

SEP 17 2009

DAVID CREWS, CLERK  
BY *[Signature]* Deputy

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

JOHN TYLER CLEMONS, )  
JESSICA WAGNER, KRystal BRUNNER, )  
LISA SCHEA, AND FRANK MYLAR, )

Plaintiffs, )

-v- )

CAUSE NO. 3:09CV104-P-A

UNITED STATES DEPARTMENT OF )  
COMMERCE; GARY LOCKE, )  
Secretary of the United States )  
Department of Commerce; )  
ROBERT GROVES, Director of the )  
Bureau of the Census; and )  
LORRAINE C. MILLER, )  
Clerk of the United States House )  
of Representatives, )

Defendants. )

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

COME NOW the Plaintiffs, by and through their counsel, and for their complaint against the Defendants allege as follows for a First Cause of Action:

Introduction

1. This action challenges the constitutionality of the current interstate apportionment of Congress under the principle of one-person, one-vote. While the Supreme Court has required meticulous precision in the apportionment of congressional districts within a state, by freezing the size of Congress at 435 seats for approximately 100 years, the interstate apportionment is now grossly out of compliance with the requirement of Article I, Section 2 and Amendment XIV, Section 2 that "Representatives shall be apportioned among the several States according to their respective

numbers.” This action asks this Court to declare the current apportionment system to be unconstitutional.

### JURISDICTION AND VENUE

2. This action arises under Article I, section 2 of the United States Constitution, as amended by section 2 of Amendment XIV, and under the laws of the United States pertaining to the apportionment of representatives in the United States House of Representatives, 2 U.S.C. § 2a and 13 U.S.C. § 141.

3. The court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1341. Declaratory and injunctive relief may be granted by this court, as authorized by 28 U.S.C. §§ 2201 and 2202.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(4) since one or more plaintiffs reside in the Northern District of Mississippi.

5. A three-judge court is required to hear and determine this action, pursuant to 28 U.S.C. § 2284(a).

### PARTIES

6. Plaintiff John Tyler Clemons is a qualified and registered voter in the state of Mississippi. He resides at Oxford, Mississippi.

7. Plaintiff Jessica Wagner is a qualified and registered voter in the state of Montana. She resides at Kalispell, Montana.

8. Plaintiff Krystal Brunner is a qualified and registered voter in the state of South Dakota. She resides at Nisland, South Dakota.

9. Plaintiff Lisa Schea is a qualified and registered voter in the state of Delaware. She resides at Newark, Delaware.

10. Plaintiff Frank Mylar is a qualified and registered voter in the state of Utah. He resides at Sandy, Utah.

11. Defendant United States Department of Commerce is an executive agency of the United States Government.

12. Defendant Gary Locke is the Secretary of the United States Department of Commerce and is responsible, pursuant to 13 U.S.C. § 141, for taking a decennial census of the population and for reporting the results of the census and the calculated reapportionment of congressional seats among the states to the President of the United States.

13. Defendant Robert Groves is the Director of the Bureau of the Census and is responsible for the taking of the decennial census.

14. Barack Obama is the President of the United States and, pursuant to 2 U.S.C. § 2a(a) is responsible for transmitting to the Congress a statement showing the whole number of persons in each state, as ascertained under the decennial census of the population, and the number of representatives to which each state is entitled under the apportionment calculated by the Department of Commerce.

15. Defendant Lorraine C. Miller is the Clerk of the United States House of Representatives and, pursuant to 2 U.S.C. § 2a(b) is responsible for notifying each state of the number of representatives in Congress to which it is entitled in accordance with the statement transmitted by the President. Pursuant to that authority, the Clerk has issued a Certificate of Entitlement to the respective states in which the plaintiffs are registered and qualified voters as follows:

- Mississippi: four seats in the House of Representatives
- Montana: one seat in the House of Representatives
- Utah: three seats in the House of Representatives
- Delaware: one seat in the House of Representatives
- South Dakota: one seat in the House of Representatives

CLAIM FOR RELIEF

16. Article I, section 2 of the United States Constitution, as amended by section 2 of the Fourteenth Amendment, requires that “[r]epresentatives [in the United States House of Representatives] shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, . . . .” This section requires equal representation for equal numbers of people, and imposes a standard of “one-person, one-vote” in determining apportionment among the states.

17 The Constitution of the United States contains four relevant requirements concerning the apportionment of Congressional districts:

- no district may be composed of fewer than 30,000 persons,
- no state shall have fewer than one representative,
- a district cannot cross state lines, and
- population variances in legislative districts are tolerated only if they "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 421; quoting *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)).

18. The total number of seats in the United States Congress is governed by 2 U.S.C. § 2a (a) and (b): which provide as follows:

- (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be

entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

- (b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

19. By reference to the Eighty-third Congress, 2 U.S.C. § 2a has frozen the total number of seats at 435 in the United States House of Representatives since 1911 (with a one-time exception between 1959 and 1963, when it was 437, because of the admission of Alaska and Hawaii.) The number of 435 has not changed since the reapportionment after the 1960 decennial census.

20. This section (2 U.S.C. § 2a) operates to create significant under-representation for some states, and significant over-representation for other states in the interstate apportionment of seats in the House of Representatives.

21. The 2000 “apportionment population” of the United States, as determined by the Bureau of the Census, was 281,424,177. This means that the “ideal” district has 646,952 persons.

22. The following states were apportioned pursuant to the 2000 decennial census with a significant over-representation (fewer people than the ideal district):

- Wyoming, 1 district of 495,304 persons
- Rhode Island, 2 districts averaging 524,831 persons
- Nebraska, 3 districts averaging 571,790 persons
- Iowa, 5 districts averaging 586,385 persons
- West Virginia, 3 districts averaging 604,359 persons

23. The following states were apportioned pursuant to the 2000 decennial census with a significant under-representation (more people than the “ideal” district):

- Montana, 1 district of 905,316 persons
- Delaware, 1 district of 785,068 persons
- South Dakota, 1 district of 756,874 persons
- Utah, 3 districts averaging 745,571 persons
- Mississippi, 4 districts averaging 713,232 persons

24. The deviation from the ideal district size for each of these ten states is as follows (with positive numbers reflecting district sizes with fewer people than the ideal):

Most over-represented states:

- Wyoming +23.44%
- Rhode Island +18.88%
- Nebraska +11.62%
- Iowa +9.36%
- West Virginia +6.58%

Most under-represented states:

- Mississippi -10.24%
- Utah -15.24%
- South Dakota -16.99%
- Delaware -21.35%
- Montana -39.94%

25. Mississippi is under-represented by 66,280 individuals per district compared to the ideal district size. It is under-represented by 217,928 individuals per district compared to the residents of Wyoming (which is the state with the fewest people per district). Mississippi voters are under-represented by 10.24% compared to the ideal district. This under-representation violates the constitutional standards for one-person, one-vote.

26. Utah is under-represented by 98,619 individuals per district compared to the ideal district size. It is under-represented by 250,267 individuals per district compared to the residents of Wyoming. Utah voters are under-represented by 15.24% compared to the ideal district. This under-representation violates the constitutional standards for one-person, one-vote.

27. South Dakota is under-represented by 109,922 individuals compared to the ideal district size. It is under-represented by 261,570 individuals compared to the residents of Wyoming. South Dakota voters are under-represented by 16.99% compared to the ideal district. This under-representation violates the constitutional standards for one-person, one-vote.

28. Delaware is under-represented by 138,116 individuals compared to the ideal district size. It is under-represented by 289,764 individuals compared to the residents of Wyoming. Delaware voters are under-represented by 21.35% compared to the ideal district. This under-representation violates the constitutional standards for one-person, one-vote.

29. Montana is under-represented by 258,364 individuals compared to the ideal district size. It is under-represented by 410,012 compared to the residents of Wyoming. Montana voters are under-represented by 39.94% compared to the ideal district. This under-representation violates the constitutional standards for one-person, one-vote.

30. The disparities created by the apportionment which followed the Census of 2000 greatly exceed the limits for equality of apportionment (one-person, one-vote) controlled by Article I, section

2 of the Constitution. In *Karcher v. Daggett*, 462 U.S. 725, (1983), the Supreme Court found a deviation between the largest and smallest districts of 0.6984% within a state to be unconstitutional. The deviation between the largest and smallest districts in interstate apportionment is 63.38%. The current disparity is over 91 times *greater* than the disparity found to be unconstitutional in *Karcher*.

31. The ratio between the two states with the greatest under- and over-representation is as follows: There are 1.83 persons per district in Montana for every 1 person per district in Wyoming. This deviation is in excess of the constitutional standard for one-person, one-vote.

32. In *Karcher*, the Court held that the average deviation of 0.1384% was an indicator of the plan's unconstitutionality. The current average deviation for all states from the ideal district size is 5.75%. This deviation is in excess of the constitutional standard for one-person, one-vote.

33. These deviations in district size unconstitutionally diminish the voting power of the named plaintiffs and of all other qualified and registered voters in the states of Mississippi, Utah, South Dakota, Delaware, and Montana.

34. The present disparity of voter strength is directly caused by the operation of 2 U.S.C. § 2a, which freezes the total number of congressional seats at 435. This section results in the unconstitutional diminution of the voting strength of the plaintiffs and all other qualified and registered voters in their respective states.

35. Plaintiffs are entitled to a declaratory judgment that the limitation of the size of Congress to 435 seats as required by 2 U.S.C. § 2a is unconstitutional in that it results in a material under-representation of plaintiffs' votes compared to voters in other states.

For a Second Cause of Action, plaintiffs allege:

36. Plaintiffs incorporate by reference paragraphs 1 through 35 of their First Cause of Action.

37. The only constitutionally appropriate method which can materially improve the equality of voting strength for the plaintiffs, as well as all voters from all affected states, is to increase the size of the United States House of Representatives.

38. Plaintiffs submit two proposed apportionment plans based on the 2000 Census. These plans demonstrate that a significant improvement can be achieved in the reduction of disparity among the states in terms of over and under representation.

Plan A

Average District Size	159,809
Number of Representatives	1,761

Plan B

Average District Size	301,957
Number of Representatives	932

39. Either plan A or B would produce significant improvement in the measurements of disparity:

Measurements of Disparity	Plan A	Plan B	Current
Disparities between the Largest and Smallest Average District Sizes			
Ratio of Average District Sizes	1.11 to 1	1.31 to 1	1.83 to 1
Difference of Average District Sizes (persons)	15,850	76,667	410,012
Deviation of Average District Sizes (% from Ideal)	9.92%	25.39%	63.38%
Disparities Among All States			
Average Absolute Deviation (persons from Ideal)	2,372	9,409	37,227
Average Absolute Deviation (% from Ideal)	1.48%	3.12%	5.75%
Number of State >20% Deviation (% from Ideal)	0	0	3
Number of State >10% Deviation (% from Ideal)	0	4	8
Number of State >5% Deviation (% from Ideal)	3	10	16

40. The Supreme Court of the United States has allowed state legislatures greater latitude when creating their own state legislative districts for one-person, one-vote purposes. Generally, a maximum variance of 10% between the largest and smallest districts has been accepted as complying with the principle of one-person, one-vote. Plaintiffs suggest that this same level of latitude ought to be allowed for Congress when it is calculating apportionment of the districts between the states.

41. Plan A clearly meets every appropriate constitutional standard regarding one-person, one-vote.

42. Plan B offers a significant improvement over the current system of apportionment by reducing the level of over and under-representation.

43. Even though the constitutional principles that result in the current law being unconstitutional are well-settled, plaintiffs

respectfully request that Congress be allowed, at least in the first instance, the opportunity to create its own plan to remedy the current disparity in light of the Supreme Court's declaration of the minimal constitutional standards for voter equality.

44. Plaintiffs are entitled to a declaratory judgment that the current method of apportionment under 2 U.S.C. § 2a is unconstitutional.

45. Plaintiffs are also entitled to injunctive relief requiring Congress to adopt a new apportionment plan that significantly reduces the disparity of voting strength between the states.

WHEREFORE, having set forth their claims against the defendants, plaintiffs pray for relief as follows:

1. That a three-judge court be convened to hear this action.
2. That the Court declare that the under-representation experienced by the plaintiffs by virtue of section 2a of Title 2, United States Code is unconstitutional under the principle of one-person, one-vote.
3. That the Court declare that a new plan of apportionment shall be adopted which significantly reduces the problems of over and under-representation between the states.
4. In the alternative, plaintiffs pray that a new plan, meeting the constitutional standards of one-person, one-vote, be created by Congress. The Court should retain jurisdiction of this matter to oversee the implementation of this plan.
5. In the alternative, on the basis of plaintiffs' Second Cause of Action, plaintiffs request that this Court order the implementation of either Plan A or B (based on the 2000 Census) for the 2010 elections.

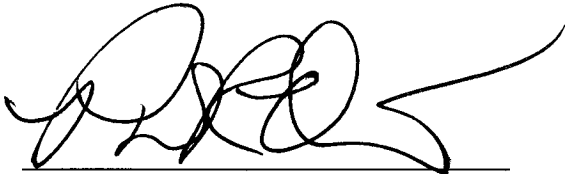
6. That the defendants be enjoined from effecting reapportionment of the House of Representatives under the current provisions of section 2a of Title 2, United States Code.

7. That the Court award to the plaintiffs their reasonable attorney's fees and such further relief as it deems just and proper under the circumstances.

Respectfully submitted this 17<sup>th</sup> day of September, 2009.



Michael P. Farris, *Lead Counsel*,  
Of Counsel  
Webster, Chamberlain & Bean  
1747 Pennsylvania Avenue, NW  
Suite 1000, Washington, DC 20006  
Tel. (202) 785-9500  
[michaelfarris@phc.edu](mailto:michaelfarris@phc.edu)  
*Personal Office*  
c/o Patrick Henry College  
One Patrick Henry Circle  
Purcellville, VA 20132  
(540) 338-8712



Phil R. Hinton, *Local Counsel*,  
MS Bar # 2480  
Wilson, Hinton & Wood, P.A.  
Post Office Box 1257  
Corinth, MS 38835-1257  
(662) 286-3366  
[philhinton@whwattorneys.com](mailto:philhinton@whwattorneys.com)