used in that manner since at least 1577. *Ibid.* The Secretary's plan for the 2000 census indisputably constitutes a means "of ascertaining the number of" persons within each State.

The *OED* also gives, as a secondary definition of the word "enumeration," "[t]he action of specifying seriatim, as in a list or catalogue." 3 *OED* at 227. The constitutional purpose of the decennial "enumeration," however, makes clear that the Framers did not use the word in that fashion. 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 p. 27, *supra*. 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 government officials charged with conducting the census may compile a list of individual residents in the course of that undertaking, the list *qua* list has no constitutional significance.

Nor can it plausibly be contended that a "headcount" of individual residents "reckoned singly" is the constitutionally required *means* of determining the state-level population figures that are the ultimate objective of the decennial

census. The Census Clause does not require that the relevant numbers be determined through any particular methodology.[23] To the contrary, it vests Congress with extremely broad discretion, providing that the census is to be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. 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.").

B. The Debates At The Constitutional Convention Indicate That The Framers Were Concerned With The Accuracy Of The State-Level Population Figures Determined Through The Census, Not With The Particular Methodology Used To Determine Those Figures

In *Wesberry* v. *Sanders*, 376 U.S. 1, 10-14 (1964), this Court summarized the debates at the Constitutional Convention concerning the basis upon which the States' representation in Congress would be determined. Delegates from the larger States argued that each State's representation should be determined on the basis of population; those from the smaller States contended that each State should have an equal number of representatives. *Id.* at 10-11. The dispute was finally resolved by means of the Great Compromise, under which representation in the Senate was divided

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[23] 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 of population"—*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.

evenly among the States, while the Members of the House were "apportioned among the several States . . . according to their respective Numbers." *Id.* at 13 (quoting U.S. Const. Art. I, § 2, Cl. 3). The Court in *Wesberry* further observed that "[t]he Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Madison as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives." *Id.* at 13-14 (footnote omitted).

The debates at the Constitutional Convention contain no discussion of the specific methodology that would be used to ascertain the "respective Numbers" of "the several States." The drafting history of the Census Clause strongly indicates, however, that the Framers did not regard the word "Enumeration" as denoting any particular means of taking the census. Edmund Randolph made the first specific proposal, moving that the Convention adopt a provision stating "that in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every ____ years thereafter –-and that the Legisl[ature] arrange the Representation accordingly." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 570-571 (1966 ed.) (Farrand). Subsequent versions of that provision consistently used the word "census"; none used the word "enumeration." See *id.* at 575, 594, 595, 600.

The Committee of Detail subsequently prepared a draft Constitution incorporating the resolutions passed by the Convention. Article IV, Section 4 of the draft Constitution directed Congress to "regulate the number of representatives by the number of inhabitants, according to the provisions herein after made, at the rate of one for every forty

thousand." 2 Farrand at 178. Article VII, Section 3, provided:

> The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) *which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.*

Id. at 182-183 (emphasis added).[24] The effect of those provisions, taken together, was that Congress was directed to "regulate the number of representatives by the number of inhabitants, * * * which number shall * * * be taken in such manner as [Congress] shall direct." The relevant provisions of the Committee of Detail's draft imposed no restriction on the "manner" in which the "number" of each State's inhabitants would be "taken."

After receiving the Committee of Detail's report, the Convention devoted approximately one month to section-by-section analysis of the draft Constitution. See 2 Farrand at 190-564. The provisions set forth above were amended in minor respects not relevant to the question presented here. See *id.* at 219-223, 339, 350-351, 357. Those provisions were approved by the Convention in their amended form, and the revised draft Constitution was referred to the Committee of Style and Arrangement. See *id.* at 565, 566, 571. The phrase

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[24] Article IV, Section 3 of the draft Constitution prepared by the Committee of Detail set forth the temporary allocation of Representatives previously determined by the Committee of Eleven and approved by the Convention, see p. 45 & note 26, *infra*, and provided that the provisional allocation would govern "until the number of citizens and inhabitants shall be taken in the manner herein after described." 2 Farrand at 178.

"actual enumeration" first appeared in a new draft Constitution submitted to the Convention by the Committee of Style. See *id*. at 590. No delegate suggested that the Committee of Style's use of the word "enumeration" was intended to affect the scope of Congress's authority to conduct the census in the manner that it saw fit. Rather, the drafting history of the relevant constitutional provisions strongly indicates that the requirement to make an "Enumeration" simply directed Congress to determine the "Numbers" of persons within the "several States."[25]

The fact that the Census Clause refers to an "actual" enumeration also does not suggest that the determination of

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[25] This Court has recognized that "the Committee of Style had no authority from the Convention to alter the meaning" of the draft Constitution submitted for its review and revision. *Nixon* v. *United States*, 506 U.S. 224, 231 (1993); accord *Powell* v. *McCormack*, 395 U.S. 486, 538-539 (1969). That does not mean that changes made by the Committee of Style should be ignored. It does suggest, however, that in construing ambiguous provisions of the Constitution in its final form, the Court "must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language." *Nixon*, 506 U.S. at 231. The phrase "actual Enumeration" should therefore be construed in a manner that renders it consistent with the language previously approved by the Convention, which stated that the "number" of persons within each State "shall * * * be taken in such manner as the said Legislature shall direct." 2 Farrand at 183, 571.

The drafting history of the Census Clause does suggest one possible explanation for the Framers' decision to use the word "enumeration" rather than the word "census." Edmund Randolph's initial proposal was that a periodic "census" be taken "in order to ascertain the alterations in the population *& wealth* of the several States." 1 Farrand at 570 (emphasis added); compare 2 *OED* at 219 (listing as first definition of "census" "[t]he registration of citizens and their property in ancient Rome for purposes of taxation"). After considerable debate, however, the delegates decided that the apportionment of seats in the House of Representatives should be based on population alone. See 1 Farrand at 606; *Wesberry*, 376 U.S. at 14 & n.33. The word "enumeration"–-like the Committee of Detail's directive that the "number" of each State's inhabitants "shall * * * be taken" at least once in every ten-year period–-might have been thought to convey more unambiguously than the word "census" that representation was to be based solely on population.

state-level population figures must be based exclusively on a "headcount" of identified individuals. Rather, the word "actual" was used to distinguish the permanent basis for apportioning Representatives from the temporary allocation set forth in the Census Clause. See U.S. Const. 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"). Delegates at the Constitutional Convention used the phrase "actual census" in contradistinction to the provisional apportionment of Representatives established by the Census Clause. See 1 Farrand 602 (Oliver Elseworth stated that the allocation of taxes on the basis of the provisional apportionment "will be unjust until an actual census shall be made"); *ibid.* (George Mason "doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an actual census").[26] Read in the context of the

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[26] The provisional allocation of Representatives set forth in Article I, Section 2, Clause 3 was undertaken by a Committee of Eleven composed of one delegate from each State then in attendance, which revised somewhat an earlier allocation drafted by a Committee of Five. See 1 Farrand at 559, 562-563. After some debate, that apportionment was agreed to by a vote of 9-2. *Id.* at 570. Members of the Committee of Eleven made clear that their allocation of Representatives was not based solely on estimates of the States' existing populations. See *id.* at 566 (Rufus King defends the allocation of three Representatives to New Hampshire in part on the ground that its population "may be expected to increase fast"); *id.* at 567, 584 (Gouverneur Morris states that "[p]roperty ought to have its weight" in apportioning Representatives, and asserts that the use of wealth as a factor "was followed in part by the [Committee of Eleven] in the apportionment of Representatives yesterday reported to the House"); *id.* at 587 (Roger Sherman states that "Georgia had more" representation under the provisional allotment than its current population would warrant, "but the rapid growth of that State seemed to justify it").

Census Clause as a whole, and of the debates surrounding its adoption by the Constitutional Convention, 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.[27]

Finally, construing the phrase "actual Enumeration" to mandate use of a particular census methodology would subvert the purposes underlying Article I, Section 2. The requirements that Representatives be chosen "by the People of the several States" (U.S. Const. Art. I, § 2, Cl. 1), and that they be apportioned among the States "according to their respective Numbers" (U.S. Const. Art. I, § 2, Cl. 3), reflect "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry*, 376 U.S. at 18; see also *Montana*, 503 U.S. at 463 (referring to "[t]he polestar of equal representation"); *Franklin*, 505 U.S. at 804, 806 ("constitutional goal of equal representation").[28] The decen-

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[27] The Act of Congress providing for the first decennial census began by stating "[t]hat the marshals of the several districts of the United States shall be, and they are hereby authorized and required to cause the number of the inhabitants within their respective districts to be taken; omitting in such enumeration Indians not taxed, and distinguishing free persons, including those bound to service for a term of years, from all others." Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101. That language suggests that the First Congress regarded the concept of conducting an "enumeration" as synonymous with that of "caus[ing] the number of the inhabitants * * * to be taken." As we explain below, see pp. 47-48, *infra*, the manner in which the first decennial census was conducted did not conform to the House of Representatives' view that the Census Clause requires a "headcount" of individuals "reckoned singly."

[28] The requirement that a new "Enumeration" be conducted within every ten-year period, see U.S. Const. Art. I, § 2, Cl. 3, was intended to further the goal of equal representation for equal numbers of people by ensuring that the apportionment of Representatives would continue to correspond to the "respective Numbers" of the "several States." The delegates to the Convention anticipated that westward migration would substantially alter the distribution of the country's population. They wished to avoid replicating the English practice of "rotten boroughs" that

nial census can fulfill that purpose only to the extent that it accurately determines the relative population shares of the individual States. The rule proposed by the House of Representatives, however, would bar Congress from employing any enumerative methodology other than a "headcount," no matter how broad the consensus within Congress and the expert community that other census-taking techniques would produce more accurate population figures. Nothing in the text, history, or purposes of the Census Clause supports that result.

C. The House Of Representatives' Interpretation Of The "Actual Enumeration" Requirement Is Inconsistent With Historical Practice

The House of Representatives' contention that the "actual Enumeration" requirement mandates a "headcount" of individuals "reckoned singly" cannot be reconciled with historical practice. From the time of the First Congress, the conduct of the decennial census has routinely involved techniques designed to obtain and use reliable information concerning the *aggregate* number of persons residing at particular locations, rather than simply attempts to locate and count identified individuals.

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resulted from the legislature's refusal to reapportion itself in light of population shifts. See *Wesberry*, 376 U.S. at 14; 1 Farrand at 584 (James Madison states that "[t]he power [in England] had long been in the hands of the boroughs, of the minority; who had opposed & defeated every reform which had been attempted."). Thus, George Mason defended the requirement of a periodic census by arguing that "[a]s soon as the Southern & Western population should predominate, which must happen in a few years, the power [would] be in the hands of the minority, and would never be yielded to the majority, unless provided for by the Constitution." *Id.* at 586. See also *id.* at 592 (Charles Cotesworth Pinckney "foresaw that if the revision of the census was left to the discretion of the Legislature, it would never be carried into execution"); *id.* at 594 (Edmund Randolph notes the danger "that the ingenuity of the Legislature may evade (or pervert the rule so as to) perpetuate the power where it shall be lodged in the first instance").

The Act providing for the 1790 decennial census stated that each "assistant" was to return to the appropriate United States marshal a schedule identifying all heads of households within the assistant's district, together with the number of persons in each household falling within each of five categories (free white males of sixteen years and upwards, free white males under sixteen years, free white females, all other free persons, and slaves). Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101-102. Nothing in the Act required the marshals or their assistants to report or record individual names. Nor did the Act specify the manner in which the relevant information was to be obtained, though it did require "each and every person more than sixteen years of age" to furnish accurate information if questioned by an assistant. § 6, 1 Stat. 103. Indeed, it was not until the seventh decennial census in 1850 that the government began to record the names of individuals other than heads of households. See S. Doc. No. 194, 56th Cong., 1st Sess. 47 (1900).

As the *Report to Congress* explains, moreover,

> Census 2000 will not be the first time that the Census Bureau has used statistical methods to correct for problems in physical enumeration and to provide a more accurate final result. Since at least 1940, statistical imputation has been used when an enumerator knew that a housing unit was occupied, but could not obtain information on the number of people living in that unit. In 1980, statistical imputation raised the physical enumeration total by 761,000 people. The number and rate of people imputed in the 1990 Census was only 53,590. Automated data control systems and field procedures may have discouraged enumerators from turning in incomplete questionnaires. In 1970, the Census Bureau used sampling to impute people to addresses that had initially been assumed vacant. The sample of 13,456 housing units initially presumed "vacant" found that 11.4

> percent of them should be reclassified as "occupied." The National Vacancy Check added 1,068,882 people, or 0.5 percent of the total, to the 1970 Census.

J.A. 81-82.[29]

We do not suggest that the statistical sampling mechanisms projected for use in the 2000 census are indistinguishable from techniques used in the past. To the contrary, the Commerce Department's decision to make increased use of sampling was explicitly based on its determination that "[c]hanges in American society dictate that census-taking methods must change." J.A. 41. The historical record makes clear, however, that the determination of population for purposes of apportionment has routinely involved methodologies that cannot be described as a "headcount" of individuals "reckoned singly."

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[29] The Census Bureau has used a variety of techniques to determine the number of persons residing in particular housing units when the Bureau was unable to contact directly any individual living therein. The Bureau attempts to obtain the relevant information from a neighbor, a practice that for much of the 20th Century was specifically authorized by the Census Act. See 13 U.S.C. 25(c) (Supp. IV 1952), quoted at note 19, *supra*. Where such inquiries are unavailing, the Bureau has employed the "hot deck" method of imputation, in which information concerning a unit for which data are unavailable is imputed from the unit processed immediately beforehand (generally a neighboring unit). See House Sum. Judg. Exh. 3, at 4; *id.* Exh. 8, at 5-7. As the *Report to Congress* explains, the Bureau made significant use of sampling in conducting the 1970 census, when it discovered that a substantial number of housing units initially classified as vacant were in fact occupied. The Bureau then surveyed a sample of units classified as vacant and extrapolated the results of its surveys to all of the "vacant" units nationwide. The effect of the National Vacancy Check was to add over 1,000,000 persons to the national population totals. See J.A. 82; Commerce Dep't Exh. 4, at 7-6, 8-26 to 8-30.

CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the district court should be reversed.

Respectfully submitted.

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