SUPREME COURT OF THE UNITED STATES

Nos. 98–404 AND 98–564

DEPARTMENT OF COMMERCE, ET AL., APPELLANTS
98–404 *v.*
UNITED STATES HOUSE OF REPRESENTATIVES ET AL.

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

WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, ET AL., APPELLANTS
98–564 *v.*
MATTHEW GLAVIN ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

[January 25, 1999]

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part III–B.

The Census Bureau (Bureau) has announced a plan to use two forms of statistical sampling in the 2000 Decennial Census to address a chronic and apparently growing problem of "undercounting" certain identifiable groups of individuals. Two sets of plaintiffs filed separate suits challenging the legality and constitutionality of the Bureau's plan. Convened as three-judge courts, the District Court for the Eastern District of Virginia and the District Court for the District of Columbia each held that the Bureau's plan for the 2000 census violates the Census Act,

13 U. S. C. §1 *et seq.*, and both courts permanently enjoined the Bureau's planned use of statistical sampling to determine the population for purposes of congressional apportionment. 19 F. Supp. 2d 543 (ED Va. 1998); 11 F. Supp. 2d 76 (DC 1998). We noted probable jurisdiction in both cases, 524 U. S. ____ (1998); 524 U. S. ____ (1998), and consolidated the cases for oral argument, 524 U. S. ____ (1998). We now affirm the judgment of the District Court for the Eastern District of Virginia, and we dismiss the appeal from the District Court for the District of Columbia.

I

A

Article 1, §2, cl. 3, of the United States Constitution states that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers." It further requires that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Ibid.* Finally, §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."

Pursuant to this constitutional authority to direct the manner in which the "actual Enumeration" of the population shall be made, Congress enacted the Census Act (hereinafter Census Act or Act), 13 U. S. C. §1 *et seq.*, delegating to the Secretary of Commerce (Secretary) authority to conduct the decennial census. §4. The Act provides that the Secretary "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." §141(a). It further requires that "[t]he tabulation of total

population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." §141(b). Using this information, the President must then "transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled." 2 U. S. C. §2a(a). Within 15 days thereafter, the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U. S. C. §2a(b) (1994 ed., Supp. III).

The instant dispute centers on the problem of "undercount" in the decennial census. For the last few decades, the Census Bureau has sent census forms to every household, which it asked residents to complete and return. The Bureau followed up on the mailing by sending enumerators to personally visit all households that did not respond by mail. Despite this comprehensive effort to reach every household, the Bureau has always failed to reach— and has thus failed to count— a portion of the population. This shortfall has been labeled the census "undercount."

The Bureau has been measuring the census undercount rate since 1940, and undercount has been the subject of public debate at least since the early 1970's. See M. Anderson, The American Census: A Social History 221–222 (1988). It has been measured in one of two ways. Under one method, known as "demographic analysis," the Bureau develops an independent estimate of the population using birth, death, immigration, and emigration records. U. S. Dept. of Commerce, Bureau of the Census, Report to Congress: The Plan for Census 2000, p. 2, and n. 1 (Aug. 1997) (hereinafter Census 2000 Report). A second method, first used in 1990, involves a large sample survey, called the

"Post-Enumeration Survey," that is conducted in conjunction with the decennial census. The Bureau compares the information gathered during the survey with the information obtained in the census and uses the comparison to estimate the number of unenumerated people in the census. See National Research Council, Modernizing the U. S. Census 30–31 (B. Edmonston & C. Schultze eds. 1995).

Some identifiable groups– including certain minorities, children, and renters– have historically had substantially higher undercount rates than the population as a whole. See Census 2000 Report 3–4. Accordingly, in previous censuses, the Bureau sought to increase the number of persons from whom it obtained information. In 1990, for instance, the Bureau attempted to reach out to traditionally undercounted groups by promoting awareness of the census and its importance, providing access to Spanish language forms, and offering a toll free number for those who had questions about the forms. *Id.*, at 4. Indeed, the 1990 census was "better designed and executed than any previous census." *Id.*, at 2. Nonetheless, it was less accurate than its predecessor for the first time since the Bureau began measuring the undercount rate in 1940. *Ibid.*

In a further effort to address growing concerns about undercount in the census, Congress passed the Decennial Census Improvement Act of 1991, which instructed the Secretary to contract with the National Academy of Sciences (Academy) to study the "means by which the Government could achieve the most accurate population count possible." §2(a)(1), 105 Stat. 635, note following 13 U. S. C. §141. Among the issues the Academy was directed to consider was "the appropriateness of using sampling methods, in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data." *Ibid.* Two of the three panels established by the Academy pursuant to this Act concluded that

"[d]ifferential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement," a statistical sampling procedure that adjusts census results to account for undercount in the initial enumeration, Census 2000 Report 7–8, and all three panels recommended including integrated coverage measurement in the 2000 census, *id.*, at 29. See National Research Council, Preparing for the 2000 Census: Interim Report II (A. White & K. Rust eds. 1997) (report of Panel to Evaluate Alternative Census Methodologies); Modernizing the U. S. Census, *supra* (report of Panel on Census Requirements in the Year 2000 and Beyond); U. S. Dept. of Commerce, Bureau of the Census, Census 2000 Operational Plan (1997).

In light of these studies and other research, the Bureau formulated a plan for the 2000 census that uses statistical sampling to supplement data obtained through traditional census methods. The Bureau plan provides for two types of sampling that are the subject of the instant challenge.[1] First, appellees challenge the proposed use of sampling in the Nonresponse Followup program (NRFU). Under this program, the Bureau would continue to send census forms to all households, as well as make forms available in post offices and in other public places. The Bureau expects that 67 percent of households will return the forms. See Census 2000 Report 26. The Bureau then plans to divide the population into census tracts of approximately 4,000 people that have "homogenous population characteristics, economic status, and living conditions." *Id.*, at 27. The Bureau would then visit a randomly selected sample of

[1] The Postal Vacancy Check program is not challenged here. See 19 F. Supp. 2d 543, 545 (ED Va. 1998) ("The Bureau's plan to use sampling in the Postal Vacancy Check is not in dispute in this lawsuit"). See also 11 F. Supp. 2d 76, 80 (DC 1998) ("The Postal Vacancy Check sampling plan is not at issue in this litigation").

nonresponding housing units, which would be "statistically representative of all housing units in [a] nonresponding tract." *Id.*, at 28. The rate of nonresponse follow-up in a tract would vary with the mail response rate to ensure that the Bureau obtains census data from at least 90 percent of the housing units in each census tract. *Ibid.* For instance, if a census tract had 1,000 housing units and 800 units responded by mail, the Bureau would survey 100 out of the 200 nonresponding units to obtain information about 90 percent of the housing units. However, if only 400 of the 1,000 housing units responded by mail, the Bureau would visit 500 of the 600 nonresponding units to achieve the same result. *Id.*, at 29. The information gathered from the nonresponding housing units surveyed by the Bureau would then be used to estimate the size and characteristics of the nonresponding housing units that the Bureau did not visit. Thus, continuing with the first example, the Bureau would use information about the 100 nonresponding units it visits to estimate the characteristics of the remaining 100 nonresponding units on which the Bureau has no information. See *ibid.*

The second challenged sampling procedure– which would be implemented after the first is completed– is known as Integrated Coverage Measurement (ICM). ICM employs the statistical technique called Dual System Estimation (DSE) to adjust the census results to account for undercount in the initial enumeration. The plan requires the Bureau to begin by classifying each of the country's 7 million blocks into "strata," which are defined by the characteristics of each block, including state, racial, and ethnic composition, and the proportion of homeowners to renters, as revealed in the 1990 census. *Id.*, at 30. The Bureau then plans to select blocks at random from each stratum, for a total of 25,000 blocks, or an estimated 750,000 housing units. *Ibid.* Enumerators would then conduct interviews at each of those 750,000 units, and if

discrepancies were detected between the pre-ICM response and ICM response, a follow-up interview would be conducted to determine the "true" situation in the home. *Ibid*. The information gathered during this stage would be used to assign each person to a poststratum– a group of people who have similar chances of being counted in the initial data collection– which would be defined by state geographic subdivision (*e.g.*, rural or urban), owner or renter, age, sex, race, and Hispanic origin. *Id.*, at 31.

In the final stage of the census, the Bureau plans to use DSE to obtain the final count and characteristics of the population. The census plan calls for the Bureau to compare the dual systems of information– that is, the data gathered on the sample blocks during the ICM and the data gathered on those same blocks through the initial phase of the census– to produce an estimation factor for each poststratum. The estimation factors would account for the differences between the ICM numbers and the initial enumeration and would be applied to the initial enumeration to estimate the total population and housing units in each poststratum. *Id.*, at 31–32. The totals for the poststrata would then be summed to determine state and national population totals. *Id.*, at 32.

The Bureau's announcement of its plan to use statistical sampling in the 2000 census led to a flurry of legislative activity. Congress amended the Census Act to provide that, "[n]otwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in Congress among the several States," H. R. Conf. Rep. No. 105–119, p. 67 (1997), but President Clinton vetoed the bill, see Message to the House of Representatives Returning Without Approval Emergency Supplemental Appropriations Legislation, 33 Weekly Comp. of Pres. Doc. 846, 847 (1997). Congress then

passed, and the President signed, a bill providing for the creation of a "comprehensive and detailed plan outlining [the Bureau's] proposed methodologies for conducting the 2000 Decennial Census and available methods to conduct an actual enumeration of the population," including an explanation of any statistical methodologies that may be used. 1997 Emergency Supplemental Appropriations Act for Recovery From Natural Disasters, and for Overseas Peacekeeping Efforts, Including Those in Bosnia, Tit. VIII, 111 Stat. 217. Pursuant to this directive, the Commerce Department issued the Census 2000 Report. After receiving the Report, Congress passed the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, §209, 111 Stat. 2482, which provides that the Census 2000 Report and the Bureau's Census 2000 Operational Plan "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census." The Act also permits any person aggrieved by the plan to use statistical sampling in the decennial census to bring a legal action and requires that any action brought under the Act be heard by a three-judge district court. *Ibid.* It further provides for review by appeal directly to this Court. *Ibid.*

B

The publication of the Bureau's plan for the 2000 census occasioned two separate legal challenges. The first suit, styled *Clinton* v. *Glavin*, was filed on February 12, 1998, in the District Court for the Eastern District of Virginia by four counties (Cobb County, Georgia; Bucks County, Pennsylvania; Delaware County, Pennsylvania; and DuPage County, Illinois) and residents of 13 States (Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Montana, Nevada, Ohio, Pennsylvania, Virginia, and Wisconsin), who claimed that the Bureau's planned use of

statistical sampling to apportion Representatives among the States violates the Census Act and the Census Clause of the Constitution. They sought a declaration that the Bureau's plan is unlawful and/or unconstitutional and an injunction barring use of the NRFU and ICM sampling procedures in the 2000 census.

The District Court held that the case was ripe for review, that the plaintiffs satisfied the requirements for Article III standing, and that the Census Act prohibited use of the challenged sampling procedures to apportion Representatives. 19 F. Supp. 2d, at 547, 548–550, 553. The District Court concluded that, because the statute was clear on its face, the court did not need to reach the constitutional questions presented. *Id.*, at 553. It thus denied defendants' motion to dismiss, granted plaintiffs' motion for summary judgment, and permanently enjoined the use of the challenged sampling procedures to determine the population for purposes of congressional apportionment. *Id.*, at 545, 553. We noted probable jurisdiction on October 9, 1998. 524 U. S. ____.

The second challenge was filed by the United States House of Representatives on February 20, 1998, in the District Court for the District of Columbia. The House sought a declaration that the Bureau's proposed use of sampling to determine the population for purposes of apportioning Members of the House of Representatives among the several States violates the Census Act and the Constitution. The House also sought a permanent injunction barring use of the challenged sampling procedures in the apportionment aspect of the 2000 census.

The District Court held that the House had Article III standing, the suit was ripe for review, equitable concerns did not warrant dismissal, the suit did not violate separation of powers principles, and the Census Act does not permit the use of the challenged sampling procedures in counting the population for apportionment. 11 F. Supp.

2d, at 93, 95, 97, 104. Because it held that the Census Act does not allow for the challenged sampling procedures, it declined to reach the House's constitutional challenge under the Census Clause. *Id.*, at 104. The District Court denied the defendants' motion to dismiss, granted the plaintiffs' motion for summary judgment, and issued an injunction preventing defendants from using the challenged sampling methods in the apportionment aspect of the 2000 census. *Id.*, at 79, 104. The defendants appealed to this Court and we noted probable jurisdiction on September 10, 1998, 524 U. S. ____, and consolidated this case with *Clinton* v. *Glavin*, No. 98–564, for oral argument, 524 U. S. ____ (1998).

II

We turn our attention first to the issues presented by *Clinton* v. *Glavin*, No. 98–564, and we begin our analysis with the threshold issue of justiciability. Congress has eliminated any prudential concerns in this case by providing that "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 census or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." §209(b), 111 Stat. 2481. In addition, the District Court below correctly found that the case is ripe for review, and that determination is not challenged here. 19 F. Supp. 2d, at 547; see *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967). Thus, the only open justiciability question in this case is whether appellees satisfy the requirements of Article III standing.

We have repeatedly noted that in order to establish Article III standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlaw-

ful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). See also *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). To prevail on a Federal Rule of Civil Procedure 56 motion for summary judgment– as opposed to a motion to dismiss– however, mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits. See *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 884 (1990). See also *id.*, at 902 (Blackmun, J., dissenting). Here, the District Court, considering a Rule 56 motion, held that the plaintiffs-appellees, residents from 13 States, had established Article III standing to bring suit challenging the proposed method for conducting the 2000 census because they had made "[g]eneral factual allegations of injury resulting from Defendant's conduct." 19 F. Supp., at 548–550. The court did not, however, consider whether there was a genuine issue of material fact as to standing.

Nonetheless, because the record before us amply supports the conclusion that several of the appellees have met their burden of proof regarding their standing to bring this suit, we affirm the District Court's holding. See *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U. S. 297, 303–305 (1983) (holding that presence of one party with standing assures that controversy before Court is justiciable); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264, and n. 9 (1977) (same). In support of their motion for summary judgment, appellees submitted the affidavit of Dr. Ronald F. Weber, a professor of government at the University of Wisconsin, which demonstrates that Indiana

resident Gary A. Hofmeister has standing to challenge the proposed census 2000 plan.[2] Affidavit of Dr. Ronald F. Weber, App. in No. 98–564, pp. 56–79 (hereinafter Weber Affidavit). Utilizing data published by the Bureau, Dr. Weber projected year 2000 populations and net undercount rates for all States under the 1990 method of enumeration and under the Department's proposed plan for the 2000 census. See *id.*, at 62–63. He then determined on the basis of these projections how many Representatives would be apportioned to each State under each method and concluded that "it is a virtual certainty that Indiana will lose a seat . . . under the Department's Plan." *Id.*, at 65.

Appellants have failed to set forth any specific facts showing that there is a genuine issue of standing for trial. See Fed. Rule Civ. Proc. 56(e). Appellants have submitted two affidavits that detail various deficiencies in the statistical analysis performed by Dr. Weber. See Declaration of Signe I. Wetrogan, Assistant Division Chief for Population Estimates and Projections, United States Bureau of the Census, App. in No. 98–564, pp. 92–99 (hereinafter Wetrogan Declaration); Declaration of John H. Thompson, Associate Director for the Decennial Census, United States Bureau of the Census, App. in No. 98–564, pp. 100–110 (hereinafter Thompson Declaration). Appellants' experts do not, however, demonstrate that any alleged

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[2] Appellants suggested at oral argument before this Court that appellees had conceded that Indiana was not likely to lose a House seat under the Bureau's sampling plan. Tr. of Oral Arg. 30. Indeed, during a motions hearing before the District Court, appellees "concede[d]," arguendo, that Indiana "is not going to lose a house *[sic]* seat." Tr. 85 (Aug. 7, 1998). Clearly this purported concession was made only for the sake of argument and was treated as such by the District Court. Moreover, appellants did not raise this issue until oral argument before this Court. Accordingly, we decline to view the appellees' statement as amounting to a true concession.

flaw in Dr. Weber's analysis calls into question his ultimate conclusion that Indiana is virtually certain to lose a seat. One expert, for example, claims that Dr. Weber's statement that Indiana is virtually certain to lose a seat is "of dubious credibility," but she fails to provide any specific factual support for this assertion. Wetrogan Declaration, *id.*, at 97. She claims that Dr. Weber used outdated population numbers, but she does not demonstrate the impact that using more recent population data would have on Dr. Weber's ultimate conclusion about Indiana. *Id.*, at 97–98. Neither of the appellants' experts reestimates the populations of the States using more "accurate" or "up-to-date" data to show that this data would produce different results. Indeed, the Associate Director for the Decennial Census specifically admits in his declaration that Dr. Weber used precisely the same data that the Bureau uses "to help it estimate expected error rates for Census 2000." Thompson Declaration, App. 106. Appellants have therefore failed to raise a genuine issue of material fact regarding Indiana's loss of a Representative.

Appellee Hofmeister's expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing. In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because "'[t]hey are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes."'" *Baker* v. *Carr*, 369 U. S. 186, 208 (1962) (quoting *Coleman* v. *Miller*, 307 U. S. 433, 438 (1939)). The same distinct interest is at issue here: With one fewer Representative, Indiana residents' votes will be diluted. Moreover, the threat of vote dilution through the use of sampling is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore* v. *Arkansas*, 495 U. S. 149, 155 (1990). It is clear that if the Bureau is going to alter its plan to use sampling in the 2000 census, it must begin doing so by March 1999.

See Oversight of the 2000 Census: Putting the Dress Rehearsals in Perspective, Hearing before the Subcommittee on the Census of the House Committee on Government Reform and Oversight, 105th Cong., 2d Sess., 84 (1998) (statement of James F. Holmes, Acting Director of the Bureau of the Census) ("I must caution that by this time next year [*i.e.*, March 1999] the train for census 2000 has to be on one track. If the uncertainty continues, if our staff continues to have to do two jobs, . . . [the census] will truly be imperiled"). See also §209, 111 Stat. 2480 (providing that the Bureau's plan to use statistical sampling in the 2000 census constitutes "final agency action"). And it is certainly not necessary for this Court to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme– possibly irremediable– hardship. In addition, as Dr. Weber's affidavit demonstrates, Hofmeister meets the second and third requirements of Article III standing. There is undoubtedly a "traceable" connection between the use of sampling in the decennial census and Indiana's expected loss of a Representative, and there is a substantial likelihood that the requested relief– a permanent injunction against the proposed uses of sampling in the census– will redress the alleged injury.

Appellees have also established standing on the basis of the expected effects of the use of sampling in the 2000 census on intrastate redistricting. Dr. Weber indicated in his affidavit that "[i]t is substantially likely that voters in Maricopa County, Arizona, Bergen County, New Jersey, Cumberland County, Pennsylvania, LaSalle County, Illinois, Orange County, California, St. Johns County, Florida, Gallatin County, Montana, Forsyth County, Georgia, and Loudoun County, Virginia, will suffer vote dilution in state and local elections as a result of the [Bu-

reau's] Plan." Weber Affidavit, *supra*, at 77–78. Several of the appellees reside in these counties,[3] and several of the States in which these counties are located require use of federal decennial census population numbers for their state legislative redistricting. The New Jersey Constitution, for instance, requires that state senators be apportioned among Senate districts "as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States." Art. IV, §1, ¶1. Similarly, the Pennsylvania Constitution requires that "[i]n each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth." Art. 2, §17(a). Several of the other States cited by Dr. Weber have comparable laws.[4] Moreover, States use the population numbers

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[3] The appellees that reside in the counties that Dr. Weber predicts will lose population relative to other counties if statistical sampling is used in the decennial census are Matthew Glavin (Forsyth County, Georgia), Stephen Gons (Cumberland County, Pennsylvania), James F. McLaughlin (Bergen County, New Jersey), John Taylor (Loudoun County, Virginia), Deborah Hardman (St. Johns County, Florida), Jim Lacy (Orange County, California), Helen V. England (Maricopa County, Arizona), Amie S. Carter (Gallatin County, Montana), and Michael T. James (LaSalle County, Illinois). Complaint for Declaratory and Injunctive Relief, App. in No. 98–564, pp. 9–12.

[4] See, *e.g.*, Fla. Stat. §11.031(1) (1998) ("All acts of the Florida Legislature based upon population and all constitutional apportionments shall be based upon the last federal decennial statewide census"); Ga. Const., Art. 3, §2 ("The apportionment of the Senate and of the House of Representatives shall be changed by the General Assembly as necessary after each United States decennial census"); Ill. Const., Art. 4, §3(b) ("In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and Representative Districts"); Ill. Comp. Stat., ch. 55, §2–3001c (1993) (providing that for purposes of reapportionment of county for election of county board, "'[p]opulation' means the number of inhabitants as determined by the last preceding federal decennial census").

generated by the federal decennial census for federal congressional redistricting. See *Karcher* v. *Daggett*, 462 U. S. 725, 738 (1983) ("[B]ecause the census count represents the 'best population data available,' . . . it is the only basis for good-faith attempts to achieve population equality" (citation omitted)). Thus, the appellees who live in the aforementioned counties have a strong claim that they will be injured by the Bureau's plan because their votes will be diluted vis-à-vis residents of counties with larger "undercount" rates. Neither of appellants' experts specifically contested Dr. Weber's conclusion that the nine counties were substantially likely to lose population if statistical sampling were used in the 2000 census. See Wetrogan Declaration, App. in No. 98–564, pp. 92–99; Thompson Declaration, *id.*, at 100–110. The experts' general assertions regarding Dr. Weber's methodology and data are again insufficient to create a genuine issue of material fact. For the reasons discussed above, see *supra*, at 14-16, this expected intrastate vote dilution satisfies the injury-in-fact, causation, and redressibility requirements. Accordingly, appellees have again carried their burden under Rule 56 and have established standing to pursue this case.

III

We accordingly arrive at the dispute over the meaning of the relevant provisions of the Census Act. The District Court below examined the plain text and legislative history of the Act and concluded that the proposed use of statistical sampling to determine population for purposes of apportioning congressional seats among the States violates the Act. We agree.

A

An understanding of the historical background of the decennial census and the Act that governs it is essential to a proper interpretation of the Act's present text. From the very first census, the census of 1790, Congress has pro-

hibited the use of statistical sampling in calculating the population for purposes of apportionment. The First Congress enacted legislation requiring census enumerators to swear an oath to make "a just and perfect enumeration" of every person within the division to which they were assigned. Act of Mar. 1, 1790, §1, 1 Stat. 101. Each enumerator was required to compile a schedule of information for his district, listing by family name the number of persons in each family that fell into each of five specified categories. See *id.*, at 101–102. Congress modified this provision in 1810, adding an express statement that "the said enumeration shall be made by an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise," and expanding the number of specifications in the schedule of information. Act of Mar. 26, 1810, §1, 2 Stat. 565–566. The requirement that census enumerators visit each home in person appeared in statutes governing the next 14 censuses.[5]

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[5] See Act of Mar. 14, 1820, 3 Stat. 548, 549 ("And the said enumeration shall be made by an actual inquiry at every dwelling-house, or of the head of every family, and not otherwise"); Act of Mar. 23, 1830, §1, 4 Stat. 384 ("[T]he said enumeration shall be made by an actual inquiry by such marshals or assistants, at every dwelling-house, or by personal inquiry of the head of every family"); Act of Mar. 3, 1839, §1, 5 Stat. 332 (substantially same); Act of May 23, 1850, §10, 9 Stat. 430 (governing censuses of 1850–1870) ("[E]ach assistant . . . shall perform the service required of him, by a personal visit to each dwelling-house, and to each family, in the subdivision assigned to him, and shall ascertain, by inquiries made of some member of each family, if any one can be found capable of giving the information, but if not, then of the agent of such family, the name of each member thereof, the age and place of birth of each, and all the other particulars specified in this act"); Act of Mar. 3, 1879, §8, 20 Stat. 475 ("It shall be the duty of each enumerator . . . to visit personally each dwelling-house in his subdivision, and each family therein, and each individual living out of a family in any place of abode, and by inquiry made of the head of such family, or of the member

The current Census Act was enacted into positive law in 1954. It contained substantially the same language as did its predecessor statutes, requiring enumerators to "visit personally each dwelling house in his subdivision" in order to obtain "every item of information and all particulars required for any census or survey" conducted in connection with the census. Act of Aug. 31, 1954, §25(c), 68 Stat. 1012, 1015. Indeed, the first departure from the requirement that the enumerators collect all census information through personal visits to every household in the Nation came in 1957 at the behest of the Secretary. The Secretary asked Congress to amend the Act to permit the Bureau to use statistical sampling in gathering some of the census information. See Amendment of Title 13, United States Code, Relating to Census: Hearing on H. R. 7911 before the House Committee on Post Office and Civil Service, 85th Cong., 1st. Sess., 4–8 (1957) (hereinafter 1957 Hearing). In response, Congress enacted §195, which provided that, "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the

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thereof deemed most credible and worthy of trust, or of such individual living out of a family, to obtain each and every item of information and all the particulars required by this act"); Act of Mar. 1, 1889, §9, 25 Stat. 763 (same); Act of Mar. 3, 1899, §12, 30 Stat. 1018 (substantially same); Act of July 2, 1909, §12, 36 Stat. 5 (same); Act of Mar. 3, 1919, §12, 40 Stat. 1296 (same; also introducing provision permitting enumerators to gather from neighbors information regarding households where no one is present); Act of June 18, 1929, §5, 46 Stat. 22 (governing 1930–1950 censuses) (substantially same). See also W. Holt, The Bureau of the Census: Its History, Activities and Organization 1–94 (1929) (describing evolution of census); C. Wright, The History and Growth of the United States Census (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 7–130 (1900) (same).

provisions of this title." 13 U. S. C. §195 (1970 ed.). This provision allowed the Secretary to authorize the use of sampling procedures in gathering supplemental, nonapportionment census information regarding population, unemployment, housing, and other matters collected in conjunction with the decennial census– much of which is now collected through what is known as the "long form"– but it did not authorize the use of sampling procedures in connection with apportionment of Representatives. See also 1957 Hearing 7–8 ("Experience has shown that some of the information which is desired in connection with a census could be secured efficiently through a sample survey which is conducted concurrently with the complete enumeration of other items").

In 1964, Congress repealed former §25(c) of the Census Act, see Act of Aug. 31, 1964, 78 Stat. 737, which had required that each enumerator obtain "every item of information" by personal visit to each household, 68 Stat. 1015. The repeal of this section permitted the Bureau to replace the personal visit of the enumerator with a form delivered and returned via the Postal Service. Pursuant to this new authority, census officials conducted approximately 60 percent of the census through a new "mailout-mailback" system for the first time in 1970. See M. Anderson, The American Census: A Social History 210–211 (1988). The Bureau then conducted follow-up visits to homes that failed to return census forms. Thus, although the legislation permitted the Bureau to conduct a portion of the census through the mail, there was no suggestion from any quarter that this change altered the prohibition in §195 on the use of statistical sampling in determining the population for apportionment purposes.

In 1976, the provisions of the Census Act at issue in this case took their present form. Congress revised §141 of the Census Act, which is now entitled "Population and other census information." It amended subsection (a) to

authorize the Secretary to "take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U. S. C. §141(a). Congress also added several subsections to §141, among them a provision specifying that the term "census of population," as used in §141, "means a census of population, housing, and matters relating to population and housing." §141(g). Together, these revisions provided a broad statement that in collecting a range of demographic information during the decennial census, the Bureau would be permitted to use sampling procedures and special surveys.

This broad grant of authority given in §141(a) is informed, however, by the narrower and more specific §195, which is revealingly entitled, "Use of Sampling." See *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 524 (1989). The §141 authorization to use sampling techniques in the decennial census is not necessarily an authorization to use these techniques in collecting all of the information that is gathered during the decennial census. We look to the remainder of the law to determine what portions of the decennial census the authorization covers. When we do, we discover that, as discussed above, §195 directly prohibits the use of sampling in the determination of population for purposes of apportionment.[6]

When Congress amended §195 in 1976, it did not in

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[6] Although §195 applies to both the mid-decade census and the decennial census, the prohibition on the use of sampling in determining the population for purposes of apportionment applies only to the decennial census. See §141(e)(2) ("Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts").

doing so alter the longstanding prohibition on the use of sampling in matters relating to apportionment. Congress modified the section by changing "apportionment purposes" to "purposes of apportionment of Representative in Congress among the several States" and changing the phrase "may, where he deems it appropriate" to "shall, if he considers it feasible." 90 Stat. 2464. The amended section thus reads: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U. S. C. §195. As amended, the section now requires the Secretary to use statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census. But the section maintains its prohibition on the use of statistical sampling in calculating population for purposes of apportionment.

Absent any historical context, the language in the amended §195 might reasonably be read as either permissive or prohibitive with regard to the use of sampling for apportionment purposes. Indeed, appellees and appellants each cite numerous examples of the "except/shall" sentence structure that support their respective interpretations of the statute. See, *e.g.*, Brief for Appellee Glavin et al. in No. 98–564, p. 36, n. 36 (citing §2 of the Fourteenth Amendment, which provides that "when the right to vote . . . is denied to any of the male inhabitants of such State . . . *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" (emphasis added)); Brief for Federal Appellant et al. in No. 98–404, p. 29, n. 15 (citing 2 U. S. C. §§179n(a)(1) and 384(a) and 5 U. S. C.

§555(e), which contain the "except/shall" formulation in contexts where appellants claim "the exception cannot reasonably be construed as prohibiting the excepted activity"). But these dueling examples only serve to illustrate that the interpretation of the "except/shall" structure depends primarily on the broader context in which that structure appears. Here, the context is provided by over 200 years during which federal statutes have prohibited the use of statistical sampling where apportionment is concerned. In light of this background, there is only one plausible reading of the amended §195: It prohibits the use of sampling in calculating the population for purposes of apportionment.

In fact, the Bureau itself concluded in 1980 that the Census Act, as amended, "clearly" continued the "historical precedent of using the 'actual Enumeration' for purposes of apportionment, while eschewing estimates based on sampling or other statistical procedures, no matter how sophisticated." See 45 Fed. Reg. 69366, 69372 (1980). That same year, the Solicitor General argued before this Court that "13 U. S. C. 195 prohibits the use of statistical 'sampling methods' in determining the state-by-state population totals." Application for Stay in *Klutznick* v. *Young*, O.T. 1979, No. A–533, p. 14, n. 7. See also *Young* v. *Klutznick*, 652 F. 2d 617, 621 (CA6 1981) (noting that the Census Director and other officials explained at trial that "since 1790 the census enumeration has never been adjusted to reflect an estimated undercount and that in their opinion Congress by statute had prohibited such an adjustment in the figures used for purposes of Congressional apportionment"), cert. denied *sub nom*. *Young* v. *Baldrige*, 455 U. S. 939 (1982); *Philadelphia* v. *Klutznik*, 503 F. Supp. 663, 678 (ED Pa. 1980) (noting that the Bureau argued that "Congress has clearly rejected the use of an adjustment figure in the Census Act"); *Carey* v. *Klutznik*, 508 F. Supp. 404 (SDNY 1980) ("Defendants

[including the Secretary of Commerce and the Director of the Bureau of the Census] [contend that the] Census Act preclude[s] utilization of statistical adjustment for the purpose of apportioning representatives"), rev'd, 653 F. 2d 732 (CA2 1981), cert. denied, 455 U. S 999 (1982). The administration did not adopt the contrary position until 1994, when it first concluded that using statistical sampling to adjust census figures would be consistent with the Census Act. Memorandum for the Solicitor General from Assistant Attorney General Dellinger 1 (Oct. 7, 1994). In light of this history, appellants make no claim to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), on behalf of the Secretary's interpretation of the Census Act. Reply Brief for Federal Appellant et al. in No. 98–404, p. 11, n. 10.

In holding that the 1976 amendments did not change the prohibition on the use of sampling in determining the population for apportionment purposes, we do not mean to suggest, as JUSTICE STEVENS claims in dissent, that the 1976 amendments had no purpose. See *post*, at 4–6. Rather, the amendments served a very important purpose: They changed a provision that *permitted* the use of sampling for purposes other than apportionment into one that *required* that sampling be used for such purposes if "feasible." They also added to the existing delegation of authority to the Secretary to carry out the decennial census a statement indicating that despite the move to mandatory use of sampling in collecting non-apportionment information, the Secretary retained substantial authority to determine the manner in which the decennial census is conducted.

JUSTICE STEVENS's argument reveals a rather limited conception of the extent and purpose of the decennial census. The decennial census is "the only census that is used for apportionment purposes," *post*, at 4, but the decennial census is not *only used* for apportionment pur-

poses. Although originally established for the sole purpose of apportioning Representatives, the decennial census has grown considerably over the past 200 years. It now serves as "a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country." National Research Council, Counting People in the Information Age 1 (D. Steffey & N. Bradburn eds. 1994). Thus, to say that the 1976 amendments required the use of sampling in collecting non-apportionment information but had no effect on the way in which the Secretary could determine the population for the purposes of apportionment is to say that they had a purpose– just not the purpose that JUSTICE STEVENS imagines.

JUSTICE BREYER's interpretation of §195 is equally unpersuasive. JUSTICE BREYER agrees with the Court that the Census Act prohibits the use of sampling as a substitute for traditional enumeration methods. But he believes that this prohibition does not apply to the use of sampling as a "supplement" to traditional enumeration methods. This distinction is not borne out by the language of the statute. The Census Act provides that sampling cannot be used "for the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U. S. C. §195. Whether used as a "supplement" or as a "substitute," sampling is still used in "determining"– that is, in "the act of deciding definitely and firmly." Webster's Ninth New Collegiate Dictionary 346 (1983). Under the proposed plan, the population is not "determined," not decided definitely and firmly, until the NRFU and ICM are complete. That the distinction drawn by JUSTICE BREYER is untenable is perhaps best demonstrated by his own inability to apply it consistently. He acknowledges that the NRFU uses statistical sampling "to *determine* the last 10 % of the population in each census tract," *post*, at 7 (emphasis added), yet he nonetheless

finds that it is a supplement to the headcount and thus permitted by the Act.

B

The conclusion that the Census Act prohibits the use of sampling for apportionment purposes finds support in the debate and discussions surrounding the 1976 revisions to the Census Act. At no point during the debates over these amendments did a single Member of Congress suggest that the amendments would so fundamentally change the manner in which the Bureau could calculate the population for purposes of apportionment. See 122 Cong. Rec. 35171–35175 (1976); *id.*, at 9792–9803, 32251–32253, 33128–33132, 33305–33307, 33815; Mid-Decade Census Legislation: Hearing on S. 3688 and H. R. 11337 before the Subcommittee on Census and Statistics of the House Committee on Post Office and Civil Service, 94th Cong., 2d Sess. (1976). See also H. R. Rep. No. 94–944 (1976); H. R. Conf. Rep. No. 94–1719 (1976); S. Rep. No. 94–1256 (1976). This is true despite the fact that such a change would profoundly affect Congress by likely shifting the number of seats apportioned to some States and altering district lines in many others. Indeed, it tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception. That the 1976 changes to §§141 and 195 were not the focus of partisan debate, see *post,* at 5, is almost certainly due to the fact that the Members of Congress voting on the bill read the text of the statute, as do we, to prohibit the use of sampling in determining the population for apportionment purposes. Moreover, it is hard to imagine that, having explicitly prohibited the use of sampling for apportionment purposes in 1957, Congress would have decided to reverse course on such an important issue

by enacting only a subtle change in phraseology.

IV

For the reasons stated, we conclude that the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment. Because we so conclude, we find it unnecessary to reach the constitutional question presented. See *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"). Accordingly, we affirm the judgment of the District Court for the Eastern District of Virginia in *Clinton* v. *Glavin*, No. 98–564. As this decision also resolves the substantive issues presented by *Department of Commerce* v. *United States House of Representatives*, No. 98–404, that case no longer presents a substantial federal question. The appeal in that case is therefore dismissed. Cf. *Sanks* v. *Georgia*, 401 U. S. 144, 145 (1971).

It is so ordered.