IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, MAKE THE ROAD NEW YORK, CASA, AMERICAN-ARAB ANTIDISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, FIEL HOUSTON INC.	:	**Docket No. 1:20-cv-05781**
Plaintiffs,	:	
v.		
DONALD J. TRUMP, in his official capacity as President of the United States, **UNITED STATES DEPARTMENT OF COMMERCE**; **WILBUR L. ROSS, JR.**, in his official capacity as Secretary of Commerce, **BUREAU OF THE CENSUS**, an agency within the United States Department of Commerce; and **STEVEN DILLINGHAM**, in his official capacity as Director of the U.S. Census Bureau,	:	**MEMORAMDUM IN SUPPORT OF INTERVENOR PLAINTIFF'S MOTIONS FOR ORDER TO SHOW CAUSE. FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**
Defendants.		
and	:	
Robert A. Heghmann,		
Intervenor Plaintiff		
v.	:	**August 2, 2020**
DONALD J. TRUMP, in his official capacity as President of the United States,	:	

INTERVENOR PLAINTIFF'S MEMORANDUM IN SUPPORT OF THE MOTION FOR ORDER TO SHOW CAUSE, MOTION FOR DECLARATORY JUDGMENT AND MOTIONS FOR PRELIMINARY AND PERMANENT INJUNCTION

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. (Emphasis added) *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975))

The creation of election districts at both the state and congressional level based solely upon total population without regard for the number of foreign-born, non-citizen population has muted the voice of suburban and rural citizen voters. Representatives in both Congress and many state houses *do not* bear *a proportion of the votes their constituents would have if convened* because of the disparity in the percentage of citizens in urban voting districts as opposed to suburban and rural voting districts.

Mr. Justice Soutar in *Johnson v. DeGrandy*, 512 U.S. 997 (1994) alluded to this situation. In *DeGrandy*, California had created majority Hispanic voting districts in the hope of electing Hispanic legislators. Despite this, the Hispanic candidates still lost. A legal challenge was filed claiming voter dilution under Sec. 2 of the Voting Rights Act. As Mr. Justice Souter writing for the Court noted, "The State protests that fully half of the Hispanic voting age residents of the region are not citizens." *Id.* at 1008 The Court in considering demographic evidence in determining dilution of Hispanic votes sanctioned the use of voting age population as opposed to total population for apportionment purposes when dealing with Hispanic districts. *Id*., 512 U.S. at 1000; *African American Voting Rights Legal Defense Fund v. Villa*, 54 F.3d 1345, 1352 – 53 (8th Cir. 1995)

Mr. Justice Souter did not stop there, "The parties' ostensibly factual disagreement (over the effects of demographics on voter dilution) raises an issue of law about which characteristics of minority population (e.g. age, citizenship) ought to be the touchstone for proving a dilution claim and devising a remedy. These cases may be resolved, however, without reaching this issue." Id., 512 U.S. at 1008.

The case to which Mr. Justice Souter referred was filed five (5) years later in the U.S, District Court for the District of Connecticut. In *Horsey*, the Plaintiff claimed that the use of total population dilutes his vote primarily due to the citizen characteristics of the foreign-born, non-citizen population The Three Judge Panel

lead by Circuit Judge Winter agreed and established what I now call the *Horsey* Rule.

The Intervenor Plaintiff had the privilege of being Plaintiff's Counsel for Mr. Horsey. I filed the case, filed all the pleadings, appeared at several hearings and have an intimate, personal knowledge of that litigation. In this Memorandum I will share with the Court and the parties the issues, arguments and legal basis for the decision of the Three Judge Panel.

The *Horsey* Litigation

The *Horsey* case is the rarest of the rare, a voting rights case brought by a single voter who was defending his right to be heard. The case received no financial support from any political party, any interest group, any political lobby or association. That in part was the problem faced by the Panel. They recognized the issues at stake but since Horsey did not have the resources to present the expert opinions usually present in this type of case, the Panel was reluctant to proceed. That was the basis of the original dismissal in Horsey I. See *Horsey v. Bysiewicz* (Horsey II), slip opinion at 2 – 3 (We concluded that Horsey had submitted only "speculative evidence based on various, often non-comparable demographic data," that was insufficient as a matter of law to support these factual claims, Horsey I, at 3, or to allow redrawing of the districts, Id. at 14.) However, the patience of the Panel extended beyond the dismissal. "We did, however, hold out the possibility that

Horsey might cure the evidentiary deficiencies on a motion for reconsideration." Id. at 3. Fortunately, by 2004 the Census Bureau was supplying the factual information the Plaintiff needed to prove his case. Thus, the Panel vacated its earlier dismissal.

The Court then considered the Plaintiff's Offer of Proof and found, "The data reveal that the percentage of non-citizens in Connecticut's congressional districts varies from between 2.2 percent and 9.7 percent. However, this is within a generally accepted range of deviation from equality. See *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (less than 10% deviation is constitutionally tolerated for state elections); *Garza v. County of Los Angeles*, 918 F.2d 763, 785 – 86 (9th Cir. 1990) (Kozinski, J., concurring in part, dissenting in part).

Thus the rule in the Second Circuit is that (1) if a plaintiff offers information regarding the percentages of citizens and non-citizens in different congressional districts, there is evidentiary support for his claim that including non-citizens for apportionment purposes substantially dilutes his vote and (2) that a 10% deviation is the red line in determining the generally accepted range of deviation from equality. In this case, the Intervening Plaintiff is asking the Court to apply it to congressional voting districts in New York, Virginia and in other states.

STATEMENT OF FACTS

The Intervening Plaintiff, Robert A. Heghmann, is qualified and registered to vote in the State of Virginia and did in fact vote in elections held in 2018 for the Congress of the United States. The Plaintiff alleges that due to apportionment of congressional election districts based solely upon total population without regard to the citizen characteristics of the population, his vote was debased and diluted. Under the ruling in *Baker v. Carr,* 369 U.S. 186 (1962), the Plaintiff claims standing, "Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. Congress has exercised that power in 28 U.S.C. 1343 (3)." Id. at 200.

This case involves the "One Person, One Vote" standard established by this Court in *Wesberry v. Sanders*, 376 U.S. 1 (1964) and *Reynolds v. Sims*, 377 U.S. 533 (1964). The congressional apportionment claim is brought under Art. 1, Sec. 2 of the Constitution. In *Horsey* a Three Judge Panel was required under 28 U.S.S. Sec. 2284 (a) since the action was, "filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." In this case a Three Judge Panel is not required. *Horsey* is a decision by a Three Judge Panel, the functional equivalent of a decision by the Second Circuit Court of Appeals. The *Horsey* decision could only be reviewed by the Supreme Court. In

Horsey, the defense of the State of Connecticut was supervised by Attorney General (now Senator) Richard Blumenthal, a long standing, experienced Attorney General. Richard Blumenthal is a life-time, ardent- partisan Democrat. It is significant that Attorney General Blumenthal elected not to appeal what was clearly an adverse decision.

Horsey established the law in this Circuit concerning apportionment by total population without regard to the number of foreign-born, non-citizen population. If within a state the difference between the congressional district with the greatest number of foreign-born, non-citizen population is more than 10%, then the state's districts must be re-apportioned. This Court is without authority to review that decision. Philip M. Kannan, The Precedential Force of Panel Law, 76 Marquette Law Rev. 755, 755 – 756 (1993)(citing *U.S. v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986) *cert denied sub nom, Cohen v. U.S.,* 483 U.S. 1006 (1987) The issue raised by the Intervening Plaintiff is that to protect the equality of the Intervening Plaintiff's right to vote and the equality of the right to vote of suburban and rural voters in the upcoming Congressional (and possibly Presidential) Election, this Court must require the President as the Enforcer of the Law to require re-apportionment of the congressional districts in New York, Virginia and any other state in which the difference in foreign-born, non-citizens is greater than 10%.

The fact that the Plaintiff, a resident and qualified voter in Virginia's Eighth Congressional District, is claiming that his vote for a representative in Congress was debased and diluted in comparison to votes cast in other Virginia congressional districts and *in congressional districts in other states* is not a bar to this Court's exercise of jurisdiction. In two separate cases, lower courts have held that the rationale of *Wesberry* is applicable to interstate as well as intrastate congressional apportionment. Upon review the Supreme Court did not rule that the rationale of *Wesberry* is not applicable to interstate congressional apportionment claims. *Department of Commerce v. Montana*, 503 U.S. 442 (1992); *Wisconsin v. City of New York,* 517 U.S. 1 (1996*)*

According to the 2017-18 Census Department's Community Survey, the population in Virginia's 9th congressional district where the Plaintiff resides and votes, is 704,831. Of this the foreign-born population in the district is 15, 260 or 2.2% of the total population. By contrast Virginia's 8th congressional district has a population of 795, 467 of which 224,571 are foreign-born or 28.2% of the total population.

While the Census Bureau has not documented the percentage of foreign born who are naturalized versus non-citizens in each congressional district as it did in 2004, we do know what counties comprise the 8th and 9th congressional districts. We

can use county citizen/non-citizen statistics to calculate congressional district foreign-born citizen versus non-citizen statistics.

The 8th Congressional District comprises all of Arlington County, approximately half of Fairfax County and the City of Fairfax. Of Arlington County's 234,965 total population, 11.9% (27, 904) are non-citizens. Of Fairfax County's 1,148,433 total population, 14.4% (165, 387) are non-citizens. Of the City of Fairfax's 23,589 total population, 15.3% (3615) are non-citizens.

Combining Arlington County, half of Fairfax County and City of Fairfax, 14.4% of the population of the 8th Congressional District are foreign born non-citizens. Even assuming all of the foreign-born population in the 9th Congressional District, 2.2%, is non-citizen (which is not likely) the difference of 12.2% is outside the acceptable range to avoid violation of the One Person, One Person standard.

In New York City Immigrants make up 38% of the population. New York City contains 11 Congressional Voting Districts. Once again, the Census Bureau has not broken out the statistics on citizen versus non-citizen population in each congressional district but it has broken out the non-citizen statistics in each county. Three of the eleven congressional districts are contained in one county.

The sixth congressional district is contained entirely within the County of Queens. Out of a population of 2,278,722, the foreign-born population of Queens is

1,111,780. If these foreign-born, 482,104, or 21.2% of the total population, are not citizens.

The ninth congressional district is entirely contained in Brooklyn. Of the 2,504,700 residents, 971,504 are foreign-born. Of these, 399,573, or 16% of the total population, are not citizens.

The 15th congressional district is contained entirely in the Bronx. Of the 1,432,132 residents, 513,499 are foreign-born. Of the foreign-born, 264,531, or 18.5% of the total population, are not citizens.

Compare these urban congressional districts with three suburban and rural New York congressional districts. The 21st congressional district has 701,112 residents of whom 26,295, or .03% of the total population, are foreign born.

The 22nd congressional district has 697,372 residents of whom 42,674, or .06% are foreign-born.

The 23rd Congressional District has 693,764 residents of whom 27,591, or .04% of the total population, are foreign-born.

Given the 2018 results, the Democrats who control the U.S. House of Representatives will continue to flood urban areas with foreign born non-citizens to create even more urban congressional districts which they will dominate in elections. And the votes of suburban and rural congressional districts citizens will continue to

be diluted and debased due to the lack of One-Person, One Vote protection. In addition, these suburban and rural voters when they exercise their freedom of association to elect candidates who reflect their views will not be able to successfully elect those candidates because their votes are debased and diluted.

If our Representative Democracy is to retain the confidence of The People and survive, this Court and the President must take a stand and defend the principle of One Person, One Vote.

ARGUMENT

THE FOUNDING FATHERS AND ROTTON BOROUGHS

When the Founding Fathers gathered in Convention in 1787, they clearly expressed their admiration for the English *system* of government but also their perception that this system had been corrupted by the control of Parliament exerted through control of rotten or pocket boroughs. As James Madison wrote in his Notes, "Much has been said of the Constitution of G. Britain. I will confess that I believe it to be the best constitution in existence." The Records of the Federalist Convention of 1787, Rev. 1966 (Farrand, Ed.) Vol. 1 at 398. (hereinafter "Farrand") Hamilton spoke glowingly of how much the British owed to "the excellence of their Constitution". In fact, he was so enamored with that Constitution that in the plan that he put forward at the Convention he provided that the Executive and the second

house of the legislature (the Senate) would have a term of office for life. This mirrored the life tenure of the King and members of the House of Lords. 1 Farrand at 288 – 289; 299-300. But as much as they admired the British Constitution, the delegates to the Convention knew that the British government was fatally flawed. As Mr. Gorham stated, "The corruption of the English government cannot be applied to America. *This evil exists there in the venality of their boroughs.*" (emphasis added) 1 Farrand at 381. "The delegates were quite aware of what Madison called the "vicious representation" in Great Britain whereby "rotten boroughs" with few inhabitants were represented in Parliament on or almost on a par with cities of greater population." *Wesberry v. Sanders*, supra, 376 U.S. at 14. Men like Madison, Wilson and Randolph wanted a National Legislature but without the abuses of the rotten boroughs.

To avoid the evils of the rotten boroughs, the Founding Fathers framed a republican system on such a scale as to insure that such rotten boroughs or districts could not be created. What was that scale? At the time of the Convention, the population of the States was estimated at approximately 3,000,000 inhabitants. 1 Farrand at 572-573, 3 Farrand at CLXXI. Originally, Madison suggested one representative for at least every 30,000 people or approximately one for every 1% of the population. Since virtually every freeman in that 30,000 would have the right to vote in elections, the Founding Fathers felt assured that they had protected the

new nation from the *venalities* of the English system. They did not provide in the Constitution for actual districts but believed that the states would arrange the districts themselves. Madison in The Federalist Papers described the system of division of States into congressional districts, the method which he and others assumed States would adopt: "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives." "[N]umbers," he said, not only are a suitable way to represent wealth but in any event "are the only proper *scale* of representation." (emphasis added) *Wesberry v. Sanders*, supra, 376 U.S. at 15. (citing Federalist No. 57 (Cooke ed. 1961) at 389 and Federalist No. 54 at 368)

In *Wesberry*, Mr. Justice Brennan emphasized that the sad experience of the English electoral system was well known to the Framers of the Constitution. He noted that in the Convention, they repeatedly referred to the English system and the "rotten boroughs".

> It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, *within the States*, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter. The delegates were quite aware of what Madison called the "vicious representation" in Great Britain whereby "rotten boroughs" with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. Wilson urged that people must be

> represented as individuals, so that America would escape the evils of the English system under which one man could send two members to Parliament to represent the borough of Old Sarum while London's million people sent but four. The delegates referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate in the election of congressional representatives. (emphasis added) *Wesberry v. Sanders*, supra, 376 U.S. at 14 – 15.

The equivalence of population and citizen voters in the minds of the Framers can be seen from later comments by James Wilson. Soon after the Constitution was adopted, Wilson, by then an Associate Justice of the Supreme Court, gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, said:

> "[A]ll elections ought to be equal. Elections are equal, when a given number of *citizens*, in one part of the state, choose as many representatives, as are chosen by the *same number of citizens*, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same." (emphasis added) *Wesberry v. Sanders*, supra, 376 U.S. at 17

DEVELOPMENT OF THE "VICIOUS REPRESENTATION"

For most of our history, voters electing both state and congressional representatives have not voted in equally populated election districts. This Court responded in the mid-1960's by establishing the One Person, One Vote standard based upon total population. The nation that the Justices viewed in 1964 when they issued their opinions resembled in many respects the nation as seen years earlier at the Convention. According to the Census Bureau's *Profile of the Foreign-Born*

Population in the United States released in October, 1999, in the mid-1960's, the percentage of foreign-born persons in the country was at a historic low. It was in the process of declining from between 5.4% (the 1960 figure) to 4.7% (the 1970 figure). Between 1960 and 1970, the number of foreign-born persons actually declined by 100,000. Most importantly, in 1970 89.6% of all those foreign-born persons who had been in the U.S. 20 years and over had become naturalized citizens. Thus, in 1964, just as in 1787, when the Court was attempting to balance voting strength among voting districts, total population remained an appropriate standard.

That has now all changed not the least because of the weaponization of immigration policy by the Democratic party. The Democratic Party beginning in 1965 weaponized Immigration Policy. Democrats are for open borders, chain migration, social benefits for illegal immigrants and Green Cards for every immigrant thereby automatically leading to citizenship. The result of this use of Immigration as a political tool was clearly visible in Virginia this year. As the New York Times, which along with the Washington Post is the newspaper of record for the Democratic Party, reported new immigrants handed Virginia to Democrats.

> Around the advent of the modern immigration system, in 1965, foreign-born people made up only about five percent of the American population. Now they are nearly 14 percent, almost as high as the last peak in the early 20th century. The concentrations used to be in larger gateway cities, but immigrants have spread out considerably since then.

> Some went South. In 1980, 56 percent of adults eligible to vote in Virginia were born in the state. Today, that's down to 45 percent. Sabrina Tavernise and Robert Gebeloff, *How Voters Turned Virginia From Deep Red to Solid Blue*, N.Y. Times, 11/09/2019.

Whether the mass immigration of the past 10 years has been good or bad for the United States can be hotly debated but what is beyond debate is that it has been good for the Democratic Party.

> Mass legal immigration is driving Democrats towards full electoral dominance, with left-wing politicians winning nearly 90 percent of congressional districts with larger than average foreign-born populations, analysis finds.
>
> *The Atlantic* senior editor Ronald Brownstein analyzed Census Bureau statistics for the 2018 midterm elections, finding that the country's admission of more than a million legal immigrants every year is set to hand over electoral dominance to House and Senate Democrats.
>
> Among Brownstein's findings is that nearly 90 percent of House congressional districts with a foreign-born population above the national average were won by Democrats. This concludes that every congressional district with a foreign-born population exceeding 14 percent had a 90 percent chance of being controlled by Democrats and only a ten percent chance of electing a Republican. Joe Klamar, *Democrats Winning 90% Congressional Districts with Large Foreign-Born Populations*, Breitbart, 02/07/2019

American Immigration Policy is being driven by the Democrat Party's thirst for power, not necessarily what is best for the United States. The Democrats are pursuing this policy at the price of the "One Person, One Vote" Constitutional Mandate. The Democrats are creating the modern equivalent of "Rotten Boroughs".

They are using immigration, both legal and illegal, to create voting districts for both federal and state elections in which there are relatively few citizens and which for that reason the Democratic Party can control the outcome of the election.

This case is not an attack on apportionment of districts among the states *per se*, it is an attack on the creation within states of congressional districts giving some persons a greater voice than others. Rotten Districts are created when the states concentrate foreign-born non-citizens in compact urban election districts. By combining urban and suburban residents in a single district, much as is done in school desegregation cases, states can dilute the concentration of the foreign-born non-citizens and permit the creation of election districts wherein the percentage of non-citizens approaches the statewide percentage of non-citizens *in that state.*

Standing of the Intervening Plaintiff to Challenge Apportionment in New York, Virginia and other States

In the debate at the Convention of 1787, many of the smaller states feared that if they submitted their fate to a national legislature that would have more delegates from the larger states, they would lose their liberty. Under the Articles of Confederation, each state was equal and had a veto power over all the other states. On that basis, the smaller states could defend themselves against the more populous larger states. On June 29, 1787, Alexander Hamilton, a Delegate from New York, rose to allay these fears by pointing out that the first branch of the legislature

represented people, not states, and that *each voter in each state would have an equal vote:*

> (Mr. Madison wrote) Mr. Hamilton observed that individuals forming political Societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States. In all of them some individuals are deprived of the right altogether, not having the requisite qualification of property. In some of the states the right of suffrage is allowed in some cases and refused in others. To vote for a member in one branch, a certain quantum of property, to vote for a member in another branch of the Legislature, a higher quantum of property is required. In like manner States may modify their right of suffrage differently, the larger exercising a larger, the smaller a smaller share of it. But as States are a collection of individual men which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been sd. that if the smaller States renounce their *equality*, they renounce at the same time their *liberty*. The truth is it is a contest for power, not for liberty. Will men composing the small States be less free than those composing the larger? The state of Delaware having 40,000 souls will *lose power*, if she has 1/10 only the votes allowed to Pa. having 400,000: but will the people of Del: *be less free*, if each citizen has an equal vote with each citizen of Pa.(emphasis in original) 1 Farrand at 465-466.

It was understood by the Founding Fathers that in the House of Representatives because seats would be allocated based upon population, the *States* would lose power. But the people would not lose their *liberty* because each voter *would have an equal vote with every other voter* regardless of state of residence. This argument was carried forward in the Federalist Papers. In arguing to the people for adoption of the Constitution, the Framers anticipated the creation of congressional

districts in which between 5000 and 6,000 would elect each Member of Congress. See, *Federalist Papers No. 57* Knowing the different suffrage requirements of each state mitigated against exact equality, nevertheless the Framers, and the people, had every reason to expect that the votes would fall within a given range. In the Federalist Papers that range was plus or minus 10% of a mean of 5500 votes. This was the argument presented at the Convention and later to the people themselves that caused the smaller states to adopt the Constitution.

To argue now that *Wesberry* is not interstate would deprive this Court of fulfilling the promise of the Founding Fathers to the People who ratified the Constitution. That cannot be permitted. Even if the Intervenor Plaintiff herein cleans up the Rotten Boroughs in Virginia, the Democrats can use Rotten Boroughs it has created in other states to impose laws and regulations through the Congress opposed by a majority of the People, including the Intervening Plaintiff, but which the Democrats by virtue of their control of the Robben Boroughs can, despite their minority status, impose their will on the majority. This is why the Intervening Plaintiff must be granted standing to challenge apportionment in other states like New York.

Prior Related Litigation

This will not be the first time the argument over the use of citizen population as opposed to total population has been presented to this Court. In *Burns v. Richardson*, 384 U.S. 73, 94 - 95 (1966), a case involving apportionment of voting districts in Hawaii, the Court found that Hawaii's special population problems, including large concentrations of military and other transients centered on Oahu, distorted the democratic process. As a result of these special population problems, 73% of the registered persons on Oahu could elect 79% of the representatives. The Court then suggests that in some cases, state citizen population rather than total population is the appropriate comparative guide for apportionment

Similarly, in *Evenwel v. Abbot*, 578 U.S. …, 136 S. Ct. 1120 (2016), the Appellants, Texas Voters, claimed that the metric of apportionment employed by Texas based solely upon total population resulted in an unconstitutional apportionment because it did not achieve equality among voters in different districts as measured by the Appellants chosen metric, Citizen Voter Age Population.

In *Evenwel*, the Appellents argued that Citizen Voter Age Population should *replace* population as the mechanism for districting. The Court rejected this argument.

> What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for

> decades, even centuries. Appellants have shown no reason for the Court to disturb this longstanding use of total population. 578 U.S. , 18.

In this case the Plaintiff does not reject population in establishing voting districts, he *embraces* it. Instead of adopting the arguments set forth in *Evenwel*, the Plaintiff adopts the approach of *Burns*. Using total population as a starting point, the districts are then tweaked to assure equality of each person's vote within districts based upon population. Every district will still have an equal number of persons *and* within 10% an equal number of citizen voters.

The Power of the President

After the first census in 1790, Congress apportioned Congressional Districts among the several states in the following statute:

> CHAP. XXIH.—An Ad for appnrtiomng Representatives among the several States, April 14,1792. according to the first enumeration. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the third day of March one thousand seven hundred and ninety-three, the House of Representatives shall be composed of members elected agreeably to a ratio of one member for every thirty-three thousand persons in each state, computed according to the rule prescribed by the constitution ; that is to say : Within the state of New Hampshire, four; within the state of Massachusetts, fourteen; within the state of Vermont, two; within the state of Rhode Island, two; within the state of Connecticut, seven ; within the state of New York, ten; within the state of New Jersey, five; within the state of Pennsylvania, thirteen; within the state of Delaware, one; within the state of Maryland^ eight; within the state of Virginia, nineteen; within the state of Kentucky, two; within the state of North Carolina, ten ; within the state of South Carolina, six; and within the state of Georgia, two members. APPROVED, April 14, 1792.

In drawing the new congressional district lines, Congress relied more upon state lines than population. As a result, one of the new congressional districts had fewer than 30,000 inhabitants as required by the Constitution. It was close enough for Congress but close enough was not acceptable for President Washington. After consulting with his politically divided and contentious cabinet, Washington, who came from the southern state of Virginia, ultimately decided that the plan was unconstitutional because, in providing for additional representatives for some states, it would have introduced a number of representatives higher than that proscribed by the Constitution.

After a discussion with the president, Jefferson was able to convince the president to veto the bill on the grounds that it was unconstitutional and introduced principles that were liable to be abused in the future. Jefferson suggested apportionment instead be derived from arithmetical operation bases upon population and not state lines. If done arithmetically, no two men can ever possibly differ. Washington's veto sent the bill back to Congress. Though representatives could have attempted to overrule the veto with a two-thirds vote, Congress instead threw out the original bill and instituted a new one that apportioned representatives at "the ratio of one for every thirty-three thousand persons in the respective States."

This Veto by the President, one of only two during his entire term as President, established clearly in the minds of Members of Congress, many of whom

had participated in the Federal Convention of 1787 which drafted the Constitution, that the President was the ultimate arbitrator of whether or not congressional district lines were constitutional.

This case calls upon President Trump to exercise the same discretion and executive power as exercised by President Washington. He must order that every state examine the congressional districts within their borders to make sure they comply with the *Horsey* Rule.

THE REMEDY SOUGHT BY THE INTERVENOR IS ENTIRELY APPROPRIATE

The recent decision in *In re: DONALD J. TRUMP*, President of the United States of America, in his official capacity and in his individual capacity, ON REHEARING EN BANC, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, No. 18-2486 is dispositive of this issue. As DIANA GRIBBON MOTZ, Circuit Judge writing for the majority stated:

> [f]or in the United States, every person — even the President — has a duty to obey the law. The duty to obey these particular laws — the Constitution's Emoluments Clauses — flows from the President's status as head of the Executive Branch, but this duty to obey neither constitutes an official executive prerogative nor impedes any official executive function. Moreover, even if obeying the law were somehow an official executive duty, such a duty would not be "discretionary," but rather a "ministerial" act within the meaning of *Johnson* (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866),(the judiciary cannot direct or otherwise interfere with the performance of this duty).Id. at 21.

:

The fact that *Trump* concerned the Emoluments Clause and this case involves the One Person, One Vote Constitutional Principal is a distinction without a difference. As was noted *supra*., "the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. *Lujan, supra.,* 504 U.S. at 571-578 (1992). In *Trump* the 4th Circuit *en banc* sanctioned naming the President as a Defendant since the Court was ordering the President to do a "ministerial" act, namely to enforce the rule of law established by the Emoluments Clause. In this case, the Plaintiff is seeking an Order of the Court directing the President to do a "ministerial" act, namely enforce the rule of law under the One Person, One Vote Mandate as established in *Horsey*.

In *Horsey*, the Plaintiff named all the relevant state officers including the Connecticut Governor and the Secretary of State. No federal officials were named as a defendant. That was appropriate since the *Horsey* Rule was yet to be established. The State's defense was supervised by then Attorney General Richard Blumenthal, now a U.S. Senator. *Horsey* was decided by a unanimous panel. Although no remedy was applied because in Connecticut at that time the difference between the Congressional District with the largest percentage of foreign-born, non-citizens and the District with the lowest percentage of foreign-born, non-citizens was less than

10%, the decision was a clear legal victory for Wade Horsey and suburban voters. Nevertheless, the State did not appeal the decision.

A three-judge panel is the functional equivalent of a Court of Appeals decision. As such, *Horsey* is the highest legal precedent on the issue of the legal requirement that state's must re-apportion if the difference between the Congressional District with the largest percentage of foreign-born, non-citizens and the District with the lowest percentage of foreign-born, non-citizens is more than 10%. Until Supreme Court over rules *Horsey*, it is the controlling authority in the United States. As such, the Plaintiff has every right to seek an Order of this Court directing the President to execute his most important constitutional duty, to "take Care that the Laws be faithfully executed," and issue an Executive Order directing the states not in compliance with the *Horsey* Rule to re-apportion.

Even the Minority in *Trump* agreed that a Court could Order the President to perform a ministerial function.

> True enough, in Mississippi, the Supreme Court left open whether the federal courts could enjoin the President to perform a "ministerial duty." 71 U.S. at 498-99. But the federal courts have never sustained an injunction on this basis. Swan v. Clinton, 100 F.3d 973, USCA4 Appeal: 18-2486 Doc: 100 Filed: 05/14/2020 Pg: 42 of 105 43 978 (D.C. Cir. 1996) ("We have, however, never attempted to exercise power to order the President to perform a ministerial duty."). And, in any event, this narrow exception could only apply to "simple, definite" duties where "nothing is left to discretion." Mississippi, 71 U.S. at 498.

> In other words, once an official responsibility involves the "exercise of judgment," it is a non-ministerial official duty. Mississippi, 71 U.S. at 499. *In re Trump*, USCA4 Appeal: 18-2486 Doc: 100 Filed: 05/14/2020 Pg: 42 - 43 of 105, (Wilkinson, Circuit Judge, dissenting)

Once the Census Department of the Department of Commerce determines which States are in violation of the *Horsey* Rule which is not set forth on the Department of Commerce or Census Bureau's current web site, informing the States that they must re-apportion is a ministerial duty of the President. It does not require or admit of any of any exercise of discretion. Once informed the States must re-apportion. Naturally, any subsequent re-apportionment will be subject to review by the Census Bureau. If again the Census Department finds the States re-apportionment does not comply with the *Horsey* Rule, the Plaintiff will again request the President to take action.

Further support for the Plaintiff's position that the President is a proper party is found in *Igartua v. Obama*, 842 F.3d 149, 156-157 (1st Cir 2016), *cert denied sub nom*. *Igartua v. Trump*, 138 S. Ct. 2649 (2018) as well as a case relied upon by the First Circuit in reaching its decision in *Igartua*, *Adams v. Clinton*, 90 F.Supp.2d 35, 38 (D.D.C. 2000) (three-judge court), *affirmed*, 531 U.S. 941, 121 S.Ct. 336, 148 L.Ed.2d 270 (2000) ("Judgment affirmed.").The significance of both *Clinton* and *Igartua* to this case is that both cases were brought against the President. Thus, both

the Supreme Court in *Clinton* and the First Circuit under *Igartua* have held that a case involving apportionment can be brought in an action against the President.

The Plaintiff has chosen the simplest possible procedure for obtaining the necessary relief. The alternative is bringing possibly 50 separate law suits against all of the States not in compliance with the *Horsey* Rule. Such a process would deny relief in time for the 2020 Congressional Election and would result of an unconstitutional election of the next U.S. House of Representatives.

CONCLUSION

The United States is on the precipice of a Constitutional crisis. The Democrats have used immigration, both legal and illegal, to create "Rotten Boroughs" or in modern terms "Rotten Districts" in order to enhance their political power. In the process, they have shredded the One Person, One Vote Mandate. If the states are not ordered to re-apportion and comply with the *Horsey* Rule, the 2020 election in the House of Representatives and perhaps in the Presidential election will be unconstitutional. The Intervening Plaintiff cannot speak for President Trump but he can speak for his 63+ million supporters. If the states are not ordered to re-apportion in accordance with the *Horsey* Rule, they will not accept the election outcome as legitimate and a Constitutional crisis not seen in the United States for over 200 years will ensue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document will be served pursuant to Rule 5 (b) (E) by filing with the Court via U.S. Mail, postage pre-paid, where it will be sent electronically to counsel for all registered participants. In addition a copy of this pleading has been sent via e-mail to Mathew Colangelo, Office of the New York State Attorney General at Mathew.Cokangelo@ag.ny.gov who seems to have taken the lead among Plaintiffs' counsel.

Bob Heghmann

Robert A. Heghmann