No. 22O140 (Original)

In the Supreme Court of the United States

STATE OF LOUISIANA AND JAMES D. CALDWELL, ATTORNEY GENERAL,

Plaintiffs,

v.

JOHN BRYSON, SECRETARY OF COMMERCE, ROBERT GROVES, DIRECTOR, UNITED STATES CENSUS BUREAU, AND KAREN LEHMAN HAAS, CLERK, UNITED STATES HOUSE OF REPRESENTATIVES,

Defendants.

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE A COMPLAINT

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QUESTIONS PRESENTED

1. Whether the Apportionment Clauses of Article I and the Fourteenth Amendment prohibit the counting of non-immigrant foreign nationals for purposes of apportioning seats in the United States House of Representatives.

2. Whether the counting of such persons for apportionment purposes, which leads to disparities in the number of voters per House district and deprives citizens of States containing few such persons of their right to equal and proportionate representation in Congress and the Electoral College, violates the requirement of Article I, Section 2, Clause 1, that Representatives be chosen "by the people of the several states."

3. Whether the counting of such persons for apportionment purposes, which dilutes the strength of a voter's ballot in States containing few such persons, denies that voter equal protection under the law as guaranteed by the Fifth Amendment.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For thirty years, Eagle Forum has consistently defended federalism and supported

[1] *Amicus* files this brief with consent by all parties, after providing timely written notice pursuant to Rule 37.2(a); the parties' written letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

American sovereignty. In addition, Eagle Forum has an active chapter in Louisiana (and all of the other affected States), the members of which will be directly affected by apportionment under the new census. For all of the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Plaintiffs State of Louisiana and her Attorney General in his individual capacity (collectively, "Louisiana") challenge the apportionment of seats in the United States House of Representatives by the Secretary of Commerce, the Director of the Census Bureau, and the Clerk of the United States House of Representatives (collectively, "Defendants") on the grounds that counting non-immigrant foreign nationals denies equal representation and dilutes voting rights of citizens of States – such as Louisiana, Missouri, Montana, North Carolina, and Ohio – that have relatively fewer such foreign nationals within their borders.

For much of this Nation's history, Congress did not regulate immigration, and neither the People nor the courts had to contend with issues raised by illegal aliens. Even after Congress began regulating immigration, the demographics of the issue remained either small enough or dispersed enough that the presence of illegal aliens did not disturb the rights of citizens to equal representation and voting rights under the Constitution. Specifically, as Louisiana explains, only with the 1960 or 1970 census did the presence of "unauthorized migrants" begin to become large enough to have a marked impact on

apportionment. Pls.' Br. at 28. Even as recently as the 1990 census, this Court found the data of dilution inconclusive in some instances. *U.S. Dep't of Commerce v. Montana,* 503 U.S. 442, 461-62 (1992); Pls.' Br at 13 n.6, Unfortunately, a trend that became noticeable a few censuses ago has become untenable under the current census.

Under the 2010 census, States have sufficiently higher and lower relative distributions of non-immigrant foreign nationals – and primarily of illegal aliens – that total population no longer approximates the eligible voting citizens, who are the "We the People" who formed this union and who, under its Constitution retain the power to govern it. As Louisiana demonstrates, the advent of States with significantly higher proportions of non-immigrant foreign nationals means that States with fewer such foreign nationals will lose representation and suffer diluted voting rights, vis-à-vis the citizens of States with more such foreign nationals.

CONSTITUTIONAL BACKGROUND

Article I, Section 2, Clause 2 of the Constitution provides that "[t]he House of Representatives shall be composed of members chosen every second year by the people of the several states." U.S. CONST. art. I, §2, cl. 2. As adopted by the Framers, 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, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons." U.S. CONST. art. I, §2, cl. 3. The

Fourteenth Amendment further provides that "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." U.S. CONST. amend. XIV, §2. That Amendment also provides for proportional reductions to reflect those who are – for various reasons – denied the right to vote:

> But when the right to vote at any election for … Representatives in Congress, … the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Id. Finally, Article I, Section 2, Clause 3 provides for the decennial census by "actual Enumeration … in such manner as [Congress] shall by law direct." U.S. CONST. art. I, §2, cl. 3.

In the voting context, the Equal Protection Clause of the Fourteenth Amendment provides the "one-person, one-vote" principle that seeks to equalize the value of individual votes across voting districts created by the States and their subdivisions. U.S. CONST. amend. XIV, §1, cl. 4; *Reynolds v. Sims,* 377 U.S. 533 (1964). Because the Fifth Amendment's

Due Process Clause includes a parallel Equal-Protection guarantee with respect to federal actions, U.S. CONST. amend. V, cl. 4; *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976), the Fifth Amendment provides the same one-person, one-vote protections with respect to voting-related actions by the federal Defendants here.

SUMMARY OF ARGUMENT

This litigation warrants the exercise of this Court's discretionary original jurisdiction for several reasons. First, this litigation presents issues of profound importance not only to the voters of the affected States but also to the entire Nation through the Electoral College that will determine the presidency (Section I.A). Second, the circuits are split on related issues of intrastate apportionment, with some deeming the choice between total population and voting-age citizen population a non-justiciable political question (Section I.B). Third, Louisiana does not have an adequate remedy in district court, both for practical reasons and because this Court's precedents are insufficient to guide a district court on the merits, even if it finds the matter justiciable (Section I.D). Finally, neither sovereign immunity (which the officer Defendants cannot assert) nor the political-question doctrine applies to deny jurisdiction (Section I.C). With regard to the latter, this Court has held that the Equal Protection principles at issue here provide the judiciary manageable standards with which to analyze claims like Louisiana's (Section I.C).

On the merits, all of Louisiana's claims have merit. First, Louisiana offers the more compelling

and historically accurate interpretation of the Constitution's apportionment clauses, particularly in light of the need to interpret those clauses consistently with the Constitution's Equal Protection guarantees (Section II.A). Second, U.S. CONST. art. I, §2, cl. 2's requirement for election "by the people of the several states" protects "We the People" – not every person passing through our borders, no matter how unlawfully or temporarily – from the vote dilution caused by the unequal distribution of illegal immigration across the several States (Section II.B). Finally, and parallel to the foregoing one-person, one-vote principles, the Equal Protection component of the Fifth Amendment's Due Process Clause provides the same vote-dilution protections that the Fourteenth Amendment's Equal Protection Clause provides (Section II.C).

ARGUMENT

I. LOUISIANA'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD BE GRANTED

This Court should grant Louisiana leave to file its complaint for several compelling reasons. At the outset, Louisiana's complaint raises profoundly important constitutional issues, both between the States themselves and between the States and the Federal Government. Moreover, Louisiana has no other adequate, alternate remedy to redress her injuries, and this litigation falls within this Court's original jurisdiction.

A. Louisiana's Motion and Complaint Raise Important Constitutional Issues that Only this Court Can Resolve

Louisiana's complaint raises profound issues, not only to the constitutional rights of the affected voters across a net swing of up to five congressional districts among eight States, but also to the political impact that that swing could have on the Electoral College and thus the presidency.

The steady divergence in the distribution of non-immigrant foreign nationals – and of primarily illegal aliens – between the States means that this Court no longer can rely on total population as an approximate surrogate for eligible voters. *See, e.g., Gaffney v. Cummings,* 412 U.S. 735, 746-47 (1973). Instead, while perhaps not as "grossly absurd" as the disparities between the total population and eligible-voting population that caused the Court to reject total population in *Burns v. Richardson,* 384 U.S. 73, 94 (1966), the disparities that Louisiana cites are nonetheless grossly unconstitutional under a one-person, one-vote analysis.

What's worse, the decision that Louisiana asks this Court to review comes from Executive-Branch political appointees, in a presidential election year that analysts anticipate will be a close election. While that does not disqualify the Defendants' handiwork, it does heighten the need for this Court's independent review. With respect to review, moreover, the Executive-Branch Defendants here cannot claim any deference on constitutional issues. While this Court often has deferred to administrative

expertise with respect to statistical methods on *how* to count, *see* Pls.' Br. at 33 (collecting cases), the question of *whom* to count is constitutional. Courts "are not obligated to defer to an agency's interpretation of Supreme Court precedent," *Univ. of Great Falls v. N.L.R.B.,* 278 F.3d 1335, 1341 (D.C. Cir. 2002), or the Constitution. *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997). Thus, before the administrative Defendants' actions can stand authoritatively, this Court must review them.

B. The Circuits Are Split on the Population to Use for Apportioning Legislative Districts

As Justice Thomas explained under the last decennial census, "as long as [it] sustain[s] the one-person, one-vote principle, [this Court has] an obligation to explain to States and localities what it actually means." *Chen v. City of Houston,* 532 U.S. 1046 (2001) (Thomas, J., dissenting from the denial of *certiorari*). Without defining the "critical variable" of which population to use in the one-person, one-vote analysis, that analysis will have "little consequence." *Id. Amicus* Eagle Forum respectfully submits that this Court must address this issue, now that voting-age citizen populations and total populations have diverged.

Significantly, the circuits are split on the question. In *Chen* and *Daly,* the Fifth and Fourth Circuits held that the choice between the total population versus the voting-age citizen population is unreviewable. *Chen v. City of Houston,* 206 F.3d 502, 528 (5th Cir. 2000); *Daly v. Hunt,* 93 F.3d 1212, 1227 (4th Cir. 1996). Because the choice of *some*

populations is plainly reviewable, *Wesberry,* 376 U.S. at 3-4, the Fourth and Fifth Circuits apparently have found that a jurisdiction constitutionally can use *either* population for its apportionment.

By contrast, in *Garza,* the Ninth Circuit found that using voting-age citizen population over total population would unconstitutionally interfere with non-citizens' "free access to elected representatives" and thereby "impermissibly burden[] their right to petition the government." *Garza v. County of Los Angeles,* 918 F.2d 763, 775 (9th Cir. 1991). In a partial dissent, Judge Kozinski cast the dispute as requiring a choice between "electoral equality" and "representational equality," finding support for both in this Court's decisions. *Garza,* 918 F.2d at 780-81 (collecting cases) (Kozinski, J., concurring in part and dissenting in part).

As Judge Kozinski explains, the instances where this Court has favored representational equality nonetheless suggest a representational-equality means to an electoral-equality end:

> "[T]he overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579, 84 S.Ct. at 1390 (emphasis added). This language has been quoted in numerous subsequent cases. *See Gaffney,* 412 U.S. at 744, 93 S.Ct. at 2327; *Mahan v. Howell,* 410 U.S. 315, 322, 93 S.Ct. 979, 984, 35 L.Ed.2d 320 (1973); *Burns,* 384 U.S. at 91 n. 20, 86 S.Ct. at 1296 n. 20. In *Connor v. Finch,* 431

> U.S. 407, 416, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977), the Court stated the proposition as follows: "The Equal Protection Clause requires that legislative districts be of nearly equal population, *so that* each person's vote may be given equal weight in the election of representatives." (emphasis added).

Id. at 783 (alterations and emphasis in *Garza*) (Kozinski, J., concurring in part and dissenting in part). In sum, notwithstanding the central role of this issue in our democracy, the Circuits are split on how to decide the questions presented.

C. This Court Has Jurisdiction, and Louisiana Has a Cause of Action

As Louisiana explains, Pls.' Br. at 16-17, this Court has upheld standing in apportionment cases like this, thereby ensuring the requisite case or controversy. Significantly, "when the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984) (citations and footnotes omitted, emphasis in original). Thus, while gaining a seat certainly would be preferable to Louisiana, jurisdiction does not require that: redress could lie in California's losing a seat.

The "political question doctrine" does not pose a barrier to this Court's resolving this dispute. A "political question" is nonjusticiable "where there is a textually demonstrable constitutional commitment of

the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Nixon v. U.S.,* 506 U.S. 224, 228 (1993) (citations and quotations omitted). Nothing in the Constitution commits apportionment to these Defendants' discretion. And whatever uncertainty lies in the apportionment clauses themselves, *but see* Pls.' Br. at 20-25, "the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a … legislative apportionment scheme." *Reynolds v. Sims,* 377 U.S. 533, 557 (1964). Given the absence of controlling discretion and the presence of manageable standards, Louisiana's complaint does not present a non-justiciable political question.

In addition, sovereign immunity poses no barrier to this Court's jurisdiction because Louisiana has named officers, not the sovereign, whom Louisiana charges with violating the Constitution. Under the circumstances, the officer-suit exception to sovereign immunity applies. *Franklin v. Massachusetts,* 505 U.S. 788, 801 (1992); *Philadelphia Co. v. Stimson,* 223 U.S. 605, 620 (1912) (*Ex parte Young* doctrine "is equally applicable to a Federal officer acting in excess of his authority"); *Powell v. McCormack,* 395 U.S. 486, 503-04 (1969) ("Legislative immunity does not … bar all judicial review of legislative acts"); *cf. Davis v. Passman,* 442 U.S. 228, 247-49 (1979). In any event, the United States has "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." S. Rep. No. 94-996, 8

(1976) (emphasis added). In sum, this Court has jurisdiction, and Louisiana has a cause of action.

D. Louisiana Lacks an Adequate Alternate Remedy

Although this Court exercises its original jurisdiction sparingly, this case is suitable for review here because Louisiana and the other affected States lack an adequate alternate remedy.

As explained in Judge Kozinski's *Garza* dissent, this Court on occasion has suggested that total population serves as an acceptable metric for apportionment. *Garza,* 918 F.2d at 780-81 (collecting cases) (Kozinski, J., concurring in part and dissenting in part). While the better reading of the Courts' various decisions suggests that total population has served merely as a means to the end of approximating eligible voters, *id.,* the result in a district court would be uncertain, at best, because the lower courts would need to follow this Court's decisions, which are both unclear and contradictory on the point.

Where "a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (interior quotations omitted). Given this Court's command in *Agostini* and its predecessors, it is unclear that a district court would or could reach a conclusion that the Constitution *prohibits* using total population to apportion congressional seats when that apportionment results in the disparities to

eligible voters that Louisiana demonstrates. Since this Court has reserved to itself the curing of inconsistencies in its decisions, *amicus* Eagle Forum respectfully submits that only this Court can provide an adequate forum to resolve the issues that Louisiana presents.

In addition, even if the district courts could provide a legally adequate alternate forum for the issues raised by Louisiana's complaint, the resolution of these issues in district courts across the country for the several States involved would risk plunging the electoral process into disarray, as Louisiana explains. Pls.' Br. at 11. For that reason, review in this Court would provide the only adequate remedy.[2]

II. LOUISIANA'S CLAIMS ARE MERITORIOUS

Because Louisiana's claims are meritorious, this Court should hear them now. Delaying the hearing of these claims will only complicate redressing the injuries that Louisiana and similarly situated States

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[2] If this Court declines to hear Louisiana's complaint, *amicus* Eagle Forum respectfully submits that the order denying leave to file should indicate that Louisiana has a justiciable and adequate alternate remedy in district court. *Compare Nixon,* 506 U.S. at 228 (quoted *supra*) *with Reynolds,* 377 U.S. at 557 (quoted *supra*). Otherwise, Louisiana may face arguments that litigating total population versus voting-age citizen population is not justiciable. *Chen,* 206 F.3d at 528.

suffer under the Defendants' misapplication of core constitutional provisions.

A. Counting Non-Immigrant Foreign Nationals Violates Apportionment Clauses

Amicus Eagle Forum cannot gainfully add to Louisiana's thorough analysis of the drafting and adoption of the Apportionment Clauses. *See* Pls.' Br. at 20-25. This Court never has held that – and Congress never has enacted a law that provides that – every person present within a States' borders qualifies for equal representation. As Louisiana explains, moreover, the specific population of illegal aliens can be deported at any time as a matter of law and is highly impermanent as a matter of fact. 8 U.S.C. §1227(a)(1)(B); Pls.' Br. at 26-27. That unlawful and impermanent presence does not qualify as the type of "respective numbers" that warrants having the decennial census memorialize it for ten years.

The Defendants' view that the Apportionment Clauses stand as a specific renunciation of the Constitution's general Equal Protection provisions has no basis in this Court's holdings or in canons of statutory construction. *See* Section II.C, *infra.* To the contrary, the Apportionment Clauses' text clearly indicates that not every person present within a State's borders counts for apportionment purposes. U.S. CONST. art. I, §2, cl. 3; U.S. CONST. amend. XIV, §2. Given that the express limitations clearly do not reflect *all* limitations – for example, foreign tourists plainly do not count – the clear import is that the Constitution uses "the respective numbers" in

precisely the way that Louisiana's analysis demonstrates: the political community of the State. That obviously does not include illegal aliens.

B. Counting Non-Immigrant Foreign Nationals Violates the People's Right to Equal and Proportionate Representation

In *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964), this Court held that "the command of [Article I, §2], that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Louisiana asks this Court to extend that now-obvious, bedrock principle for districting *within the States* by the States to apportionment of districts *between the States* by the federal Defendants.

In *U.S. Dep't of Commerce v. Montana,* 503 U.S. 442, 461-62 (1992), this Court acknowledged that the argument for applying *Wesberry* principles of voter equality to intrastate congressional districting applied with "some force" to apportioning congressional districts *between* States. On the facts of that case, however, it was "by no means clear that the facts here establish a violation of the *Wesberry* standard." *Id.* Further, on the facts of that case, apportionment's zero-sum nature meant adding a district for Montana and taking one from Washington would move Montana toward the ideal but move Washington away from it. *Id.* Here, by contrast, the imbalance between the States' relative populations has progressed sufficiently that this

Court can redress the imbalance without creating imbalance.

When the illegal-alien population was small enough not to affect apportionment, this Court could ignore the issues that Louisiana raises. As that population has grown and settled in certain States, the apportionment issues have become more acute. Moreover, the problem does not show signs of abating. To the contrary, the situation is clearly becoming *more* acute. Accordingly, the time has come for this Court to address the issue.

C. Counting Non-Immigrant Foreign Nationals Violates Equal Protection

Parallel to the holdings in *Wesberry* and its progeny that election "by the people of the several states" requires voter equality, this Court has held that Equal Protection principles require the same one-person, one-vote analysis. *See, e.g., Reynolds v. Sims,* 377 U.S. 533, 554-55 (1964); Pls.' Br at 35-36 (collecting cases). While Equal Protection protections have more relevance to State and local elections, to which the congressional apportionment clauses do not apply, those protections also guide congressional apportionment cases.

Because the Fifth Amendment applies the same Equal Protection provisions to federal actions that the Fourteenth Amendment's Equal Protection Clause applies to state actions, *Bolling,* 347 U.S. at 499; *Buckley,* 424 U.S. at 93, this Court must apply that Equal Protection analysis to Louisiana's injuries here. Thus, because the Court must interpret the Constitution as an internally consistent whole, *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988),

the Court should reject Defendants' administrative interpretation that the Constitution compels the counting of illegal aliens and other non-immigrant foreign nationals present in the United States. *See also* Pls.' Br. at 29-31. Clearly, the Constitution's general terms regarding apportionment cannot credibly violate the Constitution's Equal Protection guarantees.

In *Burns,* this Court at least implicitly held that electoral equality under Equal Protection trumps representational equality when the two differ significantly enough. *Burns,* 384 U.S. at 94. Indeed, the "concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Reynolds,* 377 U.S. at 558. That reading, moreover, is consistent with the canon of construction under which this Court can rely on the Fourteenth Amendment to interpret the previously adopted provisions of the Apportionment and Due Process Clauses. *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380-81 (1969) (subsequently enacted law "entitled to great weight in [the] statutory construction" of a prior law). This Court should reject the Defendants' contrary interpretation that the Apportionment Clauses either allow or compel counting non-immigrant foreign nationals for apportionment of congressional seats.

CONCLUSION

For the foregoing reasons and those argued by Louisiana, this Court should grant Louisiana's motion for leave to file a complaint and schedule expeditious proceedings to resolve this matter.

January 13, 2012 Respectfully submitted,

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