# SUPREME COURT OF THE UNITED STATES

No. 01–714

UTAH, ET AL., APPELLANTS *v.* DONALD L. EVANS, SECRETARY OF COMMERCE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

[June 20, 2002]

JUSTICE SCALIA, dissenting.

For the reasons I set forth in my opinion in *Franklin* v. *Massachusetts,* 505 U. S. 788, 823–829 (1992) (concurring in part and concurring in judgment)—and for an additional one brought forth in the briefing and argument of the present case—I disagree with the Court's holding that appellants have standing under Article III of the Constitution to bring this suit.

As the Court acknowledges, in order to establish standing, appellants must show that the federal courts "have the power to redress the injury that the [federal appellees] allegedly caused [them]." *Ante*, at 4 (internal quotation marks omitted). Yet the Court does not dispute that, even if appellants were to succeed in their challenge and a court were to order the Secretary of Commerce to recalculate the final census, their injury would *not* be redressed "unless the President accepts the new numbers, changes his calculations accordingly, and issues a new reapportionment statement to Congress . . . ." *Franklin*, *supra*, at 824. That fact is fatal to appellants' standing because appellants have not sued the President to force him to take these steps—and could not successfully do so even if they tried, since "no court has authority to direct the President to take an official act," 505 U. S., at 826. As the Court acknowledged in *Franklin*, the President enjoys the discretion to refuse to issue a new

reapportionment statement to Congress: "[H]e is not . . . required to adhere to the policy decisions reflected in the Secretary's report." *Id.,* at 799; see also *id.*, at 800. It displays gross disrespect to the President to assume that he will obediently follow the advice of his subordinates—in this case, a new report by his Secretary, recommending that he alter his prior determination. *Id.*, at 824–825 (SCALIA, J., concurring in part and concurring in judgment). Thus, because appellants' "standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 562 (1992) (internal quotation marks omitted), standing in this case does not exist.

The case for appellants' standing is even weaker than I described it in *Franklin*. Redress of their alleged injuries depends not only on a particular exercise of the President's discretion, but also on the exercise of the unbridled discretion of a majority of 435 Representatives and 100 Senators (or two-thirds if the President does not agree), whom federal courts are equally powerless to order to take official acts.

Section 2 of the Fourteenth Amendment 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." Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Pursuant to that authorization, Congress has provided that, once the President transmits to Congress the decennial reapportionment statement that the statute requires, 46 Stat. 26, 2 U. S. C. §2a(a), "[e]ach State shall be entitled, . . . until the taking effect of a reapportionment under this section or subsequent statute, to the number of Rep-

resentatives shown in [that] statement," §2a(b). Thus, the law provides only two means by which Utah's entitlement can be altered: "the taking effect of a reapportionment under this section or subsequent statute." *Ibid.* The first means refers to the next decennial census[1]; the second to a new law enacted in the interim. Thus, even if the President *wanted* to transfer one congressional seat from North Carolina to Utah, he could not do so before 2011 unless *Congress* enacted a new law authorizing such a reapportionment.

The Court no doubt realizes that it is not even conceivable that appellants could have standing if redress of their injuries hinged on action by Congress; accordingly, it is driven to assert that the law does not mean what it says. The statute, the Court argues, "do[es] not expressly say" what is to occur when the numbers the Secretary reported to the President are flawed; accordingly, because it "makes good sense" to do so, the Court reads into the statute a third means by which the reapportionment can be altered: judicially decreed "mechanical revision" of "a clerical, a mathematical, or a calculation error" in the Secretary's report. *Ante*, at 6, 7. This is an astonishing exercise of raw judicial power. The statute says very clearly what is to occur when *anything* (including a clerical, mathematical, or calculation error in the Secretary's report) renders the completed apportionment worthy of revision: nothing at all, unless *Congress* deems it worthy of revision and

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[1] It cannot be deemed to refer to reapportionment under the *new* presidential statement that appellants seek, because "reapportionment under this section" pursuant to the 2000 census *has already occurred*. The presidential statement effecting "reapportionment under this section" must be transmitted "[o]n the first day, or within one week thereafter, of the first regular session" of the first Congress after the census, §2a(a)—a deadline met by the President's statement under challenge here, but now long since passed.

enacts a new law making or authorizing the revision that *Congress* thinks appropriate. There was no reason for the statute to list "expressly" the infinite number of circumstances in which the reapportionment could *not* be altered by other means, because it expressly said that the States' "entitle[ment]" to the number of Representatives shown in the presidential statement *could* be altered *only by the two prescribed means*. There is simply no other way to read the governing text: that the States "shall be entitled" to the reapportionment set forth in the President's statement "until" one of two events occurs, undeniably means that *unless* one of those two events occurs, the States remain "entitled" to the reapportionment. What a wild principle of interpretation the Court today embraces: When a statute says that an act can be done *only* by means *x* or *y*, it can also be done by other means that "make good sense" under the circumstances, unless *all* the circumstances in which it cannot be done have been listed.

I would not subscribe to application of this deformed new canon of construction even if there were something about "clerical error" that made it uniquely insusceptible of correction by the means set forth in the statute. But there is not. Indeed, what more plausible and predictable occasion for congressional revision could there be than the demonstration of an error in the reported census count? By taking the responsibility for determining and remedying that error away from Congress, where the statute has placed it, and grasping it with its own hands, the Court commits a flagrant violation of the separation of powers.

The Court can find no excuse in our precedents for today's holding. It relies on three of our cases in which it says we "found standing in similar circumstances," *ante*, at 8–9. They are similar as day and night are similar. Two of them, *Federal Election Comm'n* v. *Akins,* 524 U. S. 11 (1998), and *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.,* 501

U. S. 252 (1991), are inapposite because redress of the plaintiffs' injuries did not require action by an independent third party that was not (and could not be) brought to answer before a federal court, much less by a third party for whom (as for the President) it would be disrespectful for us to presume a course of action, and much, much less in violation of the explicit text of a statute.[2] Although in the third case, *Bennett* v. *Spear,* 520 U. S. 154 (1997), we found standing to challenge the action of one agency (Fish and Wildlife Service) despite the fact that redress ultimately depended upon action by another agency (Bureau of Reclamation) not before the Court, we made it quite clear that we came to this conclusion only because in the matter at issue the one agency had the power to coerce action by the other: "[I]t does not suffice," we said, "if the injury complained of is the result of the *independent* action of some third party not before the court." *Id.,* at 169 (internal quotation marks omitted). We found that, "while the [Service] theoretically serves an advisory function, in reality it has a powerful coercive effect on the action agency." *Ibid.* (internal quotation marks and citation omitted). In this case, by contrast, we simply cannot say—both because it is not true and because it displays gross disrespect to do so—that the action of the President is "coerced" by the Secretary. Not to mention, once again, the statute that explicitly leaves this question to Congress.

For these reasons, I would vacate the judgment of the District Court and remand with instructions to dismiss for want of jurisdiction.

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[2] Moreover, in *Metropolitan Washington* there was no doubt that, if a court enjoined the challenged action, the injuries it allegedly caused would be redressed *automatically* by operation of law. See 501 U. S., at 265 (citing 49 U. S. C. App. §2456(h)).