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

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I. Texas Concedes The One-Person, One-Vote Rule Protects Eligible Voters But Claims Authority To Deny Them An Equal Vote.

This appeal presents the Court with a fundamental question: does the Fourteenth Amendment's one-person, one-vote rule protect eligible voters? The answer must be yes. "[A]n 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 v. Sims*, 377 U.S. 533, 568 (1964). Thus, the one-person, one-vote rule affords all eligible voters an equally weighted vote regardless of where they reside. Brief for Appellants ("Br.") 19-29. It is inconceivable that a constitutional rule designed "to insure that each person's vote counts as much, insofar as it is practicable, as any other person's," affords literally *no* protection against vote dilution. *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54 (1970).

Texas concedes this critical point. Texas agrees that "vote-weighting is prohibited" and "malapportioned state legislative districts" that are the "functional equivalent of weighted votes" violate the one-person, one-vote rule. Brief for Appellees ("Tex.") 14. Were it otherwise, "an individual's vote could have different proportional strength depending on the number of other voters in a district." *Id.* (citing *Reynolds*, 377 U.S. at 568). This concession should be decisive. If the one-person, one-vote rule protects eligible voters to any reasonable degree, Plan S172 is unconstitutional. Br. 49.

Yet Texas disclaims any obligation to draw districts actually protecting eligible voters. Texas contends that it may grossly malapportion districts, as it did here, because a State violates the one-person, one-vote rule only by engaging in "invidious vote dilution" and a "State does not engage in invidious vote dilution when it substantially equalizes a reliable measure of total, citizen, or voting-eligible population." Tex. 18. Texas's attempt to divorce the one-person, one-vote rule from "invidious vote dilution" is untenable.

In this case, the Court must determine 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). But failing to distribute that "relevant 'population'" equally *is* invidious discrimination. *Reynolds*, 377 U.S. at 561-63. After all, the point of the "10% deviation" framework is to root out equal-protection violations. Br. 46-49. Deviations exceeding 10% "make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973).

Appellants thus can prevail in their one-person, one-vote challenge without any further showing of invidious discrimination. If the Fourteenth Amendment requires States to equalize eligible voters across districts, then Texas's adoption of a Senate plan with massive deviations is prima facie invidious discrimination. Texas can no more defend Plan S172 by claiming it did not "intend" to engage in vote dilution than Alabama could have argued in *Reynolds* that, although each county received one Senator, it did not "intentionally dilute" votes of eligible

voters in overpopulated counties. Tex. 50. Nothing could be more "arbitrary, irrational, or invidious," *id.*, than systematically ignoring voter equality when the Constitution requires Texas to consider it. *Colegrove v. Green*, 328 U.S. 549, 569 (1946) (Black, J., dissenting) ("[S]uch a gross inequality in the voting power of citizens irrefutably demonstrates a complete lack of effort to make an equitable apportionment.").

Texas does not seriously contend otherwise. It does not suggest, for example, that Appellants must allege facts beyond showing a "population" deviation exceeding 10% to state a one-person, one-vote claim. Instead, Texas argues that a State invidiously discriminates only if it does not "sufficiently equalize *any* population base." Tex. 17. Thus, although Texas goes to great lengths to situate the one-person, one-vote rule within the broader equal-protection framework, its defense of Plan S172 rests on the same theory it has all along: that *Burns v. Richardson*, 384 U.S. 73 (1966), grants States absolute discretion to choose any measure of "population."

But Texas not only misreads *Burns*, *infra* 8-10, its position is self-contradictory. While agreeing that the one-person, one-vote rule protects against vote dilution, Texas proposes a legal standard that does not protect against it. And, Texas admits that the "10% deviation threshold … reflects the fundamental nature of the right to vote" yet asserts that "equalization of total population among districts generally satisfies the Equal Protection Clause" even when, as here, it causes gross malapportionment of eligible voters. Tex. 25-26. *Reynolds* protects eligible voters or it does not. Texas cannot sidestep this issue by nakedly asserting that the "apportionment goal of [total]

population equality is not in tension with the goal of voting equality," *id.* 34, when Plan S172 proves that pursuing total population at all costs impairs the rights of eligible voters.

The United States, on the other hand, makes its position clear: the one-person, one-vote rule affords eligible voters *no* protection. Whether "districts contain unequal numbers of eligible voters" has no relevance; all that matters is that "state legislative districts … equalize total population." United States Amicus Brief ("U.S.") 5. That is a remarkable assertion. *Reynolds* is *the* landmark vote-dilution decision. It "established that the Equal Protection Clause guarantees the right of each voter to 'have his vote weighted equally with those of all other citizens.'" *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 77-78 (1980) (quoting *Reynolds*, 377 U.S. at 576); *id.* at 116 (Brennan, J., dissenting) ("The equal protection problem attacked by the 'one person, one vote' principle is … one of vote dilution."). The concept of "vote dilution" would not exist without *Reynolds*. *Allen v. State Bd. of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part).

The United States argues "such language should not be understood to mean that the Equal Protection Clause requires States to equalize the number of voters across districts." U.S. 13. But that is the *only* thing it can mean. A challenge to "apportionment … on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted" is "justiciable" only because the Equal Protection Clause protects eligible voters. *Reynolds*, 377 U.S. at 556-57. "[O]ne person's vote must be counted equally with those of all other voters

in a State," *id.* at 560, because of the principle of equal voting power. And, "[i]n 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,'" *Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (quoting *Reynolds*, 377 U.S. at 579), precisely because the Equal Protection Clause "requires States to equalize the number of voters across districts," U.S. 13.[1] This effort to recast the one-person, one-vote rule as affording no protection to eligible voters must fail. There is no way to interpret *Reynolds* other than adopting the "principle of electoral equality." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

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1. The contention that *Reynolds* would not have keyed the one-person, one-vote rule to eligible voters at a time of rampant minority disenfranchisement, U.S. 16, misunderstands the historical context. Numerous stratagems were being used to deny or debase minority voting rights. The one-person, one-vote rule never was meant to be (nor could have been) a cure-all. The Court understood the need to affirm that the Constitution protects all voters and separately to address racially discriminatory voting laws. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 262 (1991) ("Having committed itself to safeguarding equality in voting weights, the Court next set about defining constitutional boundaries for the political community, … progressively narrow[ing] the permissible grounds of exclusion from political participation."); Sanford Levinson, *The Warren Court Has Left the Building*, 2002 U. Chi. Legal F. 119, 122-23 & n.18 (2002) ("Chief Justice Warren … suggested that … '[m]any of our problems would have been solved a long time ago if everyone had the right to vote and his vote counted the same as everybody else's.'").

Indeed, interpreting *Reynolds* that way would mean the Voting Rights Act of 1965 ("VRA") could not protect against minority vote dilution. The VRA is constitutional only to the extent it enforces the Reconstruction Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).[2] In granting minority voters special vote-dilution protection, "Congress intended to adopt the concept of voting articulated in *Reynolds*" and, in turn, protect African Americans "against a dilution of their voting power." *Perkins v. Matthews*, 400 U.S. 379, 390 (1971). The claim that the "Equal Protection Clause and Section 2 of the [VRA] protect distinct interests," U.S. 24, not only is incorrect, then, it highlights a key defect in the United States' position. If the Fourteenth Amendment does not prohibit vote dilution, a federal law targeting redistricting practices that "dilute minority voting strength" could not be valid enforcement legislation. *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994).

Affording vote-dilution protection only to minorities, moreover, would be independently problematic under the Equal Protection Clause. The Court has shown concern when statutory rights and the foundational constitutional principles they purport to enforce are moving in "different directions" and has recognized the need "to reconcile them" if possible. *Ricci v. DeStefano*, 557 U.S. 557, 580

2. The argument that Section 2 enforcement takes precedence over the one-person, one-vote rights of eligible voters, U.S. Br. 32-35, thus is mistaken. The one-person, one-vote rule is a "background" constitutional principle against which Section 2 operates. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). Statutes, including the VRA, yield to the Constitution; not the other way around. *Abrams v. Johnson*, 521 U.S. 74, 98-101 (1997).

(2009). It is one thing for Congress to afford minorities greater vote-dilution protection. It is quite another to read the Equal Protection Clause to extend vote-dilution protection only to minorities. Yet that is the consequence of reading *Reynolds* to afford no protection to eligible voters.

The United States further argues that, legal merits aside, Appellants should not prevail because they can still "elect a representative who represents the same number of constituents as all other representatives." U.S. 5. But this ignores the multiple harms vote dilution causes. Eligible voters have a constitutional interest "in maintaining the effectiveness of their votes," *Baker v. Carr*, 369 U.S. 186, 208 (1962), and the effect of Plan S172 "will be that certain citizens, and among them [Appellants], will in some instances have votes only one-[half] as effective in choosing [state senators] as the votes of other citizens." *Colegrove*, 328 U.S. at 569 (Black, J., dissenting). Texas's grossly malapportioned Senate also means fewer representatives from Appellants' region of the State, which in turn means the legislative process will be distorted to their detriment. *Morris*, 489 U.S. at 693-94. In other words, Appellants will suffer the very harms that led the Court to intervene in the first place. Br. 19-26.

It is also wrong to suggest that the rule Appellants advocate uniquely benefits rural voters. Ensuring equal voting power remedies the injury African-American voters in urban areas with large concentrations of non-voters suffer in local districting. Project 21 Amicus Brief 19-33. And it also protects minority voters when the counting of prisons, which are often located in rural areas, "unfairly dilute[s] minority voting strength and create[s] an unfair voting advantage for white voters." Motion for

Summary Judgment at 5, *Calvin v. Jefferson County Bd. of Comm'rs*, No. 4:15-cv-00131-MW-CAS (N.D. Fla. Sept. 18, 2015).[3] In short, the failure to ensure electoral equality causes harm to eligible voters from all racial, ethnic, and geographic backgrounds.

Ultimately, Texas and the United States have so much trouble explaining how the Equal Protection Clause can prohibit vote dilution and simultaneously sustain Plan S172 because there is no explanation. If *Reynolds* affords any protection to eligible voters, Appellants have stated a claim. If *Reynolds* does not, States are free to dilute the votes of eligible voters with impunity. Such a ruling would mean that the district court correctly dismissed this suit. But it would have profound ramifications for the VRA and voting rights more broadly.

II. Texas Incorrectly Contends That This Court's Decisions Allow It To Ignore Eligible Voters In The Districting Process.

Despite wide recognition that this issue has never been resolved, Texas and its *amici* argue otherwise. Texas reads *Burns* to hold that its "decision to include voting-ineligible populations in the apportionment base is … a choice 'about the nature of representation' that the Equal Protection Clause leaves to the States." Tex. 20 (quoting *Burns*, 384 U.S. at 91-92). But, unlike Texas, Hawaii did not include "voting-ineligible populations," *id.*, to the

3. The ACLU, which brought *Calvin* and similar cases, never explains in its amicus brief how those lawsuits, which are predicated on the same vote-dilution claim as Appellants bring, can be reconciled with the position it takes here.

detriment of eligible voters. Hawaii *excluded* non-voters from its apportionment base to ensure that eligible voters in districts with military bases did not have "substantially greater voting power than the electors of districts not including such bases." *Burns*, 384 U.S. at 94 n.24. Because Hawaii's "choice" was not "one the Constitution forbids," the Court had been "shown no constitutionally founded reason to interfere." *Id.* at 92.

To be sure, there is a dispute over which "population" Hawaii sought to equalize by a using a registered-voters apportionment base. Br. 35; Tex. 21-22; U.S. 30-31. But there is no dispute that the Court accepted Hawaii's choice only after closely examining it and concluding that it fully protected eligible voters. *Burns*, 384 U.S. at 96. The Court had no occasion to decide the question raised here, *Hadley*, 397 U.S. at 58 n.9, and no case since has placed it before the Court, *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari).

Texas also cannot square its reading of *Burns* with *Baker*. Br. 19-21. Texas previously claimed that its choice of a population base might actually be a political question. Appellees' Motion to Dismiss 22-23. But having abandoned that argument, Tex. 15 n.3, Texas must awkwardly argue that although the "political-question doctrine does not divest the Court of jurisdiction to adjudicate plaintiffs' claim," this suit was properly dismissed because "'this eminently political question has been left to the political process,'" *id.* (quoting *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000)). Texas must explain to the Court how a political-question rationale survives *Baker* or how allowing Texas to choose which population to equalize—irrespective of that choice's harm to eligible voters—does

not overrule *Baker sub silentio*. To this juncture, Texas has done neither.

The United States acknowledges that *Burns* did not decide this question. U.S. 30-31. The United States instead claims that *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that "congressional districts must be drawn on the basis of total population," U.S. 13, and, as a result, that state and local districts may be drawn on that basis too, *id*. 20. But the premise is flawed. *Wesberry* was no less concerned than *Reynolds* with the rights of eligible voters. Br. 23-24. In fact, *Wesberry* held that the "population disparities deprived [plaintiffs] and voters similarly situated of a right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians." 376 U.S. at 2-3.

That is not to suggest *Wesberry* resolved the issue in favor of voter equality at the congressional level.[4] But it certainly did not hold the opposite. Had *Wesberry* decided the issue, *Reynolds* would have needed to discuss it. But *Reynolds* understood *Wesberry* to hold that "one person's vote must be counted equally with those of all other voters in a State." 377 U.S. at 560. *Burns* would have extensively discussed that holding as well given the Court's decision to permit Hawaii to draw state districts based on registered voters. But *Burns* does not even mention *Wesberry*. The United States cannot reverse-engineer an answer to the question here through *Wesberry*.

4. The Court need not resolve that question here. Appellants do not challenge a congressional map, and congressional and state-level districting, while not "wholly inapposite," are "based on different constitutional considerations and [are] addressed to rather distinct problems." *Reynolds*, 377 U.S. at 560.

The remaining cases on which Texas and the United States rely are similarly inapposite. Tex. 29-31; U.S. 10. That these cases used the word "population" to refer to the apportionment base the State must equalize and relied on total population figures to evaluate the districts at issue does not bring the Court closer to resolving the question presented. *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari). No court to review this issue believes that any of these cases squarely confronted it. Appellants' Jurisdictional Statement 13-16. Texas claims that if voter equality were required, the Court "would have had no choice but to require proof that the total population approximated the voter population." Tex. 32-33. But as Texas now acknowledges, Tex. 15 n.3, this issue "is not of the jurisdictional sort which the Court raises on its own motion." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977). If the plans at issue in those cases malapportioned eligible voters, the parties needed to raise the issue. They did not.

Texas and the United States can point to no case in which a discrepancy between total and voter population was obviously present and the Court overlooked it. The contention that *Gaffney* is one such case is wrong. Tex. 27-28; U.S. 11. They point to the statement that "States have congressional districts that vary from one another by as much as 29% and as little as 1% with respect to their age-eligible voters." *Gaffney*, 412 U.S. at 747. But the Court was not resolving the issue here. As an initial matter, while the statement highlighted voter discrepancies in congressional districts, *Gaffney* was a challenge to Connecticut's *state* redistricting map. 412 U.S. at 735-36. Moreover, the gross congressional deviations the Court referenced in *Gaffney* were in California and New

York—not Connecticut. *Id.* at 747 n.13. The "congressional districts in Connecticut . . . var[ied] from one another" only "by as much as 4% in their age-eligible voters." *Id.* at 747.

If anything, the Court's focus on the "body of voters whose votes must be counted and weighed for the purposes of reapportionment," *id.* at 746, shows that its overriding concern was protecting the rights of eligible voters. The Court emphasized that "total population … is not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan." *Id.* *Gaffney* thus supports the understanding that total population is only "a proxy for equalizing the voting strength of eligible voters." *Garza*, 918 F.2d at 783 (Kozinski, J., concurring and dissenting in part). Because there was no contention that Connecticut's use of total population as an apportionment base was an insufficient proxy, the issue raised here was not presented in *Gaffney*.

Last, while asking the Court not to reach the issue, the United States strongly implies that *Garza* is correct and that districts must be based exclusively on total population. U.S. 27-32. But, as Judge Kozinski understood, the Court cannot answer the question presented in the affirmative without reaching this issue. Moreover, whether non-voters have a constitutional right to undiluted access is not a tough question. The theory cannot be reconciled with *Burns* and no decision holds that non-voters hold such a right under the Equal Protection Clause or First Amendment. Br. 16-17; Tex. 47. Endorsing the *Garza* rationale also would mean that non-voters have Article III standing to bring a one-person, one-vote claim, U.S. Br. 15 n.5, or that diluted-access claims are judicially cognizable under the Guarantee Clause, ACLU Amicus Brief ("ACLU") 4. Neither proposition is tenable.

III. Texas Inappropriately Relies On History And Tradition To Defend Its Malapportionment Of Eligible Voters.

Texas and its *amici* seek support for the use of total population in the Constitution's text and history. The requirement to apportion congressional seats among the States "based on 'the whole number of persons in each State,'" in their view, means "the framers of the Fourteenth Amendment accepted total-population equality as a permissible method of apportionment." Tex. 39 (quoting U.S. Const. amend. XIV, § 2). The argument is misplaced for several reasons.

Foremost, this argument boils down to an assertion that "the general phrase 'equal protection' in Section 1" should not impose a command not anchored in Section 2 of the Fourteenth Amendment. Tex. 40; U.S. 20; ACLU 24-25. The problem is that the *Reynolds* dissent leveled the same charge, 377 U.S. at 594-608 (Harlan, J., dissenting), but was rebuffed, Br. 42-43. The Court understood that neither Article I nor Section 2 of the Fourteenth Amendment placed any "restriction whatsoever on the power of any State to define the group of persons within the State who may vote for particular candidates." *Karcher v. Daggett*, 462 U.S. 725, 745 (1983) (Stevens, J., concurring). Like it or not, *Reynolds* determined that such restrictions followed from the rights eligible voters hold under the Equal Protection Clause.

In any event, the total-population approach Texas and other States use does not approximate the apportionment model they claim to emulate. The Constitution requires that "each State shall have at least one Representative."

U.S. Const. art. I, § 2, cl. 3. If that system were used to allocate seats within States, each county could be granted at least one seat with the rest being distributed based on total population. Br. 43. Yet *Reynolds* rejected this very proposal. 377 U.S. at 571-77. The United States wrongly claims that *Reynolds* only rejected a plan modeled on the United States Senate. U.S. 10. The Court rejected a proposal that would have given "each of the 67 counties at least one" representative in the Alabama House, "with the remaining 39 seats being allotted among the more populous counties on a population basis." *Reynolds*, 377 U.S. at 571. The federal analogy fails for this reason alone.

Furthermore, the Constitution has never allocated seats solely based on total population. The Constitution required congressional seats to be apportioned based on the "whole Number of free Persons" but counting only "three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment altered that system, which had accounted for the deplorable institution of slavery, by requiring seats to be apportioned "counting the whole number of persons in each State" but reducing a State's proportional share "when the right to vote … is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime." *Id.* amend. XIV, § 2.

There is no doubt that the Fourteenth Amendment's apportionment system arose from unique historical conditions. Cato and Reason Foundation Amicus Brief 4-33. That is why it has little or no relevance to intrastate districting. Br. 42-44. But if federal apportionment offers any guidance, it is "that egregious departures from the

principle of *electoral* equality—the disenfranchisement of adult male 'citizens'—would be penalized." *Chen*, 206 F.3d at 527; Tex. 40-41. At most, then, the constitutional text and history suggest that analogizing to the federal scheme would require States to similarly balance *both* total and voter population.

Last, Texas and its *amici* argue that States should be allowed to use total population because of tradition. Tex. 28; U.S. 11-12. But ensuring voter equality will not uproot most States' practices. *See infra* 15-16. Regardless, a traditional state policy must yield when it violates the Constitution. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955); ACLU 24. *Reynolds* "required most states to amend their constitutions and virtually every state to reapportion." John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163, 184 n.96 (1984). If tradition controlled, States would be allowed to draw districts on a geographic basis. *Baker*, 369 U.S. at 321 (Harlan, J., dissenting).

IV. There Are No Policy Or Practical Impediments To Protecting The Right Of Eligible Voters To An Equal Vote.

In a final effort to deny Appellants their equal-protection rights, Texas and its *amici* raise a host of policy and practical objections. None of the arguments has merit. At a general level, they argue that granting relief here will cause upheaval. Tex. 28; U.S. 11-12. That misunderstands the nature of the injury and what is required to remedy it. "It is the distribution of legislators rather than the method of distributing legislators that must satisfy the demands of the Equal Protection Clause." *Burns*, 384 U.S. at 77 n.4.

In most States, "eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525. Nothing will change in those States.

Protecting eligible voters also will not impair any interest in representational equality. Tex. 57; U.S. 27-28. Texas's *amici* assume that Appellants ask the Court to disregard nonvoters. But nothing could be further from the truth. Texas, for example, had a range of available options that could have largely reconciled both interests. Br. 46. It ignored them either because it believed they were not permitted, Tex. 23 n.7, or because it had no interest in protecting voter equality. Indeed, Texas does not dispute that it made no attempt to equalize both total and voter population. *Id.* 50.

In any event, the real objection is not that roughly equalizing eligible voters will make it harder to protect representational interests; it is that doing so will inhibit the racial and political gerrymandering that has come to dominate the redistricting process. U.S. 32-35. If States must equalize total population and voter population, in addition to considering "traditional districting principles such as compactness, contiguity, and respect for political subdivisions," *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993), they will have far less opportunity to gerrymander. Districts, in turn, will become more integrated and less politically cohesive. Protecting the one-person, one-vote rights of eligible voters therefore will not only enforce the Equal Protection Clause, it will curb redistricting practices that the Court has found problematic—but without judicial intervention. *Vieth v. Jubelirer*, 541 U.S. 267, 306-17 (2004) (Kennedy, J., concurring in the judgment). Protecting eligible voters, in other words, will

not further "mire the Judiciary in … the apportionment process." Tex. 54. It will have the opposite effect.

Various *amici* also argue that protecting eligible voters is bad policy because it "sends the harmful message that [ineligible voters] do not matter." City of New York Amicus Brief 9; State of New York, *et al.* Amicus Brief 36-38. This is the height of hypocrisy. States control voter qualifications, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2257-58 (2013), and it is the States that have disenfranchised non-citizens, felons, and other categories of non-voters, U.S. 27-28; City of Los Angeles, *et al.* Amicus Brief 33-34. Still they complain it is Appellants who seek to deny these non-voters a representative voice. If States sincerely want these residents to have a stake in elections, they should let them vote. But the Court should not permit States to negate the equal-protection rights of eligible voters based on the "message" it would send to constituents the States have disenfranchised.

Moreover, this argument ignores the message that ruling against Appellants will send to rural America. The one-person, one-vote rule was mainly a response to State districting policies that denied equal voting power to those living in urban areas. *Reynolds*, 377 U.S. at 543 n.7. But the Court understood that "[c]onceivably, in some future time, urban areas might … be in a situation of attempting to acquire or retain legislative representation in excess of that to which, on a population basis, they are entitled." *Id.* at 568 n.43. That situation has arisen. Tennessee Legislators Amicus Brief 12-17. Rural voters thus ask the Court to honor its promise to vigilantly enforce the one-person, one-vote rule regardless of who it might benefit or burden. Abandoning voter equality now that the equities

run the other way would send a terrible message to rural Americans about their place in society.

Practical objections to ensuring equality for eligible voters are no stronger. The principal objection is that there is inadequate data to draw eligible-voter-based districts. U.S. 22-24. As an initial matter, the argument lacks relevance here because the data is more than adequate to address Plan S172's gross deviations. The tables on which Appellants rely were produced by the Texas Legislative Council and have been used many times to draw Texas districts. The legislature relied on these statistics to draw the 2010 congressional and state maps, the federal courts that heard VRA challenges to those maps relied on them (at the request of Texas and several of its *amici*), and the legislature relied on it again to enact Plan S172. Br. 4-9. Most importantly, Texas agrees it "could reasonably decide to equalize the CVAP population in its legislative districts and deem the existing ACS data from the Census Bureau sufficiently reliable." Tex. 53. No party here has (or could) object to the statistical tables upon which Appellants rely in their complaint.

The assumption that States would have to rely exclusively on ACS data going forward is wrong too. States could still rely primarily on the Census and augment it with voting-based data only when needed to address large deviations of eligible voters. That may include ACS data, but it may also include a State's own data on eligible voters, as well as "citizenship and voting-age citizenship" data it has developed "for use in redistricting." *Id.* 54. Many States, including Texas, gather additional data to better draw state and local districts. Br. 4-5. There is no reason why States could not supplement the ACS data for this purpose too.

Texas's *amici* claim that using ACS data (especially in small districts) is problematic because of purportedly large margins of error. But demographers—those expert in drawing districts—disagree. Demographers Amicus Brief ("Demographers") 23-27. In any event, the margin of error is immaterial here given the massive deviations in Plan S172. Supplemental Appendix 4-9. No one disputes that Plan S172's deviation of eligible voters far exceeds 10%. Indeed, the complaint listed a "variety of voter-population metrics" not to make Texas choose which one "would be constitutionally acceptable," Tex. 55, but to show that Plan S172 malapportioned eligible voters under *every* metric. The "margin of error" argument is meant to distract from the important issue confronting the Court.

In future cases, moreover, "the parties challenging the plan bear the burden of proving the existence of population differences that could practicably be avoided." *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012). In cases like this one, challengers will have little difficulty carrying their legal burden. Demographers 25-26. Where the deviations are not so pronounced, it will be up to the challengers to show that the available data proves that using total population is insufficient to protect the rights of eligible voters. If the challengers cannot do so, they will not state a claim.

Regardless, criticism of the ACS data is misplaced. It is the same data used extensively in VRA litigation. One of the "necessary preconditions" for bringing a Section 2 vote-dilution claim is showing that the minority group is "sufficiently large and geographically compact to constitute a majority" of the district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009). That means the minority group must make up

at least 50.1% of the eligible voters in the district. *Id.* at 12-20. Plaintiffs, States, and DOJ all rely on the ACS data to determine whether that critical showing has been made. Demographers 15-17. This Court thus relies on the ACS data in Section 2 cases, *LULAC v. Perry*, 548 U.S. 423-25, 427-29, 436-42 (2006) (Kennedy, J.); *id.* at 502-10 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *Bartlett*, 556 U.S. at 26-28, 36-40 (Souter, J., dissenting), as does every circuit without exception, Demographers 17-18 (collecting cases). None of the *amici* can explain why ACS data is somehow reliable enough to enforce Section 2 but inadequate to enforce the one-person, one-vote rule. The data must be adequate for both purposes or for neither.

The ACS data is used for numerous other purposes too. DOJ used it to enforce Section 5 of the VRA, Congress made it the benchmark for determining which jurisdictions are subject to Section 203 of the VRA, federal agencies use it to fulfill statutory duties, and redistricting commissions and demographers use it routinely. Demographers 10-12, 19-23. The Census Bureau even prepares a "Citizen Voting Age Population (CVAP) Special tabulations" for DOJ to use in fulfilling its redistricting duties. *Id.* 14. The Bureau can also prepare special tabulations and support State initiatives to use Census Data for redistricting. *Id.* 14; U.S. Census Bureau, ACS Custom Tables, www.census.gov/programs-surveys/acs/data/custom-tables.html. ACS data "'affords comprehensive coverage of the Nation and permits statistically reliable estimation for small and large geographic areas.'" *Id.* 7 (quoting U.S. Dep't of Commerce Economics & Statistics Admin., *The Value of the American Community Survey: Smart Government, Competitive Business, and Informed Citizens* 5 (April 2015)).

That ACS CVAP data is an "estimate" does not alter the analysis. U.S. 22. The Court has never demanded perfection in districting. The decennial Census is often a "legal fiction" in redistricting litigation given the shifts and changes in a population over 10 years. *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). Indeed, based on timeliness, the 2010 Census population data used to draw Plan S172 in 2013 was *less* accurate than the comparable ACS data, which includes time periods closer to when the map was drawn.

The issue is merely whether the data is "sufficient for decisionmaking." *Karcher*, 462 U.S. at 738. At one time, decennial Census data may have been "the only basis for good-faith attempts to achieve population equality." *Id.* But that is no longer true. The combination of ACS data and modern districting tools allows States to protect the rights of eligible voters. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). Texas has the eligible-voter data needed to remedy the gross malapportionment challenged here.

Finally, those *amici* claiming that the States do not have adequate data fail to appreciate the consequences of their argument. They appear to believe that the argument is a vehicle for retaining the prevailing regime. But they confuse rights and remedies. Whether the one-person, one-vote rule protects the right to electoral equality does not turn on the availability of data sufficient to enforce that right. The inability of States to obtain data needed to remedy their injury would instead mean that there are no longer "judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Baker*, 369 U.S. at 223. Lack of a remedy because of insufficient data, in other words, would mean redistricting is once again a political question.

* * *

In 1972, Texas argued to this Court that "the bedrock assumption of the apportionment cases [is] that dilution of the *vote* is the thing protected against …. A shift from the vote-dilution rationale to any other rationale would not be a minor alteration but a diastrophic change, a repudiation of the whole theory of the apportionment cases from *Baker v. Carr* forward." Brief for Appellants at 33, *Bullock v. Weiser*, No. 71-1623 (Dec. 1972). Texas was right then and it is wrong now. If the Court believes that recognizing vote dilution as an equal-protection harm was a mistake, *Reynolds* should be overruled. But if the Court chooses to retain *Reynolds*, the district court's decision cannot be upheld. If the Equal Protection Clause prohibits vote dilution, Appellants have stated a one-person, one-vote claim.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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