No. 140, Original

In the Supreme Court of the United States

STATE OF LOUISIANA, ET AL., PLAINTIFFS

v.

JOHN BRYSON, SECRETARY OF COMMERCE, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE SECRETARY OF COMMERCE AND THE DIRECTOR OF THE CENSUS IN OPPOSITION

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QUESTIONS PRESENTED

The Constitution provides that Representatives in Congress shall be apportioned among the several States based on the "whole number of persons" in each State. U.S. Const. Amend. XIV, § 2; see *id.* Art. I, § 2, Cl. 3. The decennial census enumerates the whole number of persons in each State, and that enumeration is used to apportion Representatives. The questions presented by plaintiffs' proposed bill of complaint are:

1. Whether plaintiffs, the State of Louisiana and a Louisiana voter, have standing to challenge the inclusion of an unknown number of nonimmigrant aliens in the apportionment count.

2. Whether the Constitution requires that nonimmigrant aliens be excluded from the apportionment count.

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JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the United States Constitution and under 28 U.S.C. 1251(a) and (b)(3).

STATEMENT

The State of Louisiana and its Attorney General seek to invoke this Court's non-exclusive original jurisdiction to challenge the inclusion of "non-immigrant foreign nationals" in the population figures used to apportion Representatives among the States following the 2010 census.

1. The Constitution requires the federal government to conduct a decennial census to apportion Representatives in Congress among the several States. Article I, Section 2, Clause 3 of the Constitution provides that "Representatives * * * shall be apportioned among

the several States * * * according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, * * * excluding Indians not taxed, three fifths of all other Persons." After the abolition of slavery, that rule was modified by the first sentence of Section 2 of the Fourteenth Amendment, which reads: "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." Each State's number of Representatives, together with its two Senators, also determines the number of electors for President and Vice President that State will appoint. See U.S. Const. Art. II, § 1, Cl. 2.

To determine the whole number of persons in each State, the Constitution provides that a census shall be taken every ten years "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. Congress has implemented that requirement by directing the Secretary of Commerce every ten years to take a census of "total population." 13 U.S.C. 141(a) and (b). Congress has given the Secretary discretion to determine what information to gather on census questionnaires. 13 U.S.C. 5, 141(a).

Each decennial census, beginning with the first one in 1790, has sought to count every person living in the United States, without regard to citizenship, country of origin, or legal status. See U.S. Census Bureau, U.S. Dep't of Commerce, *How We Count America*, http://2010.census.gov/2010census/about/how-we-count.php (last visited Feb. 10, 2012) (*How We Count America*); U.S. Census Bureau, U.S. Dep't of Commerce, *Measuring America: The Decennial Censuses from 1790 to 2000*, at 5-109 (Sept. 2002) (*Measuring America*) (re-

printing questionnaires from every previous census), http://www.census.gov/prod/2002pubs/pol02marv.pdf. The 2010 census counted individuals based on where they "live and sleep * * * most of the time" as of Census Day—April 1, 2010. U.S. Census Bureau, U.S. Department of Commerce, *Form D-61* (Jan. 15, 2009), http://2010.census.gov/2010census/pdf/2010_Questionnaire_Info.pdf. The census questionnaire did not ask respondents to list their citizenship. See *ibid.* The resulting enumeration therefore included various categories of people who live in the United States but are not U.S. citizens. Foreign visitors (such as tourists or business travelers) who happen to be in the United States on Census Day, however, are not counted because they do not live or sleep in this country most of the time. See *How We Count America*.

In January 2011, as required by statute, 2 U.S.C. 2a(a), the President transmitted to Congress a statement, based on the 2010 census conducted by the Census Bureau, showing the number of persons in each State and the number of Representatives to which each State is entitled under the statutory apportionment formula. H.R. Doc. No. 5, 112th Cong., 1st Sess. (2011); see U.S. Dep't of Commerce, U.S. Census Bureau, *Table 1: Apportionment Population and Number of Representatives, by State: 2010 Census*, http://www.census.gov/population/apportionment/data/files/Apportionment%20Population%202010.pdf (last visited Feb. 10, 2012) (*Apportionment Table*). The Clerk of the House of Representatives then transmitted to the executive of each State a certificate of the number of Representatives to which that State will be entitled when the 113th Congress convenes in January 2013. See 2 U.S.C. 2a(b).

Between 2000 and 2010, Louisiana's population grew more slowly than those of 47 other States. See Paul Mackun & Steven Wilson, U.S. Census Bureau, U.S. Dep't of Commerce, *Population Distribution and Change: 2000 to 2010*, at 2 tbl.1 (Mar. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. As a result, in 2011, Louisiana was apportioned six Representatives, one fewer than in the previous decade. *Apportionment Table*; Compl. ¶ 15.

2. Plaintiffs seek to invoke this Court's non-exclusive original jurisdiction to challenge the long-standing practice of attempting to include all individuals living in the United States in the apportionment count. Plaintiffs contend that it is unlawful for the count to include "foreign nationals who are unlawfully or temporarily present in the United States in calculating the apportionment of seats in the United States House of Representatives." Compl. ¶ 1.

Plaintiffs attach to their motion for leave to file a declaration by a sociologist, which opines—based on the declarant's estimate of the nationwide "undocumented immigrant population"—that Louisiana would not have lost a Representative had the government excluded such individuals from the apportionment count. Br. in Supp. of Compl. Ex. 1, ¶ 8; see Compl. ¶¶ 14-15. The proposed complaint alleges that the government's failure to exclude all "non-immigrant foreign nationals" from the count violates Article I, Section 2 of the Constitution and Section 2 of the Fourteenth Amendment, as well as the equal-protection component of the Fifth Amendment's Due Process Clause. Compl. ¶¶ 16-27.

ARGUMENT

Recognizing that there are other forums where a State may proceed against a federal official, this Court rarely exercises its original jurisdiction to take up such a case in the first instance. This case is a poor candidate for the exercise of that discretion. The district courts are a superior forum for this case for numerous reasons, including the presence of an individual plaintiff with his own claim, who is not entitled to invoke this Court's original jurisdiction, and the need to examine the facts underlying both plaintiffs' claims of standing. Even if the district courts were somehow unsuitable, plaintiffs' claims are not sufficiently weighty to justify an original action in this Court. At the threshold, plaintiffs' claims of standing are unpersuasive. They contend that, because the 2010 apportionment was based on an enumeration that sought to count everyone living in the United States, the apportionment injured them by depriving Louisiana of a Representative. But they base that claim on borrowed statistical estimates that, on their face, lack the necessary precision. And in any event, Congress has prescribed (and this Court has recognized) that statistical "sampling" may not be used in apportioning Representatives.

On the merits, plaintiffs' claims are not substantial. Plaintiffs contend that *every* apportionment of Representatives in the Nation's history, from 1790 to 2010, has rested on an unconstitutional miscalculation of the population, because *every* decennial census has sought to include in the apportionment count all individuals who live in the United States, without seeking to determine individuals' alienage or legal status. But that practice follows directly from the Constitution, which mandates that the apportionment be based on the "whole number

of persons in each State." U.S. Const. Amend. XIV, § 2. The Framers intended apportionment to be based on population, without regard to the right to vote, country of origin, or legal status. That is how the first actual enumeration under the Constitution was conducted, and the Secretary did not violate the Constitution by following the same path.

Two previous cases raising essentially the same legal issues have been brought in district courts, and dismissed for lack of standing. Plaintiffs offer no persuasive reason why the Court should exercise its discretion to allow this case to proceed as an original action, especially because plaintiffs filed this motion seeking to undo the current apportionment more than a year and a half after the 2010 census and more than 10 months after the apportionment was transmitted. The motion should be denied.

A. A Challenge To The Census Should Be Brought In A District Court In The First Instance

The Constitution provides that this Court shall have original jurisdiction over a limited class of disputes, including those "in which a State shall be Party." U.S. Const. Art. III, § 2, Cl. 2. Congress has further specified that the Court "shall have original and exclusive jurisdiction" only over controversies between two or more States. 28 U.S.C. 1251(a). The Court has "original but not exclusive jurisdiction" over actions "by a State against the citizens of another State," 28 U.S.C. 1251(b)(3), which this Court has held includes actions by a State against a federal official who is not a citizen of the plaintiff State. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 307 (1966). This Court does not routinely take jurisdiction of an original action, and it exercises its

concurrent original jurisdiction particularly "sparingly." *E.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972) (citation omitted). In regularly denying leave to file actions that could be brought in another forum, this Court acts to protect its "role as the final federal appellate court," which no other court can perform in its stead. *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971); see *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113-114 (1972). This case presents no exceptional circumstance that would justify requiring this Court to act as a court of first view.

1. A district court would be better situated to resolve the threshold factual obstacles to plaintiffs' claims

This Court is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States* v. *Nevada*, 412 U.S. 534, 538 (1973). A plaintiff generally has a fully adequate forum in federal district court where, as here, the dispute is between a State and officers of the United States. Accordingly, "[s]ubsequent to [the] decision in *United States* v. *Nevada* in 1973," the Court has "in the majority of actions by States against the United States or its officers, summarily denied the motion for leave to file a bill of complaint." *Nebraska* v. *Wyoming*, 515 U.S. 1, 27 n.2 (1995) (Thomas, J., concurring in part and dissenting in part) (collecting cases); accord, *e.g.*, *Texas* v. *Leavitt*, 547 U.S. 1204 (2006) (No. 135, Original).

a. Plaintiffs concede (Br. in Supp. of Compl. 13) that a district court would have jurisdiction over this dispute. Indeed, two previous challenges that were virtually identical to this one were brought in district court. See *Ridge* v. *Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989); *Fed-*

eration for Am. Immigration Reform v. *Klutznick*, 486 F. Supp. 564 (D.D.C.) (*FAIR*), appeal dismissed, 447 U.S. 916 (1980). Both cases were dismissed for lack of standing, not for any defect in the district court's statutory jurisdiction.

There is good reason to follow the same procedure here. This Court has noted that acting in the "'role of factfinder'" can "tax [its] limited resources" and take time away from the Court's "primary responsibility 'as an appellate tribunal.'" *South Carolina* v. *North Carolina*, 130 S. Ct. 854, 863 (2010) (quoting *Wyandotte Chems. Corp.*, 401 U.S. at 498). And here, even if plaintiffs' claims were not subject to dismissal on threshold grounds, see pp. 19-25, *infra*, plaintiffs could not prevail without a fact-specific demonstration that the conduct of the census has caused them actual injury, as required to show standing to sue. Plaintiffs' attempt to make such a showing hinges on the premise that the practice of including nonimmigrant aliens in the apportionment count has caused Louisiana to lose a Representative. For reasons explained more fully below, plaintiffs' claim to standing fails as a matter of law and the Court need proceed no further. But even if that is incorrect, plaintiffs could not prevail on that standing theory without proving, as a factual matter, the premise that Louisiana would have received an additional Representative if nonimmigrant aliens had been excluded from the count. And unlike in several previous cases relating to appor-

tionment that have reached this Court,[1] that premise is a contested issue here.

Because plaintiffs seek to modify an apportionment that has already been conducted, based on a criterion (status as a "non-immigrant foreign national") that the decennial census did not enumerate,[2] plaintiffs' submission rests on statistical estimates and would require expert testimony. Plaintiffs append to their brief a declaration that purports to estimate the number and distribution of the "undocumented population" among the States. Br. in Supp. of Compl. Ex. 1, ¶ 5. Without such an estimate, plaintiffs could not establish whether counting nonimmigrant aliens had any effect on the number of Representatives apportioned to Louisiana. Plaintiffs' estimate, however, is flawed in numerous respects. See pp. 21-23, *infra.* And before plaintiffs could prevail, their declarant's estimations would have to be subjected to discovery, cross-examination, and rebuttal by contrary experts. Indeed, in the previous challenge to the inclusion of aliens in a decennial census, the parties engaged in discovery and made extensive factual and ex-

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[1] See, *e.g.*, *Utah* v. *Evans*, 536 U.S. 452, 458 (2002) ("[T]he parties agree that [using imputation] means that * * * Utah will receive one less Representative"); *Franklin* v. *Massachusetts*, 505 U.S. 788, 790-791, 802 (1992); *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 455 (1992).

[2] Plaintiffs appear (see, *e.g.,* Compl. ¶¶ 1, 12, 18) to use the term "non-immigrant" to mean all aliens who have not been accorded lawful permanent resident status, including undocumented aliens. This brief responds to plaintiffs' claims on that understanding. We note, however, that several classes of aliens besides lawful permanent resident aliens are not classified as "nonimmigrant" aliens by the immigration laws. See 8 U.S.C. 1101(a)(15) (2006 & Supp. IV 2010). For instance, asylees and refugees are neither lawful permanent residents, nor nonimmigrant aliens, nor undocumented aliens.

pert submissions before the district court concluded that the plaintiffs lacked standing. See *Ridge*, 715 F. Supp. at 1313-1316; see also *id.* at 1310 n.1.

A federal district court is plainly in the better position to preside over such an inquiry. Given the amount of time this Court must devote to its appellate docket, the Court has understandably been reluctant to take on original cases that could instead be brought initially in district court. See, *e.g.*, *Wyandotte Chems. Corp.*, 401 U.S. at 504. And although prospective plaintiffs have sometimes contended that this Court could appoint a Special Master to supervise the necessary discovery and review expert evidence, *e.g.*, *General Motors Corp.*, 406 U.S. at 112-113, that procedure is considerably less expeditious than a district-court action, see, *e.g.*, *South Carolina* v. *Baker*, 485 U.S. 505 (1988) (decision more than five years after bill of complaint filed), and still requires significant amounts of this Court's time, potentially on several rounds of exceptions in a single case. Bringing a case in district court, followed by appellate or certiorari review if necessary to resolve particular meritorious issues, is ordinarily the more appropriate course.

b. Plaintiffs contend that the district court is not an "*adequate* alternative forum." Br. in Supp. of Compl. 11. But plaintiffs do not contend that a district court would lack jurisdiction over a suit against the same defendants, or that the district court would have any less power than this Court to award effective relief if plaintiffs prevailed. Accordingly, there is no doubt that plaintiffs could proceed in district court, just as the plaintiffs did in the indistinguishable *FAIR* and *Ridge* cases.

Rather, plaintiffs' contention is that a suit in district court would "risk plunging the electoral process into disarray," apparently because they believe courts in differ-

ent circuits might be called upon to decide the question and might then resolve the question inconsistently. Br. in Supp. of Compl. 11; see *id.* at 13-16. But the apportionment was finalized more than a year ago, in January 2011. Plaintiffs acknowledge that, even on their theory, only four other States would be aggrieved, see *id.* Ex. 2, and no one from any of those four States has brought a challenge like plaintiffs'. Even if a second challenge were filed, that hardly amounts to an inevitable *future* circuit conflict that would warrant this Court's *immediate* consideration. Multiple actions could be centralized in a single district court if circumstances warranted. See 28 U.S.C. 1407(a). And even if cases proceeded in multiple districts, as is the norm with nearly every issue this Court considers, there is no substantial likelihood that this Court will eventually need to step in to resolve a conflict or decide a compellingly important question. Both previous cases raising this issue were dismissed for lack of standing; a third such dismissal would hardly warrant discretionary review by this Court. Thus, there is no reason to conclude that any court of appeals would reach the merits of a case such as plaintiffs', much less resolve the merits in a way that would call for this Court to grant certiorari.

Plaintiffs suggest (Br. in Supp. of Compl. 16 n.8) that plenary review by this Court is inevitable, on the theory that any action in district court would necessarily be heard by a three-judge court and that any decision by that court could be appealed to this Court as of right. See 28 U.S.C. 2284. It is not clear, however, that plaintiffs would be entitled to proceed before a three-judge district court. Neither of the previous suits making such arguments successfully did so. The more recent, *Ridge*, proceeded before a single district judge. In the earlier

case, *FAIR*, a three-judge district court was convened, but the court ultimately concluded that the case challenged census practices, rather than the apportionment as such; was not within the scope of Section 2284; and should have proceeded before a single district judge. See 486 F. Supp. at 577-578. Cf. *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992) (action challenging the mathematical method used to apportion representatives, which did proceed before a three-judge court).[3] Other challenges to census practices have been handled in different ways by district courts, compare *Wisconsin* v. *City of New York*, 517 U.S. 1, 10-12 (1996) (challenge to decision not to adjust for estimated undercount heard by single district judge), with *Utah* v. *Evans*, 143 F. Supp. 2d 1290 (D. Utah) (challenge to decision not to count missionaries living overseas heard by three-judge district court), aff'd summarily, 534 U.S. 1038 (2001), and this Court has not addressed whether a three-judge court has jurisdiction over such a challenge.[4]

Moreover, even if a suit like this one would require appointment of a three-judge district court under Sec-

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[3] See also *Massachusetts* v. *Mosbacher*, 785 F. Supp. 230, 237 (D. Mass.) ("very much doubt[ing]" that Congress intended in Section 2284 to make "all census litigation * * * appropriate for three-judge court treatment"), rev'd on other grounds, 505 U.S. 788 (1992). The three-judge court in that case was properly convened because the plaintiffs had also raised a claim about the method of apportionment, and the court held that a claim about how the census was conducted could proceed as a pendent claim. *Ibid.*

[4] In two other cases, a special statute pertaining to statistical sampling required the convening of a three-judge district court and allowed an appeal as of right to this Court. *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 326-327 (1999); accord *Utah* v. *Evans*, 536 U.S. at 457-459.

tion 2284, not all decisions of such courts are appealable to this Court as of right. In particular, a decision to dismiss for lack of standing does not "deny[]" an injunction in the relevant sense, 28 U.S.C. 1253, and is properly reviewed by the court of appeals in the first instance rather than on mandatory appeal to this Court. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 99-101 (1974); accord *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975) (per curiam); cf., *e.g.*, *Rodearmel* v. *Clinton*, 130 S. Ct. 3384 (2010) (No. 07-797).

c. Nor does plaintiffs' plea for resolution "as quickly as practicable" (Br. in Supp. of Compl. 11) provide a reason to grant leave to file directly in this Court. Plaintiffs did not bring this action until nearly a year after the 2010 apportionment became final. By contrast, the plaintiffs in *FAIR* and *Ridge* brought their actions *before* the 1980 and 1990 decennial censuses, respectively, so that if they prevailed, the census could attempt to gather the citizenship and other data that would have been necessary to adjust the apportionment.

Furthermore, although (as explained below) plaintiffs have not shown that they have standing, the evidence on which they base their *claim* to standing does not depend on data from the 2010 decennial census. The likelihood that Louisiana's disproportionately slow population growth (see p. 4, *supra*) would cost it a Representative after the 2010 decennial census has been known since mid-decade projections became available. See Gerard Shields, *La. Likely To Lose Congressional Seat*, The Advocate (Baton Rouge, La.), Dec. 22, 2006, at A1. The Census Bureau made clear in April 2008 that it did not plan to change its longstanding practice and that the 2010 decennial census would not ask respondents for their citizenship or immigration status. See 13 U.S.C.

141(f)(2) (requiring the Census Bureau to inform Congress of the questions to be asked on the decennial census two years in advance).[5] And plaintiffs do not base their estimates of the nationwide or State-by-State population of unlawfully present aliens on information from the decennial census at all. Rather, they rely on a report from the Pew Hispanic Center, issued February 1, 2011, and based on data from 2009 and 2010. See Br. in Supp. of Compl. Ex. 1, ¶ 5 & n.4; Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Ctr., *Unauthorized Immigrant Population: National and State Trends, 2010*, at 1, 26 (Feb. 1, 2011) (*National and State Trends*), http://www.pewhispanic.org/files/reports/133.pdf. Thus, even if plaintiffs had identified a cognizable injury, they have not acted to remedy that injury with the sort of speed that would warrant resolving this action on an emergency basis.

Yet truly emergency treatment would be required if this Court were to decide this case before elections are held, and Presidential electors are appointed, based on the 2011 apportionment. Those elections are rapidly approaching; indeed, Louisiana has already adopted new congressional districts based on its apportioned six Representatives. So have the other States that plaintiffs contend would benefit from a favorable decision in this action.[6] But even if there were a genuine need for expe-

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[5] In 2009, one of Louisiana's Senators sought to require the Census Bureau to collect citizenship information in the decennial census. The attempt was unsuccessful. See 155 Cong. Rec. S10,192-S10,194 (daily ed. Oct. 7, 2009); *id.* at S11,146-S11,147, S11,172 (daily ed. Nov. 5, 2009).

[6] Louisiana, Missouri, North Carolina, and Ohio have adopted new congressional districts. Montana has only one district. See Justin Levitt, *All About Redistricting*, http://redistricting.lls.edu (last visited Feb. 10, 2012). The deadline to file a congressional candidacy has al-

dition, that is no basis for insisting on original jurisdiction. The district courts and courts of appeals can handle this case with appropriate dispatch, with ultimate review by this Court if necessary. Cf. *Utah* v. *Evans*, 536 U.S. 452, 463 (2002) (Utah brought suit "soon enough" after it learned of the challenged census method's "representational consequences," and if Utah had prevailed in this Court, "several months would [have] remain[ed] prior to the first post-2000 census congressional election").

This Court reserves its concurrent original jurisdiction for truly exceptional cases, whereas "nothing in [plaintiffs'] complaint distinguishes it from any one of a host of * * * actions that might, with equal justification, be commenced in this Court." *Wyandotte Chems. Corp.*, 401 U.S. at 504. Thus, irrespective of whether plaintiffs can establish standing or prevail on the merits, see pp. 17-31, *infra*, their appropriate starting point is a federal district court.

2. Plaintiff Caldwell's one-person-one-vote claim does not properly invoke this Court's original jurisdiction

One of plaintiffs' claims does not even purport to invoke the rights of the State of Louisiana at all. Compl. ¶¶ 20-24. That claim contends that the inclusion of nonimmigrant foreign nationals in the apportionment population violates plaintiff Caldwell's rights, as an individual Louisiana voter, to equal treatment under constitutional one-person-one-vote principles. See Compl. ¶ 24; Br. in Supp. of Compl. 29-36. But Caldwell is not a State, and

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ready closed in Ohio and will soon close in Missouri and North Carolina. See Federal Election Comm'n, *2012 Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access* 3-4 (Feb. 1, 2012), http://www.fec.gov/pubrec/fe2012/2012pdates.pdf.

he plainly could not bring this claim against federal officers in a free-standing action in this Court.[7] For Caldwell, therefore, a district court is not just a superior forum, but the *only* proper forum. Although Caldwell's claim is altogether insubstantial and leave to file may be denied on that basis, see pp. 29-31, *infra*, this Court should reject Caldwell's attempt to expand this Court's original docket to include claims not brought by any State.

Individuals and entities other than States have, on occasion, participated as parties in original actions in this Court. The grant of original jurisdiction extends, of course, to actions by State plaintiffs against non-State *defendants*. Non-State parties have, on rare occasions, intervened in original actions brought by States. See, *e.g.*, *South Carolina* v. *North Carolina*, 130 S. Ct. at 864-867 (permitting two entities to intervene as defendants). But this Court has never held that non-State *plaintiffs* may broaden the scope of an original action by bringing claims that no State plaintiff asserts.[8] Nor is there any

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[7] The proposed complaint recites (at ¶ 3) that Caldwell sues in both his official and individual capacities, but his one-person-one-vote claim necessarily is brought in his individual capacity as a voter. Compl. ¶ 24. The State, which does not vote, cannot assert such a claim.

[8] Cf. *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2314 (2010) (non-State plaintiff could join action between States without implicating the defendant State's sovereign immunity, "so long as the [non-State plaintiff] asserts the same claims and seeks the same relief as the [State] plaintiffs"). Similarly, the Court has permitted non-State entities to intervene as plaintiffs where all parties—the state plaintiffs, the private intervenor-plaintiffs, and the federal intervenor-plaintiff—"raise[d] the same issues and require[d] the same proof." Report of the Special Master at 7 (May 14, 1980), *Maryland* v. *Louisiana* (No. 83, Original); see *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). See also Report of the Special Master at 8-9 (May 26, 1992), *Connecticut* v. *New*

need to recognize such a form of "supplemental original jurisdiction" in a case like this one, in which *all* of the claims are within the statutory jurisdiction of the federal district courts (to the extent they are justiciable at all).

At least as to Caldwell, leave to file should be denied because he is not a proper plaintiff. If Louisiana and Caldwell wish to sue together, they may properly join their claims in district court.

B. Plaintiffs' Claims Are Insubstantial

The motion for leave to file should also be denied because plaintiffs' claims are insubstantial. See, *e.g.*, *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1954) (per curiam); accord *Massachusetts* v. *Missouri*, 308 U.S. 1, 15-17 (1939) (denying leave to file a bill of complaint that failed to state a justiciable controversy). Plaintiffs have neither a plausible claim to standing nor plausible constitutional claims on the merits, whether under ordinary civil-procedure standards or under this Court's rules for original actions. Cf. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (a motion to dismiss should be granted if the plaintiff has failed to state a "plausible" claim to relief); Sup. Ct. R. 17.2 (in original actions, the Federal Rules of Civil Procedure serve only as "guides").

1. Plaintiffs have failed to plead facts supporting their claim of standing

To have Article III standing to sue, a plaintiff must have suffered an "'injury in fact'" that is "concrete and

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Hampshire (No. 119, Original), 1992 WL 12620353; *Connecticut* v. *New Hampshire*, 504 U.S. 983 (1992). Allowing a private party to intervene in litigation that this Court has already allowed a State to commence, where the resolution of the State's claim may affect the private party, is different in any event from allowing a private party to bring its *own* claim *ab initio*.

particularized"; that is "actual and imminent, not conjectural or hypothetical"; that is "fairly traceable to the challenged action of the defendant"; and that will likely be redressed by "a favorable judicial decision." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). Rigorous application of standing requirements is appropriate where, as here, a party seeks to have the courts invalidate on constitutional grounds the acts of a co-equal Branch of government. See *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 472-473 (1982).

A plaintiff cannot establish standing to challenge a census practice, based on that practice's alleged effect on the apportionment of Representatives, if she cannot show that using her preferred census practice would have caused her State to gain an additional Representative. In *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), the plaintiffs claimed (*inter alia*) that the apportionment was inaccurate because the decennial census had allocated overseas federal employees to particular States based on inaccurate data. But because the plaintiffs had not "shown * * * that Massachusetts would have had an additional Representative if the allocation had been done using some other source of 'more accurate' data," they "d[id] not have standing to challenge the accuracy of the data." *Id.* at 802 (plurality opinion); accord *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 331 (1999) (*House of Representatives*) (accepting an unrebutted showing that Indiana was "virtually certain to lose a [House] seat" as sufficient).

That aspect of *Franklin* confirms what two district courts held in previous cases challenging the inclusion of aliens in the apportionment count. In both of those cases, the plaintiffs lacked standing because they could "do no more than speculate as to which states might gain and which might lose representation" if they prevailed. *FAIR*, 486 F. Supp. at 570; see *Ridge*, 715 F. Supp. at 1316. As this Court has held, a plaintiff has not established standing if he depends on "'[s]peculative inferences . . . to connect [his] injury to the challenged actions of [the defendant]." *DaimlerChrysler Corp* v. *Cuno*, 547 U.S. 332, 346 (2006) (citation omitted; alterations in original).

Plaintiffs' claim that they have standing suffers from similar deficiencies. They assert that the inclusion of "non-immigrant foreign nationals" in the apportionment count has caused Louisiana to lose a Representative. Compl. ¶ 15. But the only support plaintiffs offer for that proposition is a sociologist's declaration, opining that "estimates of the undocumented population" indicate that Louisiana lost a Representative as the result of including such individuals in the apportionment. Br. in Supp. of Compl. Ex. 1, ¶¶ 5, 8. That estimate is inadequate to support a claim of standing, for several reasons.

a. First, plaintiffs' estimates fail on their own terms. Plaintiffs seek a declaration that the congressional apportionment must be based on an enumeration that excludes "non-immigrant foreign nationals," Compl. ¶¶ 1, 13-15, 17-19, 22-24, 27, a category that plaintiffs define to include aliens "who are unlawfully *or* temporarily present in the United States." Compl. ¶ 1 (emphasis added). And plaintiffs acknowledge that their proposed definition would remove from the apportionment population people who are lawfully present in the United

States on a temporary basis, such as students studying on visas. Br. in Supp. of Compl. 4. Yet the population estimate on which plaintiffs contend the apportionment should have been based, and on which they base their claim to standing, actually *includes* lawfully present aliens such as holders of student visas. *Id.* Ex. 1, ¶ 4; *id.* Ex. 2, n.*.

Plaintiffs forthrightly admit that they do not even attempt to quantify the number of lawful nonimmigrant foreign nationals in Louisiana, in any other State, or in the United States. Rather, they contend that "no evidence suggests that the numbers of such individuals present in the United States and in particular States currently affect apportionment." Br. in Supp. of Compl. 27 n.14. That statement is baseless.

During fiscal year 2010 alone, the United States issued more than 385,000 F-1 student visas; more than 320,000 J-1 exchange visitor visas (which include students, au pairs, teachers, and others); and more than 58,000 F-2 and J-2 visas for family members of those students and exchange visitors. See U.S. Dep't of State, *Classes of Nonimmigrants Issued Visas (Detailed Breakdown), Fiscal Years 2006-2010*, http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2006-2010.pdf (last visited Feb. 10, 2012). Moreover, each of those visas is valid for more than one year, meaning that several years' worth of student visa holders are in the United States at any one time. Thus, in fiscal year 2010, the Department of Homeland Security (DHS) recorded more than *2 million* admissions of aliens in F-1, F-2, J-1 and J-2 status (although multiple admissions of the same person are counted separately). See Randall Monger & Megan Matthews, Office of Immigration Statistics, DHS, *Nonimmigrant Admissions to the United States:*

2010, at 5 Tbl.3 (Aug. 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2010.pdf. And those are just four of the numerous visa categories open to nonimmigrant foreign nationals who may stay in the United States long enough to be counted in the decennial census. Plaintiffs contend that all nonimmigrant foreign nationals should be excluded from the census, but make no attempt to explain why their calculations nonetheless include these categories of nonimmigrant foreign nationals. Cf., *e.g.*, *Franklin*, 505 U.S. at 790-791 (inclusion of 922,819 overseas military personnel in the nationwide enumeration "altered the relative state populations enough to shift a Representative from Massachusetts to Washington").

b. Second, even if plaintiffs were proceeding on a different theory—one that would exclude from the apportionment population *only* the "undocumented population" that plaintiffs' declaration seeks to estimate, Br. in Supp. of Compl. Ex. 1, ¶ 5—their estimate would still be inadequate to plead standing. Plaintiffs' declaration does not state with the requisite definiteness that excluding their proposed class of undocumented foreign nationals (see note 2, *supra*) would cause Louisiana to gain a Representative.

Plaintiffs' declarant relies on a publication by a nonprofit organization, the Pew Hispanic Center, estimating the distribution of undocumented immigrants in each State. Br. in Supp. of Compl. Ex. 1 ¶ 5. The Pew Center itself cautions that those "[s]tate-level estimates should be treated with some caution because they are based on much smaller samples than the national estimates." *National and State Trends* 26. In fact, those estimates "are presented as rounded numbers to avoid the appearance of unwarranted precision." *Id.* at 27. The Pew

Center thus estimates at an "approximate[ly] 90 percent confidence" level that Louisiana's population of aliens without lawful status is somewhere between 35,000 and 90,000. *Id.* at 23 Tbl.A-3. Within that range, the Pew Center gives an estimate of 65,000, which is the figure plaintiffs use without elaboration. *Ibid.*; see Br. in Supp. of Compl. Ex. 2.

On their face, the Pew Center estimates suffer from at least four forms of indeterminacy that preclude plaintiffs from establishing with any definiteness that Louisiana would gain a Representative if nonimmigrant aliens were excluded from the apportionment count. First, the Pew Center estimates the total number of immigrants based on extrapolations from the Census Bureau's Current Population Survey (CPS) March Supplement, which surveys a sample of about 80,000 households (out of about 118 million). *National and State Trends* 26; see U.S. Dep't of Commerce, U.S. Census Bureau, *America's Families and Living Arrangements: 2011* tbl.AVG1 (Nov. 2011), http://www.census.gov/population/socdemo/hh-fam/cps2011/tabAVG1.xls.

Second, to estimate the number of unlawfully present aliens, the Pew Center estimates the number of *lawful* immigrants "by applying demographic methods to counts of legal admissions covering the period from 1980 to the present," and subtracts that figure from its estimated total number of immigrants. *National and State Trends* 25. Thus, the estimate on which plaintiffs rely is derived by subtracting one estimate from another. The ability to estimate the State-by-State population of lawfully present aliens is further limited by the fact that they may move after their address is recorded at the time they obtain a particular status. Michael Hoefer et al., Office of Immigration Statistics, DHS, *Estimates of*

the Unauthorized Immigrant Population Residing in the United States: January 2010, at 2 (Feb. 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

Third, the Pew Center then attempts to identify which individual respondents in the CPS are illegal immigrants, "based on the individual's demographic, social, economic, geographic and family characteristics." *National and State Trends* 25. That methodology identified "fewer than 50 unauthorized immigrant households" that responded to the CPS in Louisiana. *Id.* at 26.

Finally, the Pew Center "adjusts" its figures to compensate for survey omissions. *National and State Trends* 27. "These adjustments increase the estimate of * * * the unauthorized immigrant population by 10-15%." *Ibid.*

For all of those reasons, the Pew Center estimates do not have—and do not purport to have—the degree of State-by-State precision that would be necessary before this Court could rely on them for the purposes of this case. The formula used for apportionment is sensitive to even very small population shifts, see *Wisconsin* v. *City of New York*, 517 U.S. 1, 11-12 (1996) (citing reasons why the Secretary decided not to statistically adjust the 1990 census); *Ridge*, 715 F. Supp. at 1320; *FAIR*, 486 F. Supp. at 570 n.10, and hence would be sensitive to small inaccuracies in estimates as well. Even at the pleading stage, plaintiffs cannot demonstrate with the requisite degree of confidence that Louisiana would gain an additional Representative if plaintiffs' constitutional theory prevailed.

c. Plaintiffs' alleged injury is not redressable in any event. The Secretary and the Director are precluded by statute from taking the action that plaintiffs seek, *i.e.*,

preparing apportionment figures based in part on statistical sampling. Congress has provided that "the statistical method known as 'sampling'" may not be used "for the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. 195; see *House of Representatives*, 525 U.S. at 335-342, 343; *id.* at 347 (Scalia, J., concurring in part) (noting the "longstanding tradition of Congress's forbidding the use of estimation techniques in conducting the apportionment census"). Because plaintiffs' estimates, with the CPS as their starting point, are an attempted "extrapolation of the features of a large population from a small one," *Evans*, 536 U.S. at 466-467, 471, Section 195 would prohibit the Secretary and the Director from adjusting the apportionment population based on such estimates.

Nor can there be any suggestion that Section 195's prohibition on the use of that statistical method is itself unconstitutional. See *Wisconsin*, 517 U.S. at 19-24 (a decision to preclude adjustments to the apportionment population "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population").

Indeed, plaintiffs would face substantial redressability problems even if they sought a purely *prospective* remedy—which they do not, unlike the plaintiffs in *FAIR* and *Ridge*. As the evidence in *Ridge* showed, even if a *citizenship* question were added to the decennial census, the Secretary would still face the difficulty of separating lawful resident aliens from other aliens with sufficient accuracy, because neither asking directly about lawful status on the census nor estimating the unlawful population statistically would be adequate. See

715 F. Supp. at 1321 (holding challenge nonredressable); accord *FAIR*, 486 F. Supp. at 573-574 (similar).

Plaintiffs' claims therefore face a redressability obstacle unlike (*e.g.*) the claims at issue in *Montana*, *Franklin*, and *Evans*. In those cases, the Court understood that if the plaintiffs prevailed in challenging particular census methodology, a reapportionment would follow. Because that is not the case here, plaintiffs lack standing.

2. Plaintiffs' apportionment claim is insubstantial on its merits

Plaintiffs' claims are also insubstantial on their merits, which would warrant denial of the motion for leave to file even if plaintiffs had a cognizable claim to standing. Although a full discussion of the relevant law and history is beyond the scope of a brief responding to a motion for leave to file a bill of complaint, plaintiffs' argument that the Constitution *prohibits* including nonimmigrant foreign nationals in the apportionment count turns constitutional language, history, and structure on its head. It does not warrant this Court's rare exercise of discretionary, concurrent original jurisdiction.

a. Article I, Section 2, Clause 3 of the Constitution provided that Representatives would be apportioned among the States "according to their respective Numbers," including "the whole Number of free persons" and three-fifths of the slaves, but not "Indians not taxed." After the abolition of slavery, Section 2 of the Fourteenth Amendment has since provided that the apportionment count would include "the whole number of persons in each State," again "excluding Indians not taxed." The broadly inclusive wording of both references to "the whole number of persons," along with the fact that the

Framers expressly excepted particular groups from the count, strongly supports that all other "persons" living in each State should be included, without regard to citizenship or legal status. This Court has held that aliens, even those unlawfully present in the country, are "persons" covered by the Due Process and Equal Protection Clauses in Section 1 of the Fourteenth Amendment. See *Plyler* v. *Doe*, 457 U.S. 202, 210-216 (1982). There is no basis for giving "persons" a narrower meaning in the next section of the same Amendment.

That conclusion is strongly supported by constitutional history. The Framers of the Constitution apportioned Representatives among the States in the "Great Compromise," which balanced the interests of small and large States by creating a Senate, in which each State had equal representation, and a House of Representatives, in which States had representation roughly in proportion to each state's population. See *Evans*, 536 U.S. at 478 (agreeing that "the Framers chose to use population, rather than wealth or a combination of the two, as the basis for representation"); *Wesberry* v. *Sanders*, 376 U.S. 1, 12-14 (1964). The drafters of the Fourteenth Amendment continued the original Constitution's focus on population, and they considered and rejected proposals to exclude aliens and nonvoters from the apportionment count. See Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (observing that the exclusion of aliens from the apportionment base would "cause considerable inequalities * * * because the number of aliens in some States is very large"); *id*. at 9-10, 141, 535, 2804. As Representative Bingham observed, "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation." *Id*. at 432.

Thus, for several centuries, the political Branches of government have conducted their business under the assumption that all residents of the United States must be included in the apportionment count—a historical practice that is entitled to considerable weight in constitutional interpretation. Since the first census was authorized by the First Congress in 1790, the touchstone for inclusion in the census has been whether an individual (whatever his citizenship) has a "usual place of abode" in a State. Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103; *Franklin*, 505 U.S. at 805; see *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926) (legislation of the First Congress entitled to the "greatest weight" in constitutional interpretation). And every subsequent census has likewise attempted to count every individual living in the United States, including aliens. See pp. 2-3, *supra*.[9]

Moreover, although Congress has at various points in history considered proposals to exclude aliens from the apportionment count, Congress has generally assumed that only a constitutional amendment could do so. See, *e.g.*, H.J. Res. 11, 111th Cong., 1st Sess. (2009) (proposed constitutional amendment to exclude aliens from the apportionment count); H.J. Res. 20, 71st Cong., 3d Sess. (1931) (same); 71 Cong. Rec. 1821-1822 (1929) (Senate Legislative Counsel's opinion that it would be unconstitutional to exclude aliens from the apportionment count); 86 Cong. Rec. 4372 (1940) (statement of Rep. Celler).

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[9] Indeed, the 1820 and 1830 censuses enumerated "[f]oreigners not naturalized" both in the principal count and as a separate line item, confirming that Congress intended aliens to be counted. Act of Mar. 14, 1820, ch. 24, § 1, 3 Stat. 550; Act of Mar. 23, 1830, ch. 40, Schedule, 4 Stat. 389; *Measuring America* 6-7.

b. Plaintiffs argue that nonimmigrant aliens must be excluded from the apportionment count because only "inhabitants" of the States may constitutionally be counted. Br. in Supp. of Compl. 25. As this Court has observed, the Framers intended to include in the apportionment count those individuals who had a "'[u]sual residence' * * * 'in each State,'" and used "other words as well to describe the required tie to the State: 'usual place of abode,' 'inhabitant,' 'usual[] reside[nt].'" *Franklin*, 505 U.S. at 804 (quoting Act of Mar. 1, 1790, § 5, 1 Stat. 103) (first and third brackets in original). Those terms describe almost to a tee the Census Bureau's current, and traditional, criteria for counting individuals based on where they "live and sleep * * * most of the time." See p. 3, *supra*. Plaintiffs provide no adequate account for why they believe that the term "inhabitant" may reasonably be construed to exclude, rather than include, people who live in the United States, particularly if plaintiffs are correct to read the word "inhabitant" to mean "one who dwells or resides permanently in a place." Br. in Supp. of Compl. 22-23 (quoting Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828)).

Plaintiffs confuse country of residence with legal status in suggesting that nonimmigrant aliens somehow do not truly live in this country because they "stand outside of the States' political communities" and because their "link to the United States, and to any particular State, is inherently tenuous," as a matter of federal immigration law. Br. in Supp. of Compl. 25-26. Nothing in those laws remotely conflicts with, or even speaks to, the constitutional mandate to include in the apportionment count all persons living in the United States. The sole authority plaintiffs cite (*id.* at 26-27) for the contrary

proposition, *Elkins* v. *Moreno*, 435 U.S. 647 (1978), does not stand for that proposition. *Elkins* merely recognized that the federal immigration laws attach significance to whether an alien intends to reside permanently in the United States. *Id.* at 664-665. Moreover, even if one accepted plaintiffs' premise that legal status somehow changes place of residence, *Elkins* expressly recognized that the federal immigration laws permit some nonimmigrant aliens to intend to reside in the United States indefinitely. *Id.* at 666-667. Compare, *e.g.*, 8 U.S.C. 1101(a)(15)(B), (F) and (J) (2006 & Supp. IV 2010) (nonimmigrant categories that require the alien to have a "residence in a foreign country which he has no intention of abandoning"), with 8 U.S.C. 1101(a)(15)(E), (K) and (N) (nonimmigrant categories that do not require such a foreign residence). That is directly contrary to plaintiffs' assertion that the exit of nonimmigrant aliens from this country is "*legally* certain." Br. in Supp. of Compl. 27.

3. Plaintiff Caldwell's one-person-one-vote claim is not properly presented in an original action and is insubstantial on the merits

Plaintiffs veer even further afield in arguing (Br. in Supp. of Compl. 29-36) that including nonimmigrant aliens in the apportionment count in accordance with Section 2 of the Fourteenth Amendment unconstitutionally dilutes Caldwell's vote for his representative in Congress. As explained above, pp. 15-17, *supra*, Caldwell's claim is not properly brought in this Court at all; it is insubstantial in any event.

This Court has repeatedly rebuffed attempts to use the "one person, one vote" principle to review the Secretary's conduct of the decennial census and the appor-

tionment of Representatives, as opposed to intra-state redistricting. See *Wisconsin*, 517 U.S. at 17-20. Deviations from that ideal are inevitable when apportioning seats among the States. See *Montana*, 503 U.S. at 463-464; see also Br. in Supp. of Compl. Ex. 3. Consistent with those holdings, this Court recently held nonjusticiable a claim that one-person-one-vote principles required increasing the size of the House of Representatives to reduce deviations between districts in different States. See *Clemons* v. *Department of Commerce*, 131 S. Ct. 821 (2010) (No. 10-291). Caldwell thus has suffered no cognizable one-person-one-vote injury so long as Louisiana's congressional districts are equipopulous—whether Louisiana has six or seven districts, and whether those districts have more or fewer people than districts in California. There has never been any constitutional requirement that district population be "equal from one State to the next," as plaintiffs contend, Br. in Supp. of Compl. 36. See *Wisconsin*, 517 U.S. at 17; *Montana*, 503 U.S. at 447-448, 463-464.

In any event, the one-person-one-vote principle has no bearing on who can vote for members of the House of Representatives, contra Br. in Supp. of Compl. 34. Congressional districts are drawn with the goal of equalizing the "population" in each district, not the number of voters. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964); see also *Wesberry*, 376 U.S. at 13 (Framers intended to apportion Representatives based on "the number of the State's inhabitants"). Indeed, the Framers of the Fourteenth Amendment specifically rejected proposals to base representation on the number of voters in each State and instead rested representation on population. See Cong. Globe, 39th Cong., 1st Sess. 1256. Thus, children, felons, and lawful permanent residents who cannot

vote are counted for apportionment and redistricting purposes, and women were counted even in States where they lacked the franchise before the Nineteenth Amendment. Plaintiffs offer no principled reason why counting nonimmigrant aliens who cannot vote is impermissible, while counting other individuals who likewise cannot vote is not.[10]

C. If This Court Grants Leave To File, It Should Permit Dispositive Motions

This Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented," and to that end the Court will dispose of antecedent legal questions at the earliest stage "feasible." *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973). As set forth preliminarily in this brief, some aspects of plaintiffs' standing and, to the extent the claims are justiciable, the merits would be susceptible of resolution on a motion to dismiss, which would discuss those issues at greater length. (As discussed above, for plaintiffs to actually prevail would likely require factual proceedings before a Special Master.)

Therefore, if this Court concludes that plaintiffs' claims are sufficiently substantial to warrant allowing them to proceed in this Court rather than a district court, it should permit the defendants to file a motion to dismiss. See *Montana* v. *Wyoming*, 552 U.S. 1175

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[10] In fact, although alien voting in federal elections is now prohibited, see 18 U.S.C. 611, some States have previously permitted aliens to vote in state and federal elections. See *Pope* v. *Williams*, 193 U.S. 621, 622-623 (1904); *Minor* v. *Happersett*, 88 U.S. 162, 177 (1874). See generally Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993).

(2008); *New Hampshire* v. *Maine*, 530 U.S. 1272 (2000); *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999).

CONCLUSION

The motion for leave to file should be denied. If the Court grants the motion, it should permit the defendants to file a motion to dismiss.

Respectfully submitted.

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