No. 11-1178

IN THE
Supreme Court of the United States

PATRICIA FLETCHER, *et al.*,

Appellants,

v.

LINDA LAMONE, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

MOTION TO AFFIRM

DOUGLAS F. GANSLER
Attorney General of Maryland

STEVEN M. SULLIVAN
Chief of Litigation

WILLIAM F. BROCKMAN
Acting Solicitor General
Counsel of Record
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
wbrockman@oag.state.md.us
(410) 576-7055

Attorneys for Appellees

May 25, 2012

QUESTION PRESENTED

Using data generated by the federal decennial census and supplied by the United States Census Bureau, Maryland apportions its federal, State, and municipal legislative districts by counting prisoners at their last known residence instead of their place of incarceration. The three-judge district court below unanimously found that Maryland's apportionment methodology had been conducted "in the systematic manner demanded by" this Court's precedents and resulted in congressional districts drawn to achieve the smallest mathematically-possible population deviations. The question presented is:

Does the assignment of prisoners to their last known residence, using data supplied by the Census Bureau for that purpose, satisfy the standard articulated by this Court, which requires a state to apportion its congressional districts using "the best population data available" in a "good-faith effort to draw districts of equal population"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

SESSION LAWS

REGULATIONS

MISCELLANEOUS

INTRODUCTION

The plaintiffs' statement of the question presented in this appeal is misleading, in several ways. First and foremost, this appeal does not present a malapportionment claim involving "the highest congressional district population deviations in the country." J.S. at i. To the contrary, Maryland has divided its population among eight congressional districts as equally as is possible when the total population is not evenly divisible by eight. The result is seven precisely equal districts and an eighth that has *one fewer person* than the others.

This is not a situation in which a state has subordinated the constitutional one-person-one-vote principle to some other redistricting objective. Instead, Maryland has *elevated* that principle of "equal representation for equal numbers of people," *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964), by legislatively mandating improvements in the quality of the data it uses to achieve the goal of population equality in the apportionment process. That legislation directs adjustments to census data to ensure that the State draws its legislative districts using the "'best population data available.'" *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969).

Maryland has determined that administrative convenience is not an acceptable basis for tolerating the population inequality that results from using unadjusted census data that counts prisoners as residents at their place of incarceration, rather than their home community. Accordingly, the State has

enacted legislation that requires adjustments to census data so that, to the extent possible, those prisoners are assigned instead to their last residence before their incarceration.

As a result of that legislation, the "No Representation Without Population Act," a prisoner whose last known residence is outside Maryland is excluded from the count used for apportionment adjustment to remove non-Maryland residents. This accounts for the 1,321 people whom the plaintiffs describe as having been "summarily delete[d]" from the population count. J.S. at i. Declining to treat an out-of-state prisoner's involuntary incarceration as the equivalent of Maryland residency is neither "discriminator[y]" nor motivated by "invidious intent"; nor are the adjustments Maryland has made to raw census data performed in an "arbitrary" manner, as the plaintiffs assert. *Id*. The record provides no support for these irresponsible claims, and each of these contentions was rejected by the three-judge court below. J.S. App. 17-18, 44. The court instead found, unanimously, that adjustments required under the Act had been made rigorously and systematically, J.S. App. 15, and further concluded that the population data on which Maryland based its apportionment was "more accurate than the information contained in the initial census reports," J.S. App. 17.

Still, the plaintiffs insist that a state is compelled to use the population data in the form it appears in those initial census reports, even though the Census Bureau's choice to compile the data in that form is

made principally for "pragmatic and administrative reasons." J.S. App. 14. The Constitution expresses no preference for unadjusted population information, and the court below correctly concluded that a state may adjust census data in the interest of greater accuracy. J.S. App. 17. That conclusion is fully consistent with this Court's precedents. The district court's judgment should therefore be affirmed.

STATEMENT OF THE CASE

1. The appellants are nine African-American residents of Maryland who sued to enjoin implementation of the congressional redistricting plan that the Maryland General Assembly enacted in October 2011 based on the results of the 2010 decennial census. J.S. App. 2. The plaintiffs' complaint asserted claims based on four theories: (1) a claim of vote dilution in violation of § 2 of the Voting Rights Act, based on their contention that a third majority-African-American district should have been created among Maryland's eight congressional districts, (2) a claim of intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments, (3) a political gerrymandering claim, and (4) a claim that malapportionment in violation of Article I, § 2 of the Constitution resulted from the use of adjusted population data mandated by Maryland's "No Representation Without Population Act," 2010 Md. Laws, ch. 67.

After a three-judge court was convened under 28 U.S.C. § 2284(a), the court heard argument on the

plaintiffs' motion for preliminary injunction and the State's motion to dismiss or, in the alternative, for summary judgment. J.S. App. 2. With the consent of the parties, the court proceeded to decide the pending motions based on the affidavits and other exhibits submitted in connection with the motions. J.S. App. 3. On December 23, 2011, the court issued a unanimous written decision in which it denied the plaintiffs' request for injunctive relief and granted the State's motion for summary judgment on all claims, thereby "obviating its motion to dismiss." J.S. App. 3.

The plaintiffs noted their appeal on January 20, 2012, J.S. App. 49-50 and, two months later, filed their jurisdictional statement, which was docketed on March 28, 2012, four days after early voting began for the State's 2012 primary election to select the candidates for the congressional seats in the newly-established districts. In their appeal, the plaintiffs have abandoned all but one of the claims they pursued in the district court. In this Court, the plaintiffs' challenge to Maryland's redistricting plan is premised solely on their contention that the population adjustments required by the State's No Representation Without Population Act results in a malapportionment that violates Article I, § 2 of the Constitution.

2. The Maryland General Assembly enacted the No Representation Without Population Act in its 2010 legislative session, prior to the release of the results of the 2010 decennial census. As the district court explained, the Act is "intended to 'correct for

the distortional effects of the Census Bureau's practice of counting prisoners as residents of their place of incarceration.'" J.S. App. 8. The distortion remedied by the Act occurs because "the majority of the state's prisoners come from African-American areas," while "the state's prisons are located primarily in the majority white . . . Districts." *Id.* "As a result, residents of districts with prisons are systematically 'overrepresented' compared to other districts" if districts are drawn using the raw population data reported by the Census Bureau. *Id.*

"To rectify this perceived imbalance," the Act "requires that for purposes of drawing local, state, and federal legislative districts, inmates of state and federal prisons located in Maryland must be counted as residents of their last known residence before incarceration." J.S. App. 9; *see* Md. Ann. Code art. 24, § 1-111 (county and municipal districts); Md. Code Ann., State Gov't § 2-2A-01 (State legislative districts); Md. Code Ann., Election Law § 8-701(a)(2) (congressional districts). Any prisoner who was not a Maryland resident before incarceration must be "excluded from the population count." J.S. App. 9. Md. Code Ann., Election Law § 8-701(a)(1). "[P]risoners whose last known address cannot be determined are counted as residents of the district where their facility is located." J.S. App. 9; *see* Code of Maryland Regulations ("COMAR") 34.05.01.04.C.

The Maryland Department of Planning, which is designated by the U.S. Census Bureau as a repository and service center for census data, has adopted regulations to implement the Act's requirements.

See COMAR 34.05.01. In accordance with these regulations, the Department "undertook and documented a multistep process by which it attempted to identify the last known address of all individuals in Maryland's prisons." J.S. App. 15.

Using information obtained from State and federal prison authorities, *see* COMAR 34.05.01.04.A, the Department was required to ascertain the geographical coordinates of the prisoner's last known, *see* COMAR 34.05.01.04.A—a process known as "geocoding," COMAR 34.05.01.03.B(3). For those addresses that could not be geocoded in the form they were received from prison authorities, the Department was required to "make reasonable efforts to correct the last known addresses"; those efforts were required to include undertaking seven corrective measures prescribed by regulation. *See* COMAR 34.05.01.04.B. If, despite these efforts, the Department was unable to determine and geocode the address of an incarcerated individual by February 11, 2011, then the Department was required to "assign the geographical coordinates of the state or federal correctional facility where the incarcerated individual is located." COMAR 34.05.01.04.C.

With the help of a contractor, Caliper Corporation, the Department used the geocoded information "to make the relevant adjustments to the data it had received from the Census Bureau." J.S. App. 15. The Census Bureau facilitated this process by releasing its "Group Quarters" population data early. (Group quarters include, in addition to correctional facilities, nursing homes, college dormitories, and military

quarters.) The Census Bureau explained that "the early release" of the data would be beneficial to "those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries," including Delaware, Maryland, and New York. *See* 2010 Census Advance Group Quarters Summary File, *available at* http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html.[1] The group quarters data could be used by states, according to the Director of the Census Bureau, to "leave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale." J.S. App. 15.

As a result of the analysis performed in accordance with the No Representation Without Population Act and the pertinent regulations, the Department "reassigned [prisoners] to their prior residences" in Maryland and deleted from the redistricting database "1,321 inmates who reported a pre-incarceration address outside of Maryland." J.S. App. 10.

3. On July 4, 2011, the Governor's Redistricting Advisory Committee was appointed with five members, two of whom were African-American. J.S. App. 3, 29. The committee held 12 public meetings

[1] Like Maryland, California and Delaware have enacted laws, not yet implemented, to use adjusted census data to correct for the distortional effects of "prison gerrymandering" in congressional districting, and New York uses adjusted data in state redistricting. *See* Cal. Elections Code § 21003; Del. Code Ann. tit.29, § 804A; N.Y. Legis. § 83-m(13).

across the State, received more than 350 comments from members of the public, and considered several proposed redistricting plans from third-party groups. J.S. App. 3-4. On October 4, 2011, the committee presented its proposed plan, and after receiving additional comments, the Governor announced that he would be submitting legislation to enact a plan "substantially similar" to the proposal. J.S. App. 4. The General Assembly convened in special session to consider the plan. J.S. App. 4. "[A]fter adopting minor technical amendments," the legislation was enacted, and it was signed into law on October 20, 2011. J.S. App. 5.

The redistricting legislation defines the boundaries of eight congressional districts, "the same number the State had after the 2000 census." J.S. App. 3. Like the plan adopted after the 2000 census, the 2011 legislation "creates two majority African-American congressional districts": the Seventh District, which includes large portions of Baltimore City and its surrounding suburbs, and the Fourth District, which is centered in Prince George's County, which lies adjacent to the District of Columbia. J.S. App. 5. The districts are apportioned using the adjusted population base of 5,772,231, the result of excluding from the redistricting database 1,321 inmates who were determined to have a "pre-incarceration address outside Maryland." J.S. App. 10.

Because the adjusted population is not evenly divisible by eight, it would not be possible to have all eight districts with exactly equal population. The

State's plan achieves the most equitable distribution possible by establishing seven equally-populated districts with 721,529 people in each, and an eighth district having one less person. J.S. App. 10. The reassignment of prisoners to their last known address in accordance with the Act had the largest impact on the Sixth District, "which contains the majority of the prisons and lost 6,754 individuals," and the Seventh District, one of the two majority-African-American districts, "which includes Baltimore City and gained 4,832 individuals." *Id.* The other majority-African-American district also gained population as a result of the adjustment.

"In no case did the adjustments" made as a result of the Act "exceed 1% of a district's population," *id.*, and in most districts the effect was much smaller. Eight of the nine plaintiffs live in districts that gained population as a result of the adjustments and are thus "overrepresented" under their theory of "vote dilution." The ninth plaintiff, Winne Mae Campbell, lives in the Second District, where the deviation from the ideal population size based on unadjusted census figures is 0.24%.

4. In a unanimous opinion authored by Judge Paul V. Niemeyer of the United States Court of Appeals for the Fourth Circuit, and joined by District Judges Roger W. Titus and Alexander Williams, Jr., the court rejected all of the plaintiffs' claims.

The court concluded that the plaintiffs failed to satisfy the first and third preconditions necessary to prove a violation of § 2 of the Voting Rights Act, as

explained in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The first precondition was not satisfied because, although Maryland "has two—and only two—distinct concentrations of African-Americans, one in the D.C. suburbs and another in the Baltimore area," J.S. App. 22, the State lacks a minority population "sufficiently large and geographically compact to constitute a majority" in a third majority-minority congressional district, as proposed by the plaintiffs. J.S. App. 21-24. The court also found that the evidence did not permit it to "conclude that the white electorate in Maryland is sufficiently racially polarized to satisfy the third *Gingles* precondition for a § 2 claim." J.S. App. 26.

The court rejected the plaintiffs' claim of intentional racial discrimination under the Fourteenth and Fifteenth Amendments because the "evidence does not suggest, much less prove, that the political process in general or the redistricting process in particular is so infected with racial considerations that a desire to dilute African-American voting strength was the predominate factor in the creation of the State Plan." J.S. App. 28. The court also observed that "the plaintiffs offer little evidence suggesting that African-Americans are especially disadvantaged by the State Plan," which "is unsurprising given that the redistricting map drew the support of many members of Maryland's African-American community." J.S. App. 29.

The court rejected the plaintiffs' partisan gerrymandering claim because this Court has "acknowledged that there appear to be 'no judicially

discernible and manageable standards for adjudicating political gerrymandering claims,'" and the plaintiffs had "likewise offer[ed] no reliable standard by which to adjudicate their gerrymandering claim." J.S. App. 33 (quoting *Vieth v. Jubilier*, 541 U.S. 267, 281 (2004) (plurality opinion of Scalia, J.)).

With respect to the only claim the plaintiffs pursue on appeal—their challenge to the adjustment of census data in accordance with the No Representation Without Population Act—the court held that Maryland's implementation of the Act satisfied the requirement that each state must use the "'best population data available'" as the "'basis for good-faith attempts to achieve population equality'" as required by Article I, § 2. J.S. App. 11 (quoting *Karcher v. Daggett*, 462 U.S. 725, 738 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969)). The court rejected the plaintiffs' reading of this Court's precedents as requiring states to use unadjusted census data. J.S. App. 12. In the view of the three-judge court, "[n]othing in the constitution or *Karcher* compels the states or Congress to use only the unadjusted census figures," J.S. App. 13; to the contrary, "a State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution," J.S. App. 12.

The court proceeded to consider whether "Maryland's adjustments to census data were made in the systematic manner demanded by *Karcher*."

J.S. App. 15. The court deemed it "clear" that the adjustments do satisfy this condition. *Id.* Indeed, the Court found that Maryland's "adjusted data will . . . be more accurate than the information contained in the initial census reports, which does not take prisoners' community ties into account at all." J.S. App. 17.[2]

Both Judge Titus and Judge Williams authored concurring opinions in which they emphasized their full agreement with Judge Niemeyer's opinion for the court. J.S. App. 35, 42. Judge Titus wrote separately to "express concerns about the current, unsatisfactory state of the law on claims of political gerrymandering" and to offer his own proposal "for consideration in future cases." J.S. App. 35, 41. In his concurring opinion, Judge Williams pointed to flaws he perceived in Judge Titus's proposed standard for evaluating partisan gerrymandering claims. J.S. App. 46-47. Judge Williams also commented on the plaintiffs' failure to "plead or prove a discriminatory purpose or invidious discrimination" in connection with the No Representation Without Population Act, and expressed his view that the Act had been "persuasively demonstrated" to "empower[] all voters, including African-Americans, by counteracting dilution of votes and better aligning

[2] The court also found "no support" for the finding of "purposeful discrimination" necessary to sustain the plaintiffs' claim of intentional racial discrimination based on the exclusion from the adjusted population of the 1,231 out-of-state prisoners, 71% of whom are African-American. J.S. App. 17-18.

districts with the interests of their voting constituents." J.S. App. 44-45.

ARGUMENT

MARYLAND'S ADJUSTMENTS TO CENSUS DATA REPRESENT A GOOD-FAITH EFFORT THAT SUCCEEDS IN ACHIEVING POPULATION EQUALITY BY USING THE BEST POPULATION DATA AVAILABLE IN A MANNER THAT IS CONSISTENT AND SYSTEMATIC.

The governing principles here are well-established, and the application of those principles to the facts of this case demonstrates the correctness of the judgment below.

Article I, § 2 provides that the members of the House of Representatives are to be chosen "'by the People of the several States." In *Wesberry v. Sanders*, this Court held that this provision mandates that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. 1, 7-8 (1964). The "'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 523, 530-31 (1969). The one-person-one-vote principle in operation here demands that states draw congressional district boundaries that "provide equal representation of equal numbers of people." *Id.* at 531 (quoting *Wesberry*, 376 U.S. at 18). This standard permits "only the limited population variances which are unavoidable despite a good-faith

effort to achieve absolute equality, or for which justification is shown". *Kirkpatrick*, 394 U.S. at 531. A good-faith effort depends on using the "best population data available." *Karcher v. Daggett*, 462 U.S. 725, 738 (1983).

The plaintiffs' contention that Maryland's congressional districts exhibit unacceptable population deviations is based on a misreading of *Karcher* and *Kirkpatrick*, as the court below recognized. J.S. App. 12. The asserted population deviations that form the basis of the plaintiffs' entire argument are purely fictive unless one accepts the plaintiffs' mistaken insistence that Maryland's population base can be measured only by unadjusted census figures. The plaintiffs maintain that the federal Census Bureau dictates the manner in which states can draw their congressional districts and that states have no discretion to improve on census data, despite the acknowledged imperfections of the data and regardless of the feasibility of correcting for those imperfections. The plaintiffs' argument does not withstand scrutiny.

While *Karcher* and *Kirkpatrick* require states to justify deviations from ideal district size in congressional plans, neither case purports to bar states from making adjustments to census data when determining the population base that should be used in measuring ideal population size. Significantly, neither case mandates that the enumeration methods used by the federal Census Bureau are binding on the states.

A. Neither the Constitution nor This Court's Precedents Prohibit a State From Improving on Unadjusted Census Data to Obtain the "Best Population Data Available."

As the three-judge court below correctly perceived, precedent does not support the plaintiffs' argument insisting on the use of unadjusted census data to judge whether population equality has been achieved. As the court explained, this Court's precedents direct states to "use census data as a starting point" for the states' good-faith efforts to achieve population equality, but "they do not hold . . . that states may not modify th[ese] data to correct perceived flaws." J.S. App. 12. Both *Karcher* and *Kirkpatrick* offer states the possibility of "choos[ing] to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion." *Id.* A close reading of those cases bears out this interpretation.

In *Kirkpatrick*, the Court measured Missouri's 1967 efforts to achieve population equality against the "best population data available to the legislature," which came from the 1960 census figures. 394 U.S. at 528. The Court acknowledged Missouri's concerns that the census figures did not account for inevitable population shifts, and concluded that states might take such flaws in census data into account, but only if the adjustments were "thoroughly documented and applied throughout the State in a systematic, not an *ad hoc* manner." *Id.* at 535. Missouri had not, however, undertaken such an

effort, and its adjustments were made inconsistently and haphazardly.

In *Karcher v. Daggett*, the Court acknowledged that census data is a "less than perfect" measure, 462 U.S. at 738; *see also id.* at 732, but concluded that the census count "represents the 'best population data available,' " and therefore is "the only basis for good-faith attempts to achieve population equality." 462 U.S. at 738 (quoting *Kirkpatrick*, 394 U.S. at 528). The Court recognized the tendency of the census to "systematically undercount population" in ways that "may vary from place to place." 462 U.S. at 738. The Court cautioned however, that, "[i]f a State does attempt to use a measure . . . to 'correct' the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner." *Id.* at 732 n.4. Thus, the Court continued to acknowledge that States may adjust census date, while holding that "[a]ttempts to explain population deviations on the basis of flaws in census data must be supported with a precision not achieved" by New Jersey in *Karcher*. *Id.* at 738.

As the district court observed, its determination that a state may appropriate use adjusted census data in the apportionment process is supported by the weight of authority in the lower courts. J.S. App. 12-14. Thus, for instance, the Sixth Circuit has recognized the authority of a state legislature to adjust census data if it determines that this will produce the "best population data available" in the state's "attempts to effect proportionate political representation." *City of Detroit v. Franklin*, 4 F.3d

1367, 1374 (6th Cir. 1993). "Nothing in the constitution or *Karcher* compels the states or Congress to use only the unadjusted census figures." *Id.* In so holding, the Sixth Circuit reaffirmed its ealier holding that "the state legislature is not required by the Constitution to accept the Census data in all respects" and "would not be precluded from adjusting the figures for purposes of congressional apportionment" to correct for flaws in the census count. *Young v. Klutznick*, 652 F.2d 617, 624-25 (6th Cir. 1981).

Other courts have reached the same conclusion. *See, e.g.*, *Senate of State of California v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) ("If the State knows that the census data [are] unrepresentative, it can, and should utilize noncensus data in addition to the official count. . . ." (dictum)); *Perez v. Texas*, No. 11-cv-360-OLG-JES-XR, slip op. at 24 (W.D. Tex. Sept. 2, 2011) (stating that, though "there is no federal requirement to do so," a state "could enact a constitutional amendment or statute that modifies the count of prisoners as residents of whatever county they lived in prior to incarceration"); *Cuomo v. Baldridge*, 674 F. Supp. 1089, 1106 n.31 (S.D.N.Y. 1987) (concluding that a state lacks standing to complain about the Census Bureau's decision not to adjust census figures since the state "can easily avoid the consequences of that decision by its apportioning its districts on a different basis").

As they did below, the plaintiffs rely heavily on two cases that predate *Karcher*. J.S. at 21-23. One of those cases, *Preisler v. Secretary of State*, 279 F.

Supp. 952 (W.D. Mo. 1967), actually reserved ruling on the point for which the plaintiffs cite it, *see* 279 F. Supp. at 1003 ("We do not reach the precise question . . . of whether any figures other than the decennial census may be used in support of a congressional districting plan."). The second case, *Travis v. King,* which concerned a Hawaii redistricting plan that would have excluded from its population measure the entire military population. 552 F. Supp. 554, 571 (D. Haw. 1982). As the district court recognized, J.S. App. 14, this case not only was decided without the benefit of this Court's guidance in *Karcher*, but also is readily distinguished, because the plan resulted in large population deviations even after the categorical exclusion of military personnel, "whereas the Maryland legislature in this case drew districts as equally as possible after adjusting the census figures." *Id.*[3]

B. Maryland's Pursuit of Population Equality Is Advanced Through Consistent, Systematic Means that Produce More Accurate Data and More Representative Districts.

There is nothing sacrosanct about the Census Bureau's enumeration methods, and there is

[3] The plaintiffs fret that a summary affirmance in this case would "overrule *Travis*," J.S. at 21 n.9; this worry overlooks the distinctions that the district court here found readily apparent, including the differences between military personnel, who "have the liberty to interact with members of the surrounding community and to engage fully in civic life," and prisoners, who do not, J.S. App. 17.

certainly nothing that gives them the force of a constitutional rule. The Census Bureau produces several data sets used by states in apportionment and redistricting. The first, which is used to determine how many seats each state will have, includes a class of "residents"—overseas military and federal civilian employees and their dependents living with them—who are allocated to their home states, as reported by the employing federal agencies, even though regardless of whether they can be said to reside. *See* United States Census Bureau, 2010 Census: Apportionment Population and Number of Representatives, by State, Table 1, *available at* http://2010.census.gov/news/pdf/apport2010_table1.pdf. In the 2010 census, Maryland was credited with 16,377 such overseas residents, who are nevertheless excluded from the population count used for apportioning the State's congressional districts.[4]

As the district court observed, the adjustments Maryland makes to census data in accordance with the No Representation Without Population Act "is also consistent with the practices of the Census Bureau," which counts prisoners "where they are incarcerated for pragmatic and administrative

---

[4] *See* http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf. The plaintiffs' repeated insinuation that it is somehow inequitable for Maryland to have been awarded eight congressional seats based on a population that included the 1,321 out-of-state prisoners later excluded from the redistricting database is risible, particularly in light of the far larger overseas federal employees count that is used to determine each state's allotment of congressional seats but that is not used by any state in drawing its congressional districts.

reasons, not legal ones." J.S. App. 14. At Congress's direction, the Census Bureau investigated the feasibility of counting prisoners at their "permanent home of record"; cost and administrative complications were cited as reasons not to depart from the current practice that results in distortions that Maryland has resolved to remediate. *See* U.S. Census Bureau Report: *Tabulating Prisoners at Their "Permanent Home of Record" Address*, at 1, 10 (2006). Although the Census Bureau was not inclined to alter this practice (at least without further congressional direction), the Bureau acted to facilitate the efforts of states like Maryland that believe a different practice would lead to more accurate data. J.S. App. 14-15. The Bureau's current approach to counting prisoners has evolved over time, *see* National Research Council, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* 84-85 (Daniel L. Cork & Paul R. Voss eds., 2006), and the "usual residence" rule invoked as justification for the current approach has varied in its application to different categories of people, *see, e.g., Bethel Park v. Stans*, 449 F.2d 575, 579-81 (3d Cir. 1971) (discussing varying approaches to enumeration of college students and military personnel).

This Court has also recognized that whether to count group-quartered individuals as residents of their home state is *not* a matter that is "dictated by the text and history of the Constitution. . . ." *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (upholding Census Bureau's practice of assigning overseas military personnel to their home state of

record). In *Franklin*, this Court noted that under Census Bureau procedures then in place, "persons who are institutionalized in out-of-state hospitals or jails for short terms are also counted in their home states." 505 U.S. at 806.

Because the Constitution does not compel the use of unadjusted census figures, Maryland's adjustments pass constitutional muster so long as they are not arbitrary or *ad hoc*. As the court below aptly observed, the highly prescriptive and systematic process for making adjustments to census data in accordance with the No Representation Without Population Act "is a far cry from the 'haphazard, inconsistent, or conjectural' alterations" this Court rejected in *Karcher*. J.S. App. 15-16. The plaintiffs now concede the "systematic manner" in which the Act is implemented, but they cling to their claim that it was "implemented in a conjectural manner." J.S. at 37.

The district court adequately refuted the plaintiffs' arguments premised on the absence of absolute certainty about where a prisoner would move after being released from incarceration. J.S. App. 17. In essence, the plaintiffs want to make perfect population data the enemy of the "best population data available." Census data is never perfect, as this Court and the Census Bureau both have recognized. Efforts to improve the quality of the data cannot be defeated merely because the improved data remain imperfect. Maryland's adjustments to census figures are designed to advance the principles that animate this Court's Article I, § 2 jurisprudence,

and the district court rightly concluded that they do so, by providing "more accurate" population information to be used in drawing districts that produce "equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18.

CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

STEVEN M. SULLIVAN
Chief of Litigation

WILLIAM F. BROCKMAN
Acting Solicitor General
Counsel of Record
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
wbrockman@oag.state.md.us
(410) 576-7055

May 25, 2012

Attorneys for Appellees