No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

PARTIES TO THE PROCEEDING

Appellants are Sue Evenwel and Edward Pfenninger.

Appellees are Greg Abbott, in his official capacity as Governor of Texas, and Carlos Cascos, in his official capacity as Texas Secretary of State.

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BRIEF FOR APPELLANTS

Appellants Sue Evenwel and Edward Pfenninger ("Appellants") respectfully request that this Court reverse the judgment of the U.S. District Court for the Western District of Texas.

OPINION BELOW

The district court's opinion is unreported and is reprinted in the Jurisdictional Statement's Appendix ("J.S. App.") at 3a-14a.

JURISDICTION

This case was properly before a three-judge district court pursuant to 28 U.S.C. § 2284(a) because it involves a constitutional challenge to a statewide redistricting plan. The U.S. District Court for the Western District of Texas entered final judgment against Appellants on November 5, 2014, thereby denying their request for a permanent injunction. J.S. App. 15a-16a. Appellants filed a timely notice of appeal on December 4, 2014. J.S. App. 1a. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

This is an appeal from a three-judge district court decision dismissing Appellants' constitutional challenge to a Texas Senate apportionment plan. That plan (Plan S172) created Senate districts with approximately equal total populations (*i.e.*, all persons counted in the decennial Census) but with gross disparities in voting populations (*i.e.*, all persons eligible to vote). Appellants, who reside in Senate districts significantly overpopulated with eligible voters, brought this action pursuant to 42 U.S.C. § 1983 on the ground that Plan S172 violated the one-person, one-vote rule of the Fourteenth Amendment. Appellants alleged that Plan S172 violates the one-person, one-vote rule because "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 56 (1970).

The district court dismissed Appellants' complaint for failing to state a claim on the ground that Texas's choice of a population base (*i.e.*, total population instead of voter population) is not judicially reviewable. The court reached that conclusion even though doing so abdicated any judicial responsibility to ensure the votes of eligible voters in one part of Texas are approximately equal in weight to those of eligible voters in another part of the State. This Court, however, long ago settled the political-question issue in favor of justiciability. If the district court were correct, the Texas Legislature could have adopted a Senate map containing 31 districts of equal total population without violating the one-person, one-vote rule—even if 30 of the

districts each contained one eligible voter and the 31st district contained every other eligible voter in the State. That cannot be right.

The Court therefore must decide whether the one-person, one-vote rule protects the right of eligible voters to have an equal vote. If it does, then the judgment below cannot stand. To be sure, the Constitution affords States wide latitude to consider an array of policy factors, including the representational interest of non-voters, when apportioning districts. But that discretion is not limitless. It must be exercised in a fashion that guarantees the individual right to an equal vote that eligible voters hold under the one-person, one-vote rule. Texas breached that fundamental obligation in creating these Senate districts. Plan S172's massive and arbitrary malapportionment of eligible voters is patently unconstitutional. The district court's judgment should be reversed.

STATEMENT

I. The Texas Senate Redistricting

The one-person, one-vote rule requires States and localities to revise their apportionment schemes every ten years to account for population shifts and changes. *See Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964). To that end, the Texas Constitution requires the Texas Legislature to reapportion voting districts for the Texas Senate at its first regular session following the publication of each federal decennial Census. Tex. Const. art. III, § 28. The Texas Constitution further provides that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator."

Id. art. III, § 25. Texas law does not otherwise set forth substantive criteria to govern the decennial redistricting process.

Notably, the Texas Constitution previously required that "[t]he State shall be divided into Senatorial Districts of contiguous territory according to the number of qualified electors … and no single county shall be entitled to more than one Senator." Tex. Const. art. III, § 25 (2000). The Texas Constitution's "no more than one Senator" per county rule was clearly unconstitutional after *Reynolds*. *See infra* at 24-26. In 1981, the Texas Attorney General opined that the formation of Senate districts according to the number of qualified electors also was "unconstitutional on its face as inconsistent with the federal constitutional standard." Tex. Att'y Gen. Op. No. MW-350, 1981 WL 140035, at *2 (1981); *see also Terrazas v. Clements*, 581 F. Supp. 1319, 1328 (N.D. Tex. 1983) (advancing the same position in litigation). In 2001, both the "qualified electors" and "no more than one Senator" provisions were deemed obsolete and removed from the Texas Constitution. *See* H.J.R. No. 75, § 1.01.

Following the 2010 Census, the Texas Legislature undertook the task of reapportioning voting districts for the Texas Senate. To accomplish this task, the Legislature relied on the Texas Legislative Council, a nonpartisan legislative agency, to compile the data needed to draw Senate districts. Specifically, the Council provided three sets of data: (1) population data from the Census Bureau and the American Community Survey ("ACS"), including total population, voting age population ("VAP"), and citizen voting age population ("CVAP"); (2) Census Bureau geographic data, including digitized maps, data

concerning county election precincts, census tract and census block information, and reports concerning various features of existing districts; and (3) State-collected data, including voter registration, voter turnout, and election returns.[1]

Despite the availability of all this information, the Texas Legislature redrew the Senate map without attempting to ensure that each Senate district has approximately the same number of eligible voters. As a consequence, the Senate redistricting plan ("Plan S148") formed districts that, although roughly equal in terms of total population, were grossly malapportioned in terms of eligible voters. *See* Brief Amicus Curiae of Edward Chen, et al., *Perry v. Perez*, No. 11-713 (Dec. 28, 2011). On June 17, 2011, then-Governor Perry signed into law H.B. 150, which contained Plan S148, as well as the congressional and Texas House plans.

Plan S148 did not take effect, however, because Section 5 of the Voting Rights Act ("VRA") required Texas to obtain "preclearance" from the Attorney General or the U.S. District Court for the District of Columbia before it could implement any new voting law. *See* 42 U.S.C. § 1973c, *declared unconstitutional in part by Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013). In July 2011, Texas filed a declaratory judgment action before a three-judge district court in Washington D.C. seeking Section 5 preclearance of Plan S148.

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1. *See Data for 2011 Redistricting in Texas*, Texas Legislative Council (Feb. 2011), http://www.tlc.state.tx.us/redist/pdf/Data_2011_Redistricting.pdf; *Data for 2011 Redistricting in Texas – Addendum on Citizenship Data*, Texas Legislative Council, http://www.tlc.state.tx.us/redist/pdf/CitizenshipAddendum.pdf.

Two months later, various plaintiffs filed a federal action in Texas to enjoin Plan S148. *See Davis v. Perry*, No. 11-cv-788 (W.D. Tex.). The plaintiffs claimed that because Plan S148 had not (and likely would not) receive Section 5 preclearance, the court should enjoin it and create a new plan for the upcoming Senate elections. The plaintiffs also challenged Plan S148 under Section 2 of the VRA, as well as under the Fourteenth and Fifteenth Amendments. To that end, they alleged that Plan S148 "illegally dilute[d] the voting rights of minority voters (African Americans and Latinos) in the Dallas and Tarrant counties region of North Texas," and argued that the district court should, for that reason, enjoin Plan S148 "[i]n the unlikely event that Section 5 preclearance is obtained." *Id.*, Doc. 1 at 12-13. The plaintiffs specifically claimed that Plan S148 diluted their votes because "the entire north Texas region contains only one district SD23 that allows minority citizens the opportunity to elect their candidate of choice" even though the Dallas-Tarrant minority population was "sufficiently large and geographically compact to comprise the majority of citizen voting age persons in at least two state senate districts." *Id.* at 11.

A three-judge panel of the U.S. District Court for the Western District of Texas agreed with the plaintiffs that it was unlikely Plan S148 would receive preclearance in time for the 2012 Senate elections, and it created an interim map (Plan S164) to govern those elections. *See id.*, Docs. 8, 89. Texas appealed directly to this Court. On expedited review, the Court vacated Plan S164. *See Perry v. Perez*, 132 S. Ct. 934 (2012). This Court instructed the district court to use Plan S148 as its "starting point" on remand and to depart only from those aspects of Plan S148 that stood "a reasonable probability of failing to gain § 5 preclearance." *Id.* at 941-42.

On remand, the district court held a bench trial to evaluate Plan S148 in light of this Court's instructions and to examine the parties' competing interim Senate plans. In drawing their maps, both parties relied on the Texas Legislative Council's CVAP data. *See Davis*, No. 11-cv-788, Doc. 137 at 16; Doc. 127, Ex. 1; Doc. 73-8 at 19; Doc. 56-11; *see also id.* Doc. 178 (later requesting in a consolidated case that new ACS citizenship data be admitted into evidence because "the most often relied upon evidence [in vote dilution cases] is … census data that estimate[] citizen voting age population" and because "the updated ACS citizenship data would be relevant and admissible" (adopting by reference Joint Memorandum, *Perez v. Texas*, No. 11-cv-360, Doc. 756)).

After finding that aspects of Plan S148 stood "a reasonable probability of failing to gain §5 preclearance," the district court created a new interim Senate plan (Plan S172) for the 2012 elections. *Id.*, Docs. 141, 147. In drawing Plan S172, the district court likewise relied on the Texas Legislative Council's voting data and expertise. *See id.*, Docs. 19, 175. The court appointed Texas Legislative Council employees as technical advisors to assist it in understanding and operating the Council's redistricting software and extensively relied on the Council's data to redraw the Senate map. *See id.*

On June 21, 2013, the Texas Legislature passed a bill repealing Plan S148 and permanently adopting Plan S172. Governor Perry signed the bill on June 26, 2013. Because Texas no longer needed to secure Section 5 preclearance, Plan S172 took effect immediately. The Texas Legislature, in enacting Plan S172, once again had available to it the Texas Legislative Council's extensive data, which included

the number of eligible and registered voters in each Senate district under various statistical metrics. *See* J.S. App. 26a-30a; Supplemental Jurisdiction Statement Appendix ("Supp. J.S. App.") 1-12. Yet, the Texas Legislature again drew Senate districts that, while roughly equal in terms of total population, were grossly malapportioned in terms of eligible voters.

Table 1 below shows the voting population deviations from the "ideal" Senate district using Texas's own data. The "ideal" Senate district is the total relevant population statewide, divided by 31 (the number of Senate districts). For example, the statewide Texas CVAP from the 2007-2011 ACS survey was 15,581,580. Supp. J.S. App. 9. The "ideal" Senate district therefore would contain 502,632 citizens of voting age. The percentage deviation is derived by adding the maximum upward and downward percentage deviations from the "ideal" district. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842, 846 (1983); *Connor v. Finch*, 431 U.S. 407, 416-18 (1977); *White v. Regester*, 412 U.S. 755, 761, 764 (1973). As Table 1 demonstrates, Plan S172 deviates from the "ideal" district by roughly 46% to 55% depending on which voter-based metric is utilized.

TABLE 1

Population Deviations from the Ideal Senate District Under S172

Voter Metric	Percentage Deviation from Ideal District
Citizen Voting Age Population (2005-2009)	47.87%
Citizen Voting Age Population (2006-2010)	46.77%
Citizen Voting Age Population (2007-2011)	45.95%
Total Voter Registration[2] (2008)	51.14%
Total Voter Registration (2010)	55.06%
Non-Suspense Voter Registration[3] (2008)	51.32%
Non-Suspense Voter Registration (2010)	53.66%

2. "Total voter registration is the total number of all persons who are on a county's voter registration roll." Texas Legislative Council Glossary, Texas Redistricting, http://www.tlc.state.tx.us/redist/glossary/glossary.html.

3. "Non-suspense voter registration is total voter registration minus the number of previously registered voters who fail to respond to a confirmation of residence notice sent by the county voter registrar." *Id.*

II. Appellants' Districts

Sue Evenwel is a United States citizen who resides in Titus County, Texas. Ms. Evenwel is a registered voter who votes in Senate District 1 under Plan S172. She regularly votes in Texas Senate elections and plans to do so in the future. J.S. App. 19a-20a.

Edward Pfenninger is a United States citizen who resides in Montgomery County, Texas. Mr. Pfenninger is a registered voter who votes in Senate District 4 under Plan S172. He regularly votes in Texas Senate elections and plans to do so in the future. *Id.* at 20a.

Appellants live in Senate districts among the most overpopulated with eligible voters under Plan S172. *See* J.S. Supp. App. 5, 7, 9, 11-12. The tables below compare the number of eligible voters and registered voters in Senate District 1 and 4, respectively, to the Senate District with the lowest number of eligible voters and registered voters. These comparisons are expressed both as a percentage deviation from the ideal district and as a ratio of relative voting strength (*viz.*, comparing the voting power a District 1 or District 4 voter holds to the voting power a voter in the "low Senate district" holds).

As Table 2 and Table 3 show, there are eligible voters with substantially more voting power than Appellants; eligible voters from certain Senate districts hold votes weighing approximately one-and-one-half times Appellants' votes (or more depending on the relevant voter metric). For example, as measured by CVAP (2005-2009), the vote of an eligible voter in District 27 (the low Senate district) is 1.56 times more powerful than the vote of an eligible voter in District 1 (where Ms. Evenwel resides).

TABLE 2

Senate District 1 Deviation and Voting Power

Voter Metric	Senate District 1	Low Senate District	Absolute Difference	Percentage Deviation from Ideal District	Voting Power
Citizen Voting Age Population (2005-2009)	557,525	358,205	199,320	41.49%	1:1.56
Citizen Voting Age Population (2006-2010)	568,780	367,345	201,435	40.88%	1:1.55
Citizen Voting Age Population (2007-2011)	573,895	372,420	201,475	40.08%	1:1.54
Total Voter Registration (2008)	513,259	297,692	215,567	49.23%	1:1.72
Total Voter Registration (2010)	489,990	290,230	199,760	46.69%	1:1.69
Non-Suspense Voter Registration (2008)	437,044	256,879	180,165	47.76%	1:1.84
Non-Suspense Voter Registration (2010)	425,248	252,087	173,161	47.23%	1:1.69

TABLE 3

Senate District 4 Deviation and Voting Power

Voter Metric	Senate District 4	Low Senate District	Absolute Difference	Percentage Deviation from Ideal District	Voting Power
Citizen Voting Age Population (2005-2009)	506,235	358,205	148,030	30.81%	1:1.41
Citizen Voting Age Population (2006-2010)	521,980	367,345	154,635	31.38%	1:1.42
Citizen Voting Age Population (2007-2011)	533,010	372,420	160,590	31.95%	1:1.43
Total Voter Registration (2008)	468,949	297,692	171,257	39.11%	1:1.58
Total Voter Registration (2010)	466,066	290,230	175,836	41.10%	1:1.61
Non-Suspense Voter Registration (2008)	409,923	256,879	153,044	40.57%	1:1.60
Non-Suspense Voter Registration (2010)	406,880	252,087	154,793	42.22%	1:1.61

III. Proceedings Below

Ms. Evenwel and Mr. Pfenninger ("Appellants") filed suit in the U.S. District Court for the Western District of Texas pursuant to 42 U.S.C. § 1983. Appellants challenged Plan S172 as violating the one-person, one-vote rule of the Equal Protection Clause and requested a permanent injunction against its further enforcement. J.S. App. 34a. A three-judge district court was convened to hear the suit in accordance with 28 U.S.C. § 2284. Appellees ("Texas") moved to dismiss the complaint, while Appellants sought summary judgment. The district court stayed summary-judgment briefing pending resolution of the motion to dismiss.

On November 5, 2014, the district court granted the motion to dismiss. J.S. App. 3a-14a. The court recognized that the "crux of the dispute is Plaintiffs' allegation that the districts vary widely in population when measured using various voter-population metrics." *Id.* at 5a. But the district court rejected the claim, relying primarily on *Burns v. Richardson*, 384 U.S. 73 (1966). In the district court's view, the choice of which population base to use in apportioning districts is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a (citing *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996)).

In particular, the district court held that "the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" *Id.*

at 11a (quoting *Burns*, 384 U.S. at 92) (emphasis omitted). The district court held that Appellants' claim that Texas must equally apportion the population of eligible voters among the Senate districts was judicially unreviewable and dismissed the lawsuit for failure to state a claim. In the district court's judgment, Appellants had raised "'a close but ultimately unavailing [legal theory].'" *Id*. at 14a (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (alteration in original)).

This timely appeal followed. On May 26, 2015, the Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The key issue this case raises is whether the one-person, one-vote rule protects the right of eligible voters to an equal vote or, as the district court held, the choice of a population base is unreviewable no matter how much vote dilution it causes. The answer is clear—the one-person, one-vote rule protects eligible voters. Beginning with *Baker v. Carr*, 369 U.S. 186 (1962), and culminating in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held that: (1) an equal-protection challenge to a State apportionment plan is not a political question; (2) standing to bring such a claim is founded on the right to vote; and (3) a legislative apportionment plan that dilutes the vote of an eligible voter based on where he lives violates the one-person, one-vote rule. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds*, 377 U.S. at 568. The Court need not look beyond these seminal decisions to resolve the question presented in Appellants' favor.

As a result, the "population" States must equalize for one-person, one-vote purposes is the population of eligible voters. That does not mean that every State must cease using decennial Census figures to draw districts. Total population data often protect the one-person, one-vote rights of eligible voters because non-voters typically are evenly distributed throughout a given jurisdiction. But as this case demonstrates, that is not always true. When total population figures do not protect eligible voters, demographic data that ensures "the vote of any citizen is approximately equal in weight to that of any other citizen in the State" must be used in the apportionment process. *Id.* at 579.

The district court's conclusion that this type of one-person, one-vote claim is nonjusticiable because it would lead federal courts too far into the political thicket is untenable. It outright repudiates *Baker* and *Reynolds*. In those decisions, the Court held that equal-protection claims are judicially reviewable irrespective of whether they draw the Court into issues with a political dimension. It cannot be that a State's choice between a geographic or population basis is justiciable when it implicates the rights of eligible voters but nonjusticiable when the choice between different population bases reproduces that same injury. None of the Court's one-person, one-vote decisions supports such a distinction.

The district court thought that *Burns v. Richardson*, 384 U.S. 73 (1966), compelled this conclusion. But *Burns* did not decide this issue. There, Hawaii had chosen registered voters as its apportionment base in order to equalize voting power because a large number of people counted in the Census (mostly military personnel and

seasonal tourists) were not Hawaii voters. The Court upheld that choice, concluding that States are not required to use total population as the apportionment base when it would produce "a substantially distorted reflection of the distribution of state citizenry." *Id.* at 94. *Burns* thus does not support the district court's conclusion that States may use total population as an apportionment base when it *does* dilute the vote of those eligible to cast a ballot. The Court's skeptical review of Hawaii's reliance on registered-voter data as a proxy for the number of eligible voters proves the point. That probing inquiry would have been forbidden if *Burns* held, as the district believed, that a State's choice of a population basis is immune from judicial review.

Unlike the district court, the Ninth Circuit has held that this type of one-person, one-vote claim is reviewable but unsustainable on the merits. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1990) According to the Ninth Circuit, the one-person, one-vote rule cannot require equal distribution of eligible voters because that would dilute the "access" of residents to their elected representatives in districts with larger numbers of non-voters in violation of the Equal Protection Clause and the Petition Clause of the First Amendment. This novel "equal access" theory fails on every level.

As an equal protection matter, *Burns* forecloses it. If the one-person, one-vote rule required States to ensure equal access instead of equal voting power, Hawaii's plan would have been unconstitutional. But the reason why *Burns* did not invalidate Hawaii's plan is because the one-person, one-vote rule *does* "insure that each person's vote counts as much, insofar as it is practicable, as any other person's." *Hadley*, 397 U.S. at 54. The

Court anticipated that population-based districting on the State and local level would enhance representational interests as a byproduct of voter equality—not at its direct expense. It cannot be that voter equality is subordinate to representational interests. Otherwise, non-voters would have standing to bring a one-person, one-vote challenge to an apportionment plan that equally distributes eligible voters. There is no support for such a radical position.

The First Amendment rationale is no stronger. The Petition Clause ensures individuals are not unreasonably restrained in seeking redress from the government. Thus, constituents have every right to contact their elected representative, and nothing about a one-person, one-vote rule that protects eligible voters takes that right away from them. That does not mean, however, that the First Amendment includes a right to *equal* access. The Petition Clause no more guarantees constituents equal access to their elected representatives to seek to influence how tax dollars are spent than the Free Speech Clause equalizes their "*relative* ability" to seek to "influence the outcome of elections." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (emphasis added). Simply put, the First Amendment does not enshrine the comparative right the Ninth Circuit wielded to collaterally attack a voter-based conception of the one-person, one-vote rule.

Last, the Fifth Circuit has suggested that equalizing voter population would conflict with the Constitution's allocation of seats in the House of Representatives based on total population. But the Court rejected the "so-called federal analogy" when Georgia tried to defend its version of the Electoral College in *Gray v. Sanders*, 372 U.S. 368 (1963), and in *Reynolds* when Alabama tried to

defend its system as modeled on the U.S. Senate. The federalism-based concerns that drove the Framers to apportion House seats across States in the way they did sheds no light on the one-person, one-vote considerations underlying how districts are shaped within States. Analogies cannot overcome a simple truth: *Baker* and *Reynolds* are foundational cases that stand on their own and the district court's decision cannot be reconciled with them.

However, the fact that the "population" of eligible voters must be given "controlling consideration," *Reynolds*, 577 U.S. at 581, in the one-person, one-vote equation does not mean that States have no latitude to take other policy factors into consideration. The Court has always been aware of the need for States to take into account an array of factors beyond one-person, one-vote compliance when drawing districts (integrity of political subdivisions and district compactness, for example). Representational equality is another such interest; indeed, under certain conditions a State's desire to accommodate both total and voter population might afford it somewhat more latitude than would otherwise be appropriate.

What Texas may not do, though, is leverage policy considerations to deny eligible voters their fundamental right to an equal vote. That is the whole point of *Reynolds*. But, here, the Texas Legislature did not even make a good-faith effort to draw Senate districts with approximately equal numbers of eligible voters. And, Plan S172's voter-population deviations are too large to be defensible in any event. Deviations nearing 20% are *per se* unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973). The deviations here range from 30% to 50% depending on which district is analyzed and which voter-based metric is

used. Texas's malapportionment of eligible Senate voters is especially egregious because it could have substantially reconciled both total and voter population.

This appeal need not resolve every implementation issue. As in *Reynolds*, the Court should, at a minimum, provide enough guidance to ensure that the individual right to an equal vote is respected. At the end of the day, that means there must be "some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications." *Brown v. Thomson*, 462 U.S. 835, 849-50 (1983) (O'Connor, J., concurring). Because if there is not, "the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." *Reynolds*, 377 U.S. at 581.

ARGUMENT

I. Plan S172 Violates The One-Person, One-Vote Rule Of The Equal Protection Clause.

From the beginning, the fundamental purpose of the one-person, one-vote principle has been to ensure that the States apportion districts in a way that protects the right of eligible voters to an equal vote. It necessarily follows that requiring the States to apportion approximately the same number of eligible voters to each district is the only way to enforce that constitutional right.

In a series of pathbreaking cases, this Court held that the Equal Protection Clause includes a "one-person, one-vote" rule. Initially, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that an equal-protection challenge to the

Tennessee Legislature's apportionment of seats in the General Assembly presented a justiciable federal question "by virtue of the debasement of [the plaintiffs'] votes." *Id.* at 187-88 (internal quotation marks omitted). The Court premised that holding on three distinct legal conclusions.

First, the Court held that "the cause of action is one which 'arises under' the Federal Constitution." *Id.* at 199. Tennessee apportioned seats in the General Assembly among its counties "'according to the number of qualified voters in each.'" *Id.* at 188-89 (quoting Tenn. Const. art. II, § 5). The plaintiffs did not oppose the use of "qualified voters" as Tennessee's apportionment base. They contested Tennessee's refusal to reapportion the General Assembly given the "substantial growth and redistribution of her population" that had occurred between 1901 and 1961. *Id.* at 192-94. In particular, the complaint alleged that the Tennessee Legislature's refusal to reapportion the General Assembly despite the fact that "[t]he relative standings of the counties in terms of qualified voters [had] changed significantly" violated the Equal Protection Clause. *Id.* The Court ruled that "[a]n unbroken line of … precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature." *Id.* at 201.

Second, the Court sustained the plaintiffs' standing to bring this federal claim. They were "qualified to vote for members of the General Assembly" and had sued "'on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who [were] similarly situated.'" *Id.* at 204-05 (citation omitted). The Court found that the plaintiffs, as Tennessee voters, had a "personal stake in

the outcome of the controversy." *Id.* at 204. The claimed "injury" giving rise to standing was being subject to an apportionment plan that "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207-08. The plaintiffs accordingly had asserted "a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the Government be administered according to law." *Id.* at 208 (citations and internal quotation marks omitted). In sum, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Id.* at 206.

Third, and last, the Court held that such a "challenge to an apportionment presents no nonjusticiable 'political question.'" *Id.* at 209. There was no impediment to judicial review because "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Id.* at 210. The lawsuit, moreover, did not "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking" because "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Id.* at 226. In sum, the plaintiffs' "allegations of a denial of equal protection present[ed] a justiciable constitutional cause of action" because "[t]he right asserted [was] within the reach of judicial protection under the Fourteenth Amendment." *Id.* at 237.

Although *Baker* decided that a voter's challenge to an apportionment scheme is justiciable, it did not

resolve the claim's merits. The Court first addressed that question in *Gray v. Sanders*, 372 U.S. 368 (1963). There, the plaintiff, who was "qualified to vote in primary and general elections," brought an equal-protection challenge to "Georgia's county unit system as a basis for counting votes in a Democratic primary for the nomination of a United States Senator and statewide officers." *Id.* at 370. Georgia's county unit voting system was modeled on the Electoral College; subject to certain exceptions, then, a candidate for statewide office received a county's entire share of the nomination votes by winning the popular vote in that county. *See id.* at 370-71.[4] But because the county's share of the nomination votes was not precisely tied to its population, Georgia's smaller, rural counties inevitably possessed outsized influence over the electoral result. *See id.* at 371-72.

The Court found that the plaintiff, "like any person whose right to vote is impaired, has standing to sue." *Id.* at 375 (citation omitted). As to the merits, the case was straightforward. "Every voter's vote is entitled to be counted once." *Id.* at 380. "Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties." *Id.* at 379. That was unconstitutional. "Once the geographical unit

4. Under Georgia's unit system, each county was allotted two "units" and then would receive "an additional … unit … for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for each of the next two brackets of 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons." *Gray*, 372 U.S. at 372.

for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex and … wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Id.*

In reaching this conclusion, the Court emphasized the equal-voting-power principle's deep constitutional roots. "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Id.* at 379-80; *see also id.* ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."). "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381.

In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court applied the one-person, one-vote rule to a State legislative apportionment plan for the first time. The plaintiffs, who were "citizens and qualified voters," challenged Georgia's congressional map on the ground that "population disparities deprived them and voters similarly situated of a right under the Federal Constitution to have their votes for Congressman given the same weight as the votes of other Georgians." *Id.* at 2-3. As an initial matter, the Court extended *Baker* to congressional districting. Thus, "state congressional apportionment laws which debase a citizen's right to vote" are subject to challenge on equal protection grounds. *Id.* at 5-6.

On the merits, the Court determined that the one-person, one-vote rule applies with equal force to legislative apportionment. The Court explained that, after *Gray*, it is not possible "to suggest that in … statewide elections the votes of inhabitants of some parts of a State … could be weighted at two or three times the value of the votes of people living in more populous parts of the State." *Id.* at 8. The Court would not "permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants." *Id.* Accordingly, "it was population which was to be the basis of the House of Representatives." *Id.* at 8-9. Georgia's congressional map could not survive judicial review under this standard. *See id.* at 7 ("If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.").

Last, *Reynolds v. Sims*, 377 U.S. 533 (1964), applied the one-person, one-vote rule to Alabama's apportionment plans for both houses of its legislature. The plaintiffs, voters proceeding "[on] their own behalf and on behalf of all similarly situated Alabama voters," challenged the plans under the Equal Protection Clause. *Id.* at 537. As a result, the district court sustained the plaintiffs' standing, *see id.* at 542, and that ruling was not challenged. The sole focus in this Court was the merits of the plaintiffs' claim.

To begin, the Court reiterated that the Constitution "protects the right of all qualified citizens to vote, in state as well as in federal elections," and that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 554-

55. The Court therefore understood precedent to center on the constitutional rights of eligible voters. Per *Baker*, an equal-protection challenge to "a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy." *Id.* at 556-57. Per *Gray*, "the Georgia county unit system" was "unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided." *Id.* at 557. And, per both *Gray* and *Wesberry,* under the one-person, one-vote rule "one person's vote must be counted equally with those of all other voters in a State." *Id.* at 560.

Faithfully applying these cases, *Reynolds* held that "the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Id.* at 561. Guaranteeing the constitutional right to an equal vote meant that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside" could not be tolerated. *Id.* at 563; *see also id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status.") (internal citations omitted). As to "allocation of legislative representation," then, "all voters, as citizens of a State, stand in the same relation regardless of where they live." *Id.* at 540, 565.

Reynolds thus held that the one-person, one-vote rule "requires that the seats in both houses of a bicameral

state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired *when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State*." *Id*. at 568 (emphasis added). Because neither of the Alabama Legislature's houses had been apportioned on a population basis (as opposed to a geographic basis), the existing and proposed substitute plans were all unconstitutional. *See id*. at 571-72.

Together, these cases compel the conclusion that the "population" that must be equalized for purposes of the one-person, one-vote rule is the number of eligible voters in the geographic area from which districts are to be apportioned. In each case, it was the plaintiffs' status as eligible voters that supplied the foundation for Article III standing. In each case, it was the denial of their right to an equally weighted vote that injured them under the Equal Protection Clause.[5] And, ultimately, in each case the Court remedied that constitutional violation by requiring the State to apportion districts in a fashion that ensured equal voting power.

That is precisely why the Court has held that "when members of an elected body are chosen from separate districts, each district must be established on a basis that

5. Being an eligible voter is necessary but not sufficient to establish injury. Eligible voters from *underpopulated* districts do not have standing for the same reason that non-voters lack standing: neither has suffered vote dilution. *See, e.g.*, *League of Women Voters v. Nassau Cty. Bd. of Supervisors*, 737 F.2d 155, 161 (2d Cir. 1984) (holding that "as voters from overrepresented municipalities, these plaintiffs cannot claim any injury").

will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley,* 397 U.S. at 56; *see also Bd. of Estimate v. Morris,* 489 U.S. 688, 701 (1989) ("In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen.'") (quoting *Reynolds,* 377 U.S. at 579). This can mean only one thing: the one-person, one-vote rule protects the right of eligible voters to an equal vote. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) ("[T]he name by which the Court has consistently identified this constitutional right—one person one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five or ten.") (citation omitted).

No doubt the Court has been "somewhat evasive in regard to which population must be equalized." *Chen v. City of Houston*, 206 F.3d 502, 524 (5th Cir. 2000). But the imprecision stemmed from the lack of any need for further refinement. In the 1960s, the distribution of the voting population generally did not deviate from the distribution of total population to the degree necessary to raise this issue. *See, e.g.*, *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (S.D.N.Y. 1965) (noting that "a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State"), *aff'd*, 382 U.S. 4 (1965).[6] "Absent

6. *Burns v. Richardson*, 384 U.S. 73 (1966), could have raised the issue, but Hawaii used registered voters to apportion districts and that choice was upheld; the Court thus was not called upon to decide the question presented here. *See infra* at 32-35.

significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa." *Garza*, 918 F.2d at 781 (Kozinski, J., concurring and dissenting in part). Even today, "eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525.

That should not in any way distract, however, from the fact that the "consistent theme" of the Court's one-person, one-vote "decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement." *Hadley*, 397 U.S. at 54. The Court has always understood, as a consequence, that "the overriding objective must be substantial equality of population among the various districts, *so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State*." *Reynolds*, 377 U.S. at 579 (emphasis added); *see also Connor v. Finch*, 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population, *so that each person's vote may be given equal weight in the election of representatives*.") (emphasis added).

When the use of total population protects "the right of each qualified voter to participate on an equal footing in the election process," *Hadley*, 397 U.S. at 55, it is a perfectly acceptable basis for apportionment. But when, as here, total population figures do not "insure that each person's vote counts as much, insofar as it is practicable, as any other person's," *id.* at 54, demographic data that guarantees the equal-protection rights of eligible voters must be used to apportion districts. At all times, the one-person, one-vote right of eligible voters to an equal vote

must be the touchstone. That is what the *Baker/Reynolds* line of decisions requires.

II. No Theory The Lower Courts Have Relied On To Deny Eligible Voters An Equally Weighted Vote Is Sustainable.

The lower courts have relied on a variety of theories to reject the proposition that the one-person, one-vote rule protects eligible voters. First, the district court, among other courts, ruled that the State's choice of a population basis is judicially unreviewable. Second, the Ninth Circuit has ruled that the Equal Protection Clause and the First Amendment require States and localities to apportion based on total population in order to protect the right of all residents to "equal access" to their elected representatives. Third, the Fifth Circuit has suggested that apportioning State and local districts based on voter population might conflict with the way the Constitution apportions seats in the House of Representatives among the States. None of these rationales is sustainable.

A. The district court's conclusion that Texas's choice of a population basis is immune from judicial review conflicts with *Baker v. Carr* and *Reynolds v. Sims*.

Following the lead of the Fourth and Fifth Circuits, the district court dismissed the complaint, reasoning that the choice of an apportionment base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a. Subjecting the State's choice of an apportionment base to judicial review, according to these courts, "would lead

federal courts too far into the 'political thicket.'" *Daly*, 93 F.3d at 1227 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring)); *see also Chen*, 206 F.3d at 528 (holding that "this eminently political question has been left to the political process"). The notion that a State's choice of an apportionment base is an unreviewable political question cannot be squared with this Court's one-person, one-vote decisions.

Baker definitively settled this issued a long time ago. *See supra* at 19-21. The fundamental point of the opinion was that the political-question doctrine could not insulate from an equal-protection challenge State apportionment of districts based on geography instead of population when that choice injured eligible voters. That the injury to eligible voters here results instead from the choice of one population basis over another is not a neutral basis for distinction. As in *Baker*, this federal challenge is "justiciable, and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'" 369 U.S. at 209-10 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)).

If any doubt remained, however, *Reynolds* eliminated it by firmly rejecting the very reasoning the district court employed here:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to

> restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566.

The bottom line is that, since *Baker*, the Court has "consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts." *Davis v. Bandemer*, 478 U.S. 109, 118 (1986). That seminal decision engendered strong dissents. But those dissents may not be relied upon to declare off limits the one-person, one-vote issue presented here. *Compare Chen*, 206 F.3d at 527 ("[W]e have some difficulty in reading the Equal Protection Clause to require the adoption of a particular theory of political equality."), *with Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting) ("What is actually asked of the Court in this case is to choose … among competing theories of political philosophy …."). Having "crossed the Rubicon," *Branch v. Smith*, 538 U.S. 254, 278 (2003), and found an enforceable one-person, one-vote right in the Constitution, the Court cannot now claim that the matter is committed to the political process when enforcement is required.

That should have been the end of the road for the political-question doctrine with respect to this particular issue. The district court nevertheless held that *Burns v.*

Richardson, 384 U.S. 73 (1966), decided not even two years after *Reynolds*, decisively resolved this issue in favor of unreviewability. J.S. App. 10a-13a. No fair reading of *Burns* could lead to that conclusion.

In *Burns*, Hawaii had apportioned both houses of its legislature using registered voters as the population basis so as to exclude those, including military personnel and seasonal tourists, who were counted in the Census but not registered to vote in the State. 384 U.S. at 90-91. Although Hawaii's plan created deviations over 100% as to total population (*i.e.*, certain Hawaii districts contained twice as many residents as others), the districts had only minor deviations with respect to registered voters. *Id.* at 90-91 & n.18. The plan was challenged under the Equal Protection Clause on the ground that *Reynolds* required Hawaii to exclusively use total population as its apportionment base. *Id.* at 75, 93. The Court rejected the challenge.

The Court started from the "proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Id.* at 91. "Although total population" was "in fact the basis of comparison" in *Reynolds*, that decision "carefully left open the question what population was being referred to" and "discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population." *Id.* "The decision to include or exclude any such group," the Court continued, "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."

Id. at 92. "Unless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with" *Reynolds* "is to be measured thereby." *Id.* (citation omitted).

There was no reason to interfere with Hawaii's choice of registered voters given the case's circumstances. Under *Reynolds*, the Court explained, States need not "include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Id.* The Constitution did not require Hawaii to apportion districts based on total population given that a large number of residents who were not part of the State's voting population, such as military personnel and seasonal tourists, "counted as part of Hawaii's census population." *Id.* at 94.

The Court did express concern, however, about using a "registered voter or actual voter basis" because it "depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote." *Id.* at 92. "Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment." *Id.* at 92-93 (citation omitted). After careful study, the Court concluded that Hawaii's use of registered voters as its apportionment base satisfied "the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93.

For several reasons, then, *Burns* did not foreclose judicial review. Foremost, the passage discussing "choices about the nature of representation with which" the Court had "been shown no constitutionally founded reason to interfere" identified—but did not resolve—the issue described as "carefully left open" in *Reynolds*. *Id.* at 91-92. The Court's subsequent pronouncement that "some question" remains as to the proper "[population] basis of apportionment" is proof. *Hadley*, 397 U.S. at 57-58 n.9 (citing *Burns*, 384 U.S. at 90-95). After all, no question would remain had *Burns* held that States and localities simply may use any population base they wish "absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a. This important issue remains open because "the Court [has] never determined the relevant 'population' that States and localities must equally distribute among their districts." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from denial of certiorari).

Regardless, any suggestion in *Burns* that use of total population as an apportionment base is not subject to judicial challenge even when it fails to protect the rights of voters would have been dicta. *Burns* did not present the question because Hawaii's apportionment base—registered voters—was designed to ensure that each voter was treated equally through the districting process. *Burns* thus holds that apportionment based on total population is not required when doing so would undermine the rights of voters. But *Burns* could not have decided the issue here: whether a State may exclusively apportion districts based on total population when it *does* undermine voter equality.

If anything, *Burns* suggests that total population would not be a "permissible population base" under facts such as those here. 384 U.S. at 95. In light of the issue Hawaii confronted with military personnel and seasonal tourists, "grossly absurd and disastrous results would flow" from apportioning districts based on total population. *Id.* at 94 (citation and internal quotation marks omitted). In other words, because using total population, for Hawaii, would have "constitute[d] a substantially distorted reflection of the distribution of state citizenry, … a finding that registered voters distribution [did] not approximate total population distribution [was] insufficient to establish constitutional deficiency." *Id.* at 94-95. Although it did not need to reach the issue, it is unlikely the Court would have approved of an apportionment base causing "absurd" and "disastrous" results.

Finally, the district court's reading of *Burns* cannot be squared with the Court's close examination of Hawaii's use of registered voters. As explained, the Court agreed that Hawaii had fairly ruled out using total population. But "state citizen population," which was shorthand for "[s]tate citizen population eligible to vote (*i.e.*, voter population)," *id.* at 84 n.12, would have been a superior legislative choice in that it would have solved Hawaii's military and seasonal tourist problems without triggering the equal-protection concerns that result from excluding eligible (but unregistered) voters from the apportionment base, *see id.* at 92-95. As noted, the Court scrutinized Hawaii's use of registered voters as the apportionment base, ultimately tolerating it only because it "approximate[d] distribution of state citizens or another permissible population base." *Id.* at 95.

Under the district court's reasoning, Hawaii's choice among total population, state citizenship, and registered voters would have been judicially unreviewable. But the Court did review Hawaii's choice of a population basis because there must be some apportionment basis "against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92; *see also Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of rehearing en banc) ("The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population."). The reluctance to interfere with State and local apportionment decisions where there is no indication that the "choice is one the Constitution forbids" is appropriate. *Burns*, 384 U.S. at 92. The Court saw no need to interfere with Hawaii's choice of registered voters because it led to the same place as apportionment based on eligible voters. But that does not mean Texas's use of total population as an apportionment base is unreviewable when that legislative choice dilutes the votes of those eligible to cast a ballot. No decision of this Court—including *Burns*—relegates legal protection of Appellants' rights under the one-person, one-vote rule to the political process.

Plainly stated, adopting the district court's reading of *Burns* would mean the one-person, one-vote rule affords *no* constitutional protection to eligible voters. For example, Texas could have adopted a Senate plan containing 31 districts of equal total population without violating the one-person, one-vote rule even if 30 of the Senate districts each contained one eligible voter and the 31st district contained all other eligible voters in Texas. The idea that this hypothetical apportionment plan could withstand one-person, one-vote review is absurd. That it

would prevail under the district court's interpretation of *Burns* is reason alone to reject it.

B. The Ninth Circuit's representational equality rationale cannot be reconciled with *Burns v. Richardson* or any other decision.

Unlike the district court, the Ninth Circuit held that this one-person, one-vote claim is judicially reviewable, but rejected it on the merits under both the Equal Protection Clause and the Petition Clause of the First Amendment. The Ninth Circuit read *Reynolds* to mean that "*all* the people … including those who are ineligible to vote, form the basis for representative government." *Garza*, 918 F.2d at 774. "Basing districts on voters rather than total population" would lead to "serious population inequalities," which in turn would give "[r]esidents of the more populous districts … less access to their elected representative" in violation of the one-person, one-vote rule. *Id.* The Ninth Circuit further held that this same "[i]nterference with … free access to elected representatives" would have violated these residents' right to "petition the government." *Id.* at 775. The Ninth Circuit thus *requires* States and localities within its reach to apportion voting districts based on total population.

Neither theory is tenable as a matter of precedent. As explained above, *Burns* squarely held that Hawaii was not required to apportion districts on the basis of total population. *See* 384 U.S. at 91-92 ("Indeed, in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), decided the same day [as *Reynolds*], we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population

measure."); *WMCA, Inc.*, 238 F. Supp. at 921 (concluding that the Supreme Court has "approved the use of citizen population as a basis for legislative apportionment"). Quite the opposite, *Burns* suggests that there are circumstances when using total population would be inappropriate. *See supra* at 35. There can be no doubt, then, that *Burns* rejects the Ninth Circuit's conception of *Reynolds*; if the one-person, one-vote rule required use of total population, the case would have come out the other way. *See Garza*, 918 F.2d at 784 (Kozinski, J., concurring and dissenting in part). The Ninth Circuit's "equal access" theory is foreclosed whether it is framed under the Equal Protection Clause or the First Amendment.

Both Ninth Circuit theories likewise fail as a matter of constitutional principle. First off, nothing about the rule Appellants propose here would deny any resident access to his or her elected representative, and the Ninth Circuit did not suggest otherwise. The constitutional injury the Ninth Circuit held that residents of electoral districts with larger populations of non-voters would "suffer … in a voter-based apportionment scheme" is instead "*diminishing* access to government." *Garza*, 918 F.2d at 775 (emphasis added). That is not a cognizable claim.

It certainly is not a cognizable claim under the one-person, one-vote rule. As explained at length above, "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Garza*, 918 F.2d at 782 (Kozinski, J., concurring and dissenting in part). To be certain, the Court thought transitioning from a State and local districting model based on geography to one based on population would "prevent debasement of voting power" as

well as "diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). But the latter was always understood to be the byproduct of the former—not an independently enforceable constitutional right. *Reynolds*, 377 U.S. at 565-66 ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.").

Put differently, none of this Court's decisions suggest (let alone hold) that a resident's diluted access to his or her representative is a "legally cognizable injury" within the meaning of the one-person, one-vote rule. *Baker*, 369 U.S. at 208. In all of these decisions, the plaintiffs established standing based on their eligibility to vote. *See supra* at 19-24. Absent that showing, there is no reason to believe that the Court would have declared a judicially enforceable one-person, one-vote right in the first place. Article III requires a "causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In the *Baker/Reynolds* line of decisions, there was a causal connection between the vote-dilution injury and the contested method of reapportionment.

But under the Ninth Circuit's equal-access version of the one-person, one-vote rule, the residents' eligibility to vote has no relevance. Indeed, *non-voters* would have standing to bring a one-person, one-vote claim for diluted access to their elected representative. That cannot be. Whatever its precise contours, there is no doctrinal support for the notion that a non-voter could somehow

have a cognizable claim under the one-person, one-vote rule to secure a right of undiluted access at the direct expense of a voter's right to an equal vote. *See Baker*, 369 U.S. at 205-08.

The Ninth Circuit's novel First Amendment rationale fares no better. According to this theory, even if *Reynolds* protects eligible voters, the Petition Clause is a barrier to enforcing that right. In other words, that which the Equal Protection Clause requires, the First Amendment forbids. But the premise of the Ninth Circuit's collateral attack on *Reynolds* is flawed. The Petition Clause does not include a right to "equal access."

Decisions like *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961), upon which the Ninth Circuit relied, protect an individual's right to petition the government free from unreasonable restraint. *See United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965). But there is no right under the Petition Clause to equal time. A constituent is entitled to mail, call, or visit his elected representative's office. But he has no right to have that letter opened, call returned, or have his meeting request accepted—even if the representative reads the letters, answers the calls, or meets with other constituents of the district. Individuals thus certainly "have a right to petition their government for services and to influence how their tax dollars are spent." *Garza*, 918 F.2d at 775. But just as there is no interest under the Free Speech Clause "in equalizing the relative ability of individuals and groups to influence the outcome of elections," *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), there is no protectable interest under the Petition Clause in equalizing the access of constituents to their elected representatives.

Accordingly, there is no support for the comparative right of undiluted access the Ninth Circuit mistakenly read into the Petition Clause. This unusual competition between the First Amendment and the Equal Protection Clause has not arisen before because representational equality is not an individual constitutional right. It may be a nonjusticiable constitutional value, *see, e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), or a redistricting policy such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Either way, representational equality is not an interest on par with the fundamental right to an equal vote. *See Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

This is not to disparage representational equality as an appropriate legislative concern. Voter equality must be given "controlling consideration" under the one-person, one-vote rule. *Reynolds*, 377 U.S. at 581. But States are not forbidden from making total-population equalization a legislative priority; the one-person, one-vote rule does not require a State to maximize voter equality to the exclusion of all other policy interests, such as representational equality, it might genuinely deem important. What a State may not do, as Texas did here, is elevate that policy interest above the fundamental constitutional protection the one-person, one-vote rule affords to eligible voters. *See infra* at 48.

C. The Court has consistently rejected the "so-called federal analogy."

Last, one court of appeals has suggested that making voter equality the touchstone of the one-person, one-vote rule would be inappropriate because, subject to certain exceptions, the Constitution apportions seats in the House of Representatives among the States "according to their respective numbers, counting the whole number of persons in each State." U.S. Const., amend. XIV, § 2. In the Fifth Circuit's view, "use of total population figures for purposes of allocating the federal House of Representatives among the states" undermines the case for interpreting *Reynolds*, to require the equal distribution of eligible voters. *Chen*, 206 F.3d at 527. The Fifth Circuit's reasoning is incorrect. The Constitution's formula for apportioning Congressional seats *across* States has no bearing on the requirements for creating districts *within* each State.

The Court has rejected the "so-called federal analogy." *Reynolds*. 377 U.S. at 572. In *Reynolds*, Alabama argued that its allocation of one senator to each county was "analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population." *Id.* at 571. The Court found the analogy "inapposite and irrelevant to state legislative districting schemes." *Id.* at 573. "The system of representation in the two Houses of the Federal Congress is one … conceived out of compromise and concession indispensable to the establishment of our federal republic." *Id.* at 574. The unique conditions that produced the federal system shed no light on what the Equal Protection Clause requires of the States. In short, "the Founding Fathers clearly had no intention of establishing a pattern or model for

the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted." *Id.* at 573.

Gray rejected Georgia's similar argument in defense of its county unit system as approximating the Electoral College. *See supra* at 22. Like Alabama's comparison to the U.S. Senate, "analogies to the electoral college" were "inapposite." *Gray*, 372 U.S. at 378. "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election." *Id.* (footnote omitted). Had the Framers sought to grant the States the latitude to model their systems of representation on the Electoral College, they would have. "No such specific accommodation of the latter was ever undertaken," however, "and therefore no validation of its numerical inequality ensued." *Id.*

Any reliance in the present context on the use of total population to apportion the House of Representatives fails for similar reasons. As an initial matter, the analogy is far from perfect even on its own terms. Under the Constitution, "each State shall have at Least one Representative," U.S. Const., art. I, § 2, cl. 3, even if a State would not be entitled to one under a one-person, one-vote model. The one-person, one-vote rule thus has no application to federal apportionment.

More fundamentally, neither the text nor history of Article I or Section 2 of the Fourteenth Amendment shows that the basis for apportioning Congressional seats was designed to control the outcome of the one-person,

one-vote inquiry. *See* Scot A. Reader, *One Person, One Vote Revisited: Choosing A Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521, 528 (1994) ("[T]he Framers arrived at their method for the allocation of congressional representatives among the states out of concerns about federalism, not equal protection of individuals."). Indeed, "the overall context in which the amendment was drafted prevents any firm conclusion being drawn as to the framer's intent regarding the question before us." *Chen*, 206 F.3d at 527. Even if the "federal analogy" were not forbidden, then, it still would be of little assistance.

In the end, the Court cannot resolve the issue here by analogy. *Baker* and *Reynolds* are foundational rulings that must be interpreted on their own terms. What the Court must decide therefore is whether the one-person, one-vote rule recognized in those decisions protects the rights of eligible voters—to any reasonable degree. Because if it does, there is no basis upon which the district court's decision can be affirmed.

III. Plan S172 Is *Per Se* Unconstitutional Under The Settled Legal Framework For Reviewing One-Person, One-Vote Claims.

Deciding that the one-person, one-vote rule affords each eligible voter an equal vote principally resolves the question presented. As in *Reynolds*, however, the Court also needs to set forth "general considerations" that will fully protect the rights of eligible voters throughout the apportionment process and will provide the lower courts the direction needed to resolve implementation issues "on a case-by-case basis." 377 U.S. at 578. On an issue this

significant, moreover, States are entitled to guidance as the next redistricting cycle approaches.

As an initial matter, the Court should make clear that the existing legal framework for evaluating State and local compliance with the one-person, one-vote rule continues to apply. The framework is designed to ensure that the relevant population is as equal "as is practicable" given that "[m]athematical exactness" is not a "workable constitutional requirement," while affording States the "flexibility" needed "to implement legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 577-79. Nothing about this appeal requires modification of the longstanding approach to one-person, one-vote enforcement. States and localities have extensive experience with it. All this Court need do is clarify that, for the many reasons set forth above, the case law's reference to "population" in this analysis means the population of eligible voters.

This framework serves two critical functions. First, it ensures voter equality by requiring the State to make "an honest and good faith effort to construct districts … as nearly of equal population as is practicable." *Id.* at 577. This case shows just how important that requirement is. Texas did not even attempt to equalize the number of eligible voters in each Senate district because it labored under the misapprehension that the one-person, one-vote rule *required* it to apportion districts based on total population irrespective of how much vote dilution that caused. *See supra* at 4. Therefore, Texas could not have properly exercised any discretion it holds to consider policy factors. Adhering to this basic requirement ensures that the "arbitrariness," *Roman v. Sincock*, 377 U.S. 695,

710 (1964), that infected Texas's redistricting process will not become a recurring problem.

In fact, had the Texas Legislature used the population of eligible voters as its starting point (as *Baker* and *Reynolds* require), it still could have largely reconciled total and voter population. "Using standard GIS software, one can readily adjust the boundaries of the districts in Plan S172 to create numerous alternatives to Plan S172." J.S. Supp. App. 2. As a mathematical matter, "it is possible to devise a number of feasible alternative 31-district plans with different combinations of total population and CVAP deviations," including at least one plan "that eliminate[s] the gross deviations in CVAP without significantly exceeding the 8.04% total population deviation from the ideal in Plan S172." *Id.* at 2-3. In short, there are "many feasible ways" to apportion Senate districts in order to "eliminate gross deviations in CVAP without causing significantly larger deviations in total population." *Id.* at 3. As this case shows, requiring States to make a good-faith effort to achieve voter equality will go a long way toward vindicating the animating principle of the one-person, one-vote rule without forcing them to abandon an interest in representational equality.

Second, the framework's "10% deviation" standard ensures that the appropriate party shoulders the burden of justifying or challenging the districts that States and localities have drawn. Under this model, a plan "with a maximum population deviation under 10% falls within [the] category of minor deviations," *Brown v. Thomson*, 462 U.S. 835, 842 (1983), and is therefore "considered to be of *prima facie*

constitutional validity," *Connor*, 431 U.S. at 418.[7] "A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State." *Brown*, 462 U.S. at 842-43; *see also Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973).[8] A large enough deviation is *per se* unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973).

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7. With respect to congressional redistricting, in contrast, the State must "make a good-faith effort to achieve precise mathematical equality" and "[u]nless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick*, 394 U.S. at 530-31. The more restrictive standard was required given that, unlike the Equal Protection Clause, "Article I, § 2 … permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher*, 462 U.S. at 730 (citations and internal quotation marks omitted).

8. The courts of appeals are divided over whether strict scrutiny or some more generous standard applies to one-person, one-vote deviations exceeding 10%. *Compare, e.g.*, *Daly*, 93 F.3d at 1218 n.8, *with, e.g.*, *Carlson v. Wiggins*, 675 F.3d 1134, 1139 (8th Cir. 2012). The Court need not resolve that issue given that, as explained herein, Texas's deviations are *per se* unconstitutional. The questions in *Harris v. Ariz. Indep. Comm'n*, No. 14-232, also are not implicated as that appeal asks the Court, among other things, to decide the proper standard of judicial review when the population deviations are *less than* 10%. It is noteworthy, however, that the Court may not be able to reach the issues raised in *Harris* if Appellants prevail here as the deviations, once properly measured against the base of eligible voters, are not actually less than 10%. *See Harris* Jurisdictional Statement at 25-26 (noting that "when measured using citizen voting-age population the deviation was not … 8.8%, but 54.81%").

This has always been a sensible way to approach the issue. There are a number of recognized districting policies that can justify "divergences from a strict population standard." *Reynolds*, 377 U.S. at 577. Indeed, there is no doubt that the Court has been appropriately cognizant of each State's sovereign authority to implement a variety of "legitimate objectives" beyond ensuring compliance with the one-person, one-vote rule. *Brown*, 462 U.S. at 842; *see also Abate v. Mundt*, 403 U.S. 182, 185 (1971). Accordingly, legitimate legislative priorities such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s]" can justify some variance between districts. *Karcher*, 462 U.S. at 740. As noted above, representational equality is another such interest. In some States, like Texas, representational equality might even be sufficiently important to allow voter-population deviations somewhat greater than ordinarily permissible. *Reynolds*, 377 U.S. at 578 ("What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case.").

At the same time, such policy considerations cannot be allowed to swallow the fundamental rule of equal voting power. As the Court has explained, "if, even as a result of a clearly rational state policy … population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." *Id.* at 581. States retain substantial flexibility (as they should) to apportion districts in a fashion best suiting their needs. *See Brown*, 462 U.S. at 848 (O'Connor, J., concurring). But such flexibility must be

exercised without negating the equal-protection rights of eligible voters. Otherwise, an interest in representational equality, "urged in justification of disparity in district population," could be leveraged to "emasculate the goal of substantial equality." *Mahan*, 410 U.S. at 326. That would conflict with the "overriding objective" of ensuring "'that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.'" *Id.* at 322 (quoting *Reynolds*, 377 U.S. at 579).

At bottom, then, there must be "some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications." *Brown*, 462 U.S. at 849-50 (O'Connor, J., concurring). And the Court must make clear that the massive deviations of Plan S172 exceed that outer limit. As the Court has explained, a 16.4% deviation "may well approach tolerable limits" no matter the State's justification. *Mahan*, 410 U.S. at 329. Under Plan S172, District 1's deviation ranges from 40.08% to 49.23% under various metrics for calculating the population of eligible voters; for District 4, the deviation ranges from 30.81% to 42.22%. *See supra* at 11-12. Plan S172's deviations thus are double and triple those that the Court found troubling in *Mahan*. No state policy, however urgent, could justify this type of gross malapportionment. If the one-person, one-vote rule affords eligible voters any protection, Plan S172's deviations are *per se* unconstitutional.

* * *

"Redistricting is 'primarily the duty and responsibility of the State.'" *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). But in

enacting Plan S172, Texas did not fulfill its responsibility under the Equal Protection Clause to give voter equality "controlling consideration." *Reynolds*, 377 U.S. at 581. It gave *no* consideration to voter equality. That error led to gross deviations in the number of eligible voters residing in each Senate district under Plan S172, which deprived Appellants of the equally weighted vote to which they are entitled under this Court's decisions. Appellants therefore have made out a classic one-person, one-vote claim to which Texas has no viable defense.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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