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.
Appellees.

On Appeal from the United States District Court
For the District of Columbia

BRIEF OF NATIONAL REPUBLICAN LEGISLATORS ASSOCIATION, LOCAL GOVERNMENT COUNCIL, DR. ALAN HESLOP AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTERESTS OF AMICI CURIAE [1]

The National Republican Legislators Association is a voluntary group of elected members of state legislatures. Its membership includes representatives from legislative chambers across the nation. Its interest is in the fair and equitable distribution of political authority within the United States and within the boundaries of each state. Many of its members are active participants in the crafting of representational districts. Its redistricting part of the apportionment process is dependent upon the timely receipt of accurate data from the Census Bureau.

The Local Government Council is a non-profit, non-partisan, educational organization dedicated to promoting pro-business, free-market, and traditional values public policies. LGC is associated with over 1,700 individuals from 38 states who share a desire to keep government small and support Constitutional principles. LGC's interest is that local government officials have access to timely and accurate census data, that can be used for redistricting for counties, cities, towns, school districts and other local government jurisdictions.

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[1] All parties in this matter have consented to the filing of this Amicus Curiae Brief, as evidenced by letters of consent lodged with the Clerk. This brief was not authored in whole or in part by any counsel for a party. No person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

Dr. Alan Heslop is the Director of the Rose Institute of State and Local Government at Claremont McKenna College. He is the Rose professor of government at the same institution. He has written extensively on issues affecting representation and has also served as a consultant for numerous jurisdictions regarding the drawing and redrawing of district lines. He is closely familiar with the ways in which census data are used in computerized districtings and redistrictings and has experience in working with congressional representatives, state legislators and municipal officials in such processes.

Both as a political scientist and as someone concerned about the future health of local government, Dr. Heslop has taken a keen interest in proposals for different kinds of census sampling and enumeration techniques**.** In this work, Dr. Heslop has become very familiar with the uses and misuses of different kinds of census information.

SUMMARY OF THE ARGUMENT

We recognize the Constitutional imperative of the federal census as a means by which peaceful and periodic transfer of political power is accomplished in America. The Framers of the Constitution knew about the temptations to accumulate and hold political power and provided numerous institutional safeguards to keep such temptations away from participants in our governing process. The very real potential exists that the numbers from the 2000 census for the apportionment process, including redistricting, may be subject to manipulation to further partisan goals. We view with alarm a plan to deliberately not count at least 10% of the nation's population and to add virtual persons to, or subtract real persons from, the census count, as being violative of Article 1, ' 2, U.S. Constitution.

The terms reapportionment and redistricting were used by this Court and Congress synonymously throughout the 1950s, 1960s, and 1970s. Therefore, the issue before this Court is not only the method that the Census Bureau may use to determine the population data for the division of Congressional representatives between the states, but also the population data for representation districting. A historical and practical reading of the Census Act leads inevitably to the conclusion that data for the redistricting part of the reapportionment process must not be based on estimates and polls.

Furthermore, we are gravely concerned that, under the Census Bureau's plan, those responsible for drawing the boundaries of representative districts within each state and other political subdivisions, including these Amici, will be unable to create legitimate representative districts, either in a timely fashion or of equal population as mandated by a generation of this Court's reapportionment jurisprudence.

I. THE FRAMERS OF THE CONSTITUTION WERE AWARE OF THE POTENTIAL FOR MANIPULATION OF CENSUS COUNTS FOR POLITICAL GAIN AND INSTITUTED SAFEGUARDS TO ASSURE AN OBJECTIVE ENUMERATION.

While we can never know with absolute certitude what each of the Framers of our Constitution had in mind when the phrase “actual enumeration” was used, their probable understanding of the history of census taking provides the logical starting point for any analysis.

Historically, a census had been undertaken by one of two basic means. First was an effort to catalogue every person, or at least persons meeting certain criteria, e.g., males over a certain age. The second general means of determining the size of the population was to count a small subset of the total population in order to estimate the size of the overall population.[2]

The notion of institutionalizing a complete nominal enumeration,[3] or a head count, was not unknown at the time of the Constitutional Convention. However, it was not standard practice for many governments. "It is commonly thought that the idea, as well as the execution, of an enumerative census was started by the United States in 1790. The truth is that the idea of a complete enumerative population census was then by no means novel." Wolfe at 357.

"The earliest medieval record of any importance is the Domesday Survey made in England at the order of William the Conqueror in 1083-1086 ." Id. at 361. The "names of property owners were recorded" in the famous Domesday Book. Id.

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[2] A. B. Wolfe, Journal of the American Statistical Association, Vol. 27: December 1932, 357-369 passim, (hereinafter "Wolfe"). See also City of New York v. Department of Commerce, 739 F. Supp. 761, 762 (E.D.N.Y., 1990) (discussing how Christianity was "founded in a stable - thanks to the census").

[3] "A population census, in the correct, and specific sense, is a direct enumeration, preferably on a set date, and by name of each individual in the census area. A census so made is both enumerative and nominal." Wolfe at 357.

"Lively interest in quantitative data on population was evinced during the eighteenth century in France and also in England. In both countries, suggestions for national enumerations began to be made by the middle of the century." Id. at 366. More than a century before the Convention in 1662, John Graunt, known as a father of statistical sampling, published the first population estimate of London based on statistical analysis.[4] "In 1753, Thomas Potter introduced a bill in Parliament providing for a general enumeration." Wolfe at 368.

A Frenchman, LaPlace, proposed a method in 1786 of "taking a precise population, but only at a few given places in a country."[5] His method of counting was by enumeration, "carefully enumerating at a given time, the inhabitants of several communities." Accuracy and statistical adjustment were key concerns. LaPlace confirmed that the accuracy of the ratios used to estimate the overall population would be "more accurate as the enumeration is more extensive." Stigler at 164. This method was used in France, in 1802, but was abandoned later, being replaced by full counts nationwide, due in part to the concern about the representativeness of the sample communities. Stigler at 164.

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[4] Philip Kraeger, "New Light on Graunt," Population Studies, Journal of Demography, Vol. 42, No.1, (Mar. 1988) p.129.

[5] Stephen M. Stigler, The History of Statistics – The Measurement of Uncertainty before 1900, Belknap Press, Cambridge, Mass., (1986) p. 164 (hereinafter "Stigler").

In America, before the Constitutional Convention, "several of the states composing the young Republic had formed the habit of making frequent enumerations of their inhabitants during their existence as colonies."[6] An awareness of the difference between different forms of censuses, statistical estimates and an actual enumeration can therefore be reasonably assumed.

The method that many American states used prior to the Philadelphia Convention to determine their population is unclear. Such censuses were apparently undertaken without sufficient procedural safeguards, as evidenced by the disparities in the numbers available at the Convention.[7] The potential for manipulation of the process by the individual states was on the minds of several delegates.

The Framers provided for a number of institutional safeguards against manipulation "of the respective numbers." First, the Constitution provided that an institutionally neutral entity, the Federal Government, undertake the actual enumeration. Edmund Randolph, of Virginia, observed that

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[6] A Century of Population Growth, Bureau of the Census, Washington, DC (1909), p.2.

[7] Several sets of population numbers and contribution quotas were available at the Convention. Max Farrand, ed., The Records of the Federal Convention of 1787, Revised Edition in Four Volumes, Yale University Press, New Haven (1966) (hereinafter "Farrand"). Farrand at I:190; I:573-4; III:253; IV:160-1. Estimates for colonial censuses were "based on materials ranging from relatively complete enumeration… to fragmentary data…" Historical Statistics of the United States, 1789-1945, Bureau of the Census, Washington, DC. (1949) p. 16. The debates reflect several discussions about the numbers and attempts to alter the initial representation of particular states. Farrand at I:561, II:63, II: 623-24.

"the census must be taken under the direction of the general legislature [Congress]. The states will be too much interested to take an impartial one for themselves." Farrand at I:580. However, this precaution alone did not provide a sufficient safeguard in the minds of the delegates because "… the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree, on the disposition, if not on the cooperation of the states …".[8]

To solve this problem of having an interested party involved in preparing the numbers by which political power would be apportioned, the Framers' second step was to link representation with direct taxation. This coupling formed an important disincentive to the states against manipulation of the numbers. As Madison observed, "[w]ere their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality."[9]

As stated by another member of the convention, "by connecting the interest of the states [representation in the House] with their duty [payment of direct taxes], the latter would be sure to be performed." Farrand at I:197 (emphasis added). However, since the adoption of the Sixteenth Amendment in 1913, whatever financial disincentive had

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[8] Jacob E. Cooke, ed., The Federalist, Wesleyan University Press, Middletown, CT (1961) p. 371, (hereinafter "the Federalist").

[9] The Federalist at 371-2.

existed at the state and local level was lost to the footnotes of history.

The Framers' third affirmative step to limit the potential for political manipulation was the "actual enumeration" requirement. The appellants essentially seek to remove this critical Constitutional safeguard -- the actual count of inhabitants -- from the Framers' plan. Freed from the requirements of an actual enumeration or count, the census could become just a tool to further the political ends of its designers, the political party that controls the executive branch.

The Solicitor General contends that "actual enumeration" is not meant to restrict Congress' method of determining the number of persons to an actual count. The term census rather than "actual enumeration" was used throughout most of the Convention. The term "actual enumeration" was introduced to the convention from the Committee of Style in the final week of the Convention.

The Solicitor General states that "[n]o delegate suggested that the Committee of Style's use of the words 'actual enumeration' was intended to affect the scope of Congress's authority…" See Appellants' Brief at 44. There is no record of the debates for the Committees of Style or Detail. Generally, the records of the convention are silent on this issue of drafting history, but the argument in the Solicitor General's brief makes an unsavory soup of conclusions from the rocks and waters of silence and a lack of records.

Considering the clearly expressed concerns of the Framers about the manipulation of population numbers, it is logical to conclude that the term "actual enumeration" was purposefully used. In light of the different types and forms of censuses likely known to the Framers, it is equally as logical to conclude that actual enumeration was meant to mandate an actual count of inhabitants.[10] The interpretation the Solicitor General proposes would render the words "actual enumeration" as meaning exactly the same as census.

When the language of the draft Constitution was changed from the more general term "census" to the more specific term "actual enumeration," standard interpretative analysis demands that the change be given meaning.[11] What is clear from the Federalist Papers and the debates at the Philadelphia Convention is an overriding concern for a permanent and precise standard for representation that would afford objectivity and avoid conjecture.

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[10] A contemporaneous definition of the term also supports this conclusion. The word "enumeration" is defined in Samuel Johnson's 1773 dictionary as "[t] act of numbering or counting over; number told out." 1 Samuel Johnson, A Dictionary of the English Language (1773).

[11] See e.g., United States v. Wilson, 503 U.S. 329, 336 (1992) (noting the "familiar maxim that when Congress alters the words of a statute, it must intend to change the statute's meaning") (Citing Russello v. United States, 464 U.S. 16, 23-24 (1983)).

II. THE COMMERCE DEPARTMENT'S PLAN TO CONDUCT A LIMITED POPULATION COUNT AND TO STATISTICALLY ADJUST THAT RESULT CREATES THE POTENTIAL FOR SIGNIFICANT MANIPULATION

The Commerce Department's plan for the 2000 census to deliberately not count 10% of the nation's population and to adjust the initial numbers to reflect expected norms is subject to manipulation for political ends. This potential for manipulation is as clear in the 1990's as it was in the 1780's.

The Secretary of Commerce, in his statement announcing his decision to not adjust the 1990 census results, pointed out the multiple scenarios which would have been possible by adjustment of the 1990 census counts:

> Consider the results of two possible adjustment methods that were released by the Census Bureau on June 13, 1991. The technical differences are small, but the differences in results are significant. The apportionment of the House of Representatives under the selected scheme moved two seats relative to the apportionment implied by the census, whereas the modified method moved only one seat.[12]

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[12] Statement of Secretary Robert A. Mosbacher on Adjustment of the 1990 Census, (July 15, 1991. Federal Register, vol 56:140, p.33582, (hereinafter "Mosbacher"). "One expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Id. at 33582.

Adjustment, being based upon modeling,[13] by its very nature implies that assumptions are made. Assumptions themselves imply logical deductions, but also subjectivity. Subjectivity in such a volatile setting, with political stakes so high, will result in a succumbing to partisan temptation, absent the repeal of the nature of Man. "What is unsettling, however, is that the choice of the adjustment method selected by the Bureau officials can make a difference in apportionment, and the political outcome of that choice can be known in advance." Mosbacher at 33582.

In 1991, the Co-Chairman of the Special Advisory Panel established by the Secretary concluded that:

> *It is certainly not hard to imagine that such a process, especially when cloaked in the mysteries of statistical complexity, could easily be corrupted and manipulated, particularly if it should become accepted practice and not subject to rigorous public examination….*[14]

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[13] Modeling has been defined as "using a simplified or idealized description or conception of a particular system, situation, or process… that is put forward as a basis for calculations, predictions, or further investigations. Oxford English Dictionary Second Edition, Clarendon Press, Oxford (1989) p. 941.

[14] V. Lance Tarrance, Jr., Co-Chairman, Special Advisory Panel, Summary Report to the Secretary of Commerce (June 14, 1991) p. 29 (emphasis in the original) (hereinafter "Tarrance"). See also Mosbacher at 33599.

There are numerous different ways to sample and adjust the census. These different ways will distribute political power differently between various groups. Each potential sampling and adjustment design has its own set of debatable assumptions, but predictable outcomes. The appellants have argued that we must trust the impartial expertise of the Census Bureau and the Department of Commerce. Yet, the Framers of our Constitution wisely put their faith in strict structural limits and not in any belief in the benevolent nature of man. "[F]rom the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary, we know they will always when they can rather increase it." Farrand at I:578-9.

Amici pray for the indulgence of the Court to consider the operational elements of the Commerce Department's plan for the 2000 census. It is important for this Court to understand exactly what this plan will entail for the 2000 census and how it differs significantly from the 1990 census and all other prior censuses in U.S. history.

Under the Commerce Department's plan, the 2000 census will become only a partial census completed through estimation and adjusted through polling and modeling. The estimation will attempt to account for the Bureau's intentional undercount of 10% of the housing units and the modeling will attempt to adjust for the under counting and over counting which differs among population subgroups.

As part of a consent decree in litigation before the 1990 census was taken, there was an option before the Secretary of Commerce either to adjust, or to let stand, the actual enumeration numbers. Following the actual enumeration, the Secretary carefully reviewed the evidence

regarding an adjustment of the 1990 census and, in July 1991 decided not to adjust.

This review option is a critical distinction between the Department of Commerce's plan for the 2000 census and the 1990 census. For the 2000 plan there will not be even an attempt at a 100% headcount which might be adjusted retroactively. The only physical count for 2000 will be up to 90% in each census tract. If the Department of Commerce is permitted to implement its plan, the 1990 census will have been the last full census conducted to apportion political power in our national republic.[15]

III. THE PROHIBITION ON SAMPLING IN TITLE 13 SECTION 195 ALSO APPLIES TO THE DISTRICTING PART OF THE APPORTIONMENT PROCESS

Apportionment is a two-step process involving an initial allocation of representatives followed by the secondary construction of districts. Apportionment without districting is incomplete. This was and still is the widely prevalent understanding of apportionment. Often, this Court, lower federal courts, state legislatures, scholars and Congress used

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[15] The Solicitor General argues that the House of Representatives' interpretation of actual enumeration as requiring an actual count "cannot be reconciled with historical practice" and that each person was not always individually personally counted. See Appellants' Brief at 47. There is one element of these historical practices which distinguishes them fundamentally from those proposed by Appellants. Aside from an isolated emergency case after the 1970 census, in each of these non-individual headcount practices, there has always been some physical, tangible evidence found to account for each individual number.

the term apportionment and redistricting synonymously through the 1950's, 1960's 1970's and 1980's.

The term apportionment has been used in the inclusive sense by this Court to encompass districting throughout the development of this Court's reapportionment jurisprudence. The apportionment revolution was, of course, a redistricting revolution, starting with Wesberry v. Sanders, 376 U.S. 1 (1964), where this Court invalidated the Georgia "apportionment" of congressional districts. This Court has consistently used the term apportionment to include districting, by directly and unequivocally referring to the drawing of district boundaries as apportionment. While each of the decisions in the revolution ostensibly ruled on "apportionment," in fact, the decisions dealt with the districting part of the apportionment process.[16]

Also, numerous lower Federal Court cases evidence that the common usage of the term "reapportionment" incorporated "redistricting."[17] Federal courts properly have

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[16] See Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm'n for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly Of Colo, 377 U.S. 713 (1964). See also White v. Weiser, 412 U.S. 783, 784 (1973); Gaffney v. Cummings, 412 U.S. 735, 735 (1973); Davis v. Bandemer, 478 U.S. 109, 113 (1986); Karcher v. Daggett, 462 U.S. 725, 727 (1983); Shaw v. Reno, 509 U.S. 630, 633 (1993).

[17] See, e.g., Burns v. Gill, 316 F. Supp 1285, 1293 (D. Haw. 1970) (approving of a "two-tier apportionment plan" whereby all representatives and senators initially would be apportioned among basic island units and thereafter district lines would be drawn within the islands themselves); Taylor v. McKeithen, 499 F.2d 893, 910-911 (5th Cir. 1974) ("[n]ot the

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not distinguished apportionment and districting and in fact, have historically subsumed redistricting within the overall process of apportionment.[18]

Another way to understand the analogous usage of these terms is to view them from the perspective of state legislators. Today 47 states use some form of the term "apportionment" in their statutes that deal with the drawing of representative districts.[19] Of course, none of these states

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least of the problems that would be created by representative apportionment is that the cartographer…cannot draw his meandering lines"); Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 688 (D.C. Cir. 1991) (citing regulation that defined redistricting as "any effort, directly or indirectly, to participate in the revision or reapportionment of a legislative, judicial or elective district at any level of government, including the timing or manner of the taking of a census"); Johnson v. Mortham, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (finding only a "technical difference" between reapportionment and redistricting).

[18] "Fundamentally, redistricting versus reapportionment is a distinction without a difference," Gorin v. Karpan, 775 F. Supp.1 430, 1443 (D. Wyo. 1991). "Congressional Districts were malapportioned." Dixon v. Hassler, 412 F. Supp. 1036, 1038 (WD Tenn.), affirmed, 429 US 934 (1976); "Apportionment of seats in the House of Representatives," Boyer v. Gardner, 540 F. Supp. 624, 625 (D.N.H. 1982); "reapportionment between censuses…" Westwego Citizens for Better Gov't v. Westwego, 906 F.2d 1042, 1045-46 (5th Cir. 1990); "the County has adopted its current reapportionment plan…" stating that fragmentation has been a "goal of each redistricting scheme since 1959", Garza v. County of Los Angeles, 918 F.2d 763, 773 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

[19] Only Illinois, Kentucky and Washington use the term redistricting to the exclusion of apportionment.

actually apportion representatives between governmental units. They construct representational districts. State legislatures continue to use the terms interchangeably. The National Conference of State Legislatures (NCSL) has a subgroup of legislators interested in these issues, that only two years ago changed its name from the Reapportionment Task Force to the Redistricting Task Force.

A listing of the most preeminent scholars with their works shows the use of the term apportionment interchangeably with, or to include, districting. Probably the most generally recognized work in this area is Democratic Representation: Reapportionment in Law and Politics by Robert G. Dixon, Jr. (hereinafter "Dixon"). Clearly Dixon's view is that redistricting is a subset of reapportionment.[20]

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[20] See Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics, Oxford University Press, New York, (1968) p. 3 (noting "reapportionment revolution"). Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation, Twentieth Century Fund, New York (1965) p. 6 ("In short, it appears that the apportionment and districting functions in the state legislative process will be merged into a single task to be performed by each legislature. "). Bruce E. Cain, The Reapportionment Puzzle, University of California Press, Berkeley (1984) p.xi; (noting that [r]eapportionment is a murky and dimly perceived process for most political observers"). ("The district lines drawn by reapportionment…") Id. at 1.; Stephen J. Thomas, "The Lack of Judicial Direction in Political Gerrymandering: An Invitation to Chaos Following the 1990 Census;" Hastings Law Journal, Vol.40:1067 (July 1989) p. 1067 ("Gerrymandering may be accomplished through a variety of methods, including malapportionment."); Gordon E. Baker, "The Unfinished Reapportionment Revolution," Political Gerrymandering and the Courts. Bernard Grofman, ed., Agathon Press, New York (1990) p. 25 ("the problem of malapportionment in the form of vast population disparities among districts.") David L. Anderson, "When Restraint Requires Activism: Partisan Gerrymandering and the Status (continue)

The congressional understanding of the interchangeability of apportionment and redistricting is reflected in the passage of P.L.94-171, which provided for the distribution of block-level population data for districting, 13 U.S.C. '141 was amended in 1975 to include “legislative apportionment” as part of the section heading.

Title 13 U.S.C §195 not only prohibits sampling for apportionment, but redistricting as well. The addition of specific redistricting language in 13 U.S.C. §141(e)(2) does not affect this analysis. The Census Act was amended in 1976 in substantial part to allow for a mid-decade census to provide timely statistical information for allocation of funding. Congress would have perceived no need to amend 13 U.S.C. '195 to expressly expand the prohibition on "sampling" data for apportionment, because there can be little doubt that Congress in 1976 would have understood 13 U.S.C. '195 to already prohibit "sampling" data in redistricting.

When analyzed in the context of this general understanding of apportionment, it is reasonable to view the 13 U.S.C. §195 prohibition on the use of sampling for the purposes of apportionment, as applying with equal force to the apportioning of representatives among the states (apportionment) *and* to the revision of representation districts (redistricting).

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Quo Ante," Stanford Law Review, Vol. 42:1549 (July 1990) (noting “that the Court should withdraw from reapportionment reform").

Section 13 U.S.C. '195 prohibits data from sampling for congressional apportionment. As the above review indicates, this use of the term apportionment most logically extends to redistricting as well. Congress intended sampled data to be used in only two limited circumstances: (1) to allow the so-called "long form" data to be collected from a sample of the entire population; and (2) to allow the use of sampling for a mid-decade census to provide more current data for federal aid distribution in between censuses. 13 U.S.C. '195 was amended to strengthen the intent of Congress to use sampling for supplementary data. 13 U.S.C. '141 was amended to allay fears that any more recent data, no matter what the level of accuracy, could be used to challenge any apportionment or districting scheme.[21] Read together, it is clear that Congress intended that sampled data be used in neither step of the apportionment process.

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[21] Congressional Record, 94th Congress (April 7, 1976) p. 9786-9795, passim.

The silence of 13 U.S.C. '195 with respect to the term redistricting reflects the interchangeability of the terms at the time. Indeed, this interconnection explains the silence. While the concepts of reapportionment and redistricting share a common base of population data, the timeframes are distinct. 13 U.S.C. '141(e)(2) addresses the time element of both events. The language clarified that the mid-decade census, based upon sampling, could not be used either to invalidate the current apportionment or to enable challenges to current redistricting plans.

IV. FOR CONGRESS TO HAVE PROHIBITED THE USE OF SAMPLING IN STATE-LEVEL APPORTIONMENT, BUT TO HAVE ALLOWED ITS USE AT THE DISTRICTING LEVEL WOULD BE IRRATIONAL.

Whatever impact adjustment would have on the apportionment of political representation among states, the impact on the apportionment process *within* states would be much larger. The reasons behind this statement require only the most basic understanding of sampling or polling as a statistical theory.

Many national surveys or polls commonly note that the reported percentages are plus or minus 3-4% for national analysis. However, estimates of sampling error for lower levels of geography will be much higher. Whereas several thousand respondents may be representative of the nation as a whole, to provide a representative cross-section of even a state in a national survey requires many more respondents.

As a basic statistical principle, the relative degree of sampling/polling error increases as the size of the population universe decreases.[22]

The use of sampling to improve the accuracy of the census, if valid at all, can only be true for the highest level of geography. As one moves down the geographic hierarchy, the numbers become less accurate. There is basically an inverse relationship between the population size of a unit (state, county, city or block) and the accuracy of the data from sampling.[23] It was exactly this concern which was a basis for the Secretary's concern for the 'distributive accuracy' rather than 'numerical accuracy' in his decision to not adjust the 1990 Census.[24] Confidence that any sampling/poll will accurately represent the actual numbers, which would have been obtained by a full traditional count, at the block level disappears.[25]

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[22] For example, an error of one person out of 100 persons is a 1% error. An error of one person out of 10 persons is a 10% error.

[23] Note that the Bureau's plan involves the use of sampling in two phases, the Non-Response Follow-Up (NRFU) and the Integrated Coverage Measurement (ICM). While the ICM phase is designed to improve accuracy, the Bureau does not claim that accuracy is a concern for NRFU, which is primarily "to save time and money." General Accounting Office, GAO/GCD-97-142, Progress Made on Design, But Risks Remain (July 1997) p. 44, (hereinafter "GAO"). This element of the plan for 2000 ignores the fact that the most accurate data are obtained directly from respondents, which can be only collected through the traditional means of personal contact. GAO at 26.

[24] Mosbacher at 33584.

[25] The Secretary expressed a further concern about adjustment for small areas. "As the population units get smaller, including small and (continue)

A judicial rule of statutory construction is that it is presumed that a legislative body enacts rational legislation.[26] Given the disproportionally larger impact on redistricting within a state, it would be absurd to prohibit the use of sampling for apportioning seats between the states, but to allow it for representative redistricting. The only rational analysis is that if sampling/polling cannot be legally used for the division of congressional seats between states, it cannot be used for the subset of that process, representative redistricting within a state, where its problems and their effects are indisputably larger.

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medium sized cities, the adjusted figures become increasingly unreliable." Mosbasher at 33583.

[26] "Legislation in question is presumed to be rational[.]" Peterson v. Lindner, 765 F.2d 698, 705 (7th Cir. 1985) (citing Hodel v. Indiana, 452 U.S. 314, 322 (1980)).

V. THE COMMERCE DEPARTMENT'S PLAN FOR THE 2000 CENSUS IS SO COMPLEX AND SUBJECT TO INEVITABLE INADVERTENT ERROR THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT LEGALLY SUFFICIENT CENSUS DATA WILL NOT BE AVAILABLE FOR THE DRAWING OF REPRESENTATIVE DISTRICTS IN TIME FOR THE 2001 AND 2002 ELECTIONS

Experience provides evidence of this problem. Review the situation following the 1990 census. The Bureau given the luxury of time to review its 1990 post enumeration survey (PES)[27] revised the national undercount rate downward in July 1992. "As a result of an error in computer processing, the estimated national overcount rate of 2.1% was overstated by 0.4%. ...[a]fter making other refinements and corrections, the national undercount is now estimated to be about 1.6%." Report of the Committee on Adjustment of Postcensal Estimates, Bureau of the Census, Aug. 1992, p. 15. This overstatement revolved around coding errors for *only 2,000 households* in the 1990 post enumeration survey. However, the impact of this error, from these few households, was enormous.[28] It affected the estimate of the national undercount by about a million persons.

This inadvertent error, which reduced the national undercount rate from an estimated 2.1% to 1.6%, would have changed the apportionment of congressional seats affecting

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[27] The PES was a large poll of 165,000 housing units taken after the 1990 Census designed to measure the coverage of the census.

[28] Howard Hogan, "The 1990 Post-Enumeration Survey Operations and Results." Journal of The American Statistical Association, Vol. 88:423 (September 1993) p. 1047, 1054.

several states. For the reasons mentioned above, the effect of this error would have been greatly magnified in the redistricting part of the apportionment process.

The modeling schemes proposed by appellants for the 2000 plan will result in each housing unit in the nationwide survey having an impact far beyond its own infinitesimal share of 1 out of 100+ million housing units. Under a traditional count, the total population for any level is merely the aggregate of the data from all housing units. Under appellants' plan, the totals for every jurisdiction are impacted by the representativeness of the sample used in the poll. Bad samples produce flawed numbers.

Considering the complexity of the appellants' plan, with its nationwide survey component much larger than 1990, it is reasonable to conclude that the Bureau can not implement this *Rube Goldbergesque* machine in a timely manner without some significant errors creeping into the process. As one prominent statistician recently observed, "[t]he results of adjustment are highly dependent on somewhat arbitrary technical decisions. Furthermore, mistakes are almost inevitable, very hard to detect, and have profound consequences." Lawrence D. Brown, et al., Statistical Controversies in Census 2000, Technical Report, Department of Statistics, U.C. Berkeley (October 1998) p. 18.

VI. STATE AND LOCAL OFFICIALS CHARGED WITH THE CREATION OF NEW REPRESENTATIVE DISTRICTS WILL BE UNABLE TO CREATE DISTRICTS WHICH MEET A GENERATION OF THIS COURT'S EQUIPOPULOUS REAPPORTIONMENT JURISPRUDENCE WITH THE USE OF ESTIMATION AND POLLING DATA

Both the estimation and modeling phases will be based upon sampling, or to use the more colloquial term - polling techniques. These will have known error rates. Sampling or polling error results from the fact that only a part of the entire population is asked questions. The principal issue for any poll is whether the sample chosen is an appropriate sample that is representative of the entire population.

The use of polling and estimation in the census results in a measurable error. The error reflects the fact that the sample which was used was only one of many possible samples and may not have been representative of the entire universe of persons. This error measurement quantifies the degree of difference between the numbers generated by a polling technique versus numbers generated by a complete count. The smaller the number of persons in the sample or poll, the larger the potential for a greater percentage of error.

Herein lies a problem with respect to the drawing of district boundaries and equal representation. This Court has repeatedly made clear that in order to comply with Article 1, ' 2, U.S. Constitution states must draw congressional districts as nearly equal in population "as is practicable."[29]

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[29] Wesberry, 376 U.S. at 8.

(continue)

This Court and lower federal courts have invalidated many congressional redistricting plans with relatively small population variances. See e.g., Karcher v. Daggett, 462 U.S. 725, 742 (1983) (striking down a New Jersey plan with a population deviation of 0.6984%). Following the 1990 census, 10 states enacted congressional apportionment plans with a population deviation of 0 or 1 person[30] and although this Court has generally afforded states greater latitude in creating state legislative districts, states are still constitutionally required to make "an honest and good faith effort" to create population equality among districts. Brown v. Thomson, 462 U.S. 835, 842 (1983). Given this Court's limited tolerance for population deviation, if the data used to construct the districts have a known error rate larger than permitted population deviations, how is the line drawer to proceed?

The results of the 1995 Test Census held in Oakland, California are illustrative of the problem. For a small census block in Oakland, a reported estimate of 100 persons would mean that a full count would have found between 72 and 128 persons, an error due to sampling of 28%.[31] What is the population figure to be used for city council redistricting?

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[30] Another six states only missed this status by a very few persons. 1990 Census Population and Housing Profile: Congressional Districts of the 103rd Congress, Bureau of the Census, Washington, D.C., CPH-L117, (n.d., 1993) p. 1-8.

[31] This estimate reflects a 95% confidence level. 1995 Census Test, Census Block Level Data, CDRom, Bureau of the Census, Washington, DC, CD95-CENTEST (August 1996) passim.

For its test Census, the Bureau calculated the average error for the census blocks as follows: 18.3% Paterson, New Jersey, 12.6% for Oakland, and 25.2% for selected Parishes in Northwestern Louisiana. These error rates were termed "quite substantial" by the Bureau. Martha Farnsworth Riche, Report to Congress, The Plan for Census 2000, revised August 1997, p. 45-8, (hereinafter “Riche”).

The relevant level for error analysis is not just the completed congressional district, as this Bureau now maintains.[32] If one is crafting local representation districts, each census block's error must be considered.[33] The census block is the building block for most representative districts around the nation. It is also the lowest common denominator for the entire census. If the lowest level data are suspect, equal population local representation districts cannot be drawn with this data.[34] Local officials will be faced with the use census block data for their city, town or township, which they may know, from direct personal observation, are wrong.

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[32] Riche at 46-7.

[33] "Margins of error are critical for small areas." Commerce News, CB91-214 (June 5, 1991). Adjustment would be implemented at the block level.

[34] These error rates may be compounded in individual representative districts. The error rate in some blocks may reflect an undercount, in others an overcount. These errors might “balance out” nationally if the underlying assumptions and the execution are correct. They will not “balance out” in representative districts. Redistricting is not a random process. Blocks are frequently specifically assigned to a district based upon demographic characteristics. Districts are typically small enough and sufficiently homogenous that they may well be composed substantially of blocks with the same kind of error, magnifying the population deviation.

The Summary Report to the Secretary of Commerce before the decision to not adjust in July 1991, stated the problem as follows: "[t]he hard fact is that the numbers produced by the present adjustment procedures are only *estimates* and, at very small geographical levels, such as city blocks, estimates will not be 'accurate' and may not be even 'closer to the truth'." Tarrance at 10. (emphasis in the original).

The report emphasized the inherent problems with using sampled data. "Statistical sampling procedures produce good results only when the sample is large; the smaller the sample, the less accurate the estimate." Noting that many users of census data rely on data for small geographic areas, the report stated that this would be "where the ship called accuracy or 'closer to the truth' will founder on the shoals of reality." Id.

It takes no active imagination to foresee the numerous pieces of litigation that will be spawned by using sampling in the redistricting process. How is a line drawer to reconcile these significant error rates? What data should any court use when reviewing future redistricting cases?[35] The appellants' plan for 2000 will aggravate uncertainty in the already complex and litigious apportionment process. The timeframe under which new districting plans must be enacted is extremely tight in several states holding fall 2001 legislative elections. These plans must be finalized a few short months

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[35] While equal representation has frequently been measured by overall population deviation among districts, alternative perspectives are possible. See Garza v. County of Los Angeles, 918 F.2d 763, 778 (1990), Judge Kocinski concurring and dissenting.

after the block-level data first become available in April of 2001 and include states which must submit plans for pre-clearance under Section 5 of the Voting Rights Act.

An "actual enumeration," based upon physical evidence of the existence of persons, and not conjectural estimates,[36] provides the best available data for the creation of representational districts. Millions of persons will be counted as some fraction above or below a whole person.[37]

CONCLUSION

Amici share the concern of the Framers that partisan manipulation of the census should be avoided. The federal census is the largest participatory event of our American government. The goal should be to encourage every American to be counted, not discounted or left uncounted.

Amici pray this Court in the interest of judicial economy, as suggested by the Solicitor General, to resolve the Constitutional issues with respect to the "actual enumeration" of the "respective numbers." If the present litigation is resolved solely on the grounds of statutory construction and is limited solely to the apportionment of congressional seats between the states, there will be even more litigation following the 2000 census with respect to the redistricting part of the reapportionment process. Clearly,

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[36] This Court has held that "if a state does attempt to use a measure other than total population or to "correct" the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner." Karcher 462 U.S. at 732, n. 4 (citing Kirkpatrick v. Preisler, 394 U.S. 526, 534-35 (1969)).

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[37] Mosbacher at 33636.

this Court would not wish to create a circumstance where the legal sufficiency of the data used for the creation of thousands of representative districts across the nation, at every level of political geography, is a continuing unanswered question.

Respectfully submitted,

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