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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections of the Fourteenth Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2013, the Texas legislature enacted into law a redistricting plan for the State Senate, drawing thirty-one districts containing substantially equal numbers of individuals. Using total population data gathered in conducting the U.S. Census, Texas's State Senate districting plan—like plans enacted by states across the nation—ensured equal representation for all persons. Evenwel, however, contends that a state violates the Equal Protection Clause of the Fourteenth Amendment when it draws districts that contain substantially equal numbers of persons if those districts do not also contain approximately the same number of eligible voters. According to Even-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

wel, "the 'population' States must equalize for one-person, one-vote purposes is the population of eligible voters." Appellants' Br. at 15. In other words, only a subset of the population counts in the one-person, one-vote calculus. That radical claim—which has never been accepted by any court—cannot be squared with the Constitution's text and history.

Both at the Founding and following the Civil War, our Constitution's Framers debated how to ensure a system of equal representation consistent with our Constitution's promise of individual rights and democratic self-governance. On both occasions, our Constitution's Framers decreed that representation in the House of Representatives would be based on the total population, not the number of eligible voters or other less-encompassing metrics. *See* U.S. Const. art. I, §2; *id.* at amend. XIV, § 2. During the debates over the Fourteenth Amendment, many Congressmen urged—as Evenwel does here—that the number of eligible voters should be the basis of representation, insisting that voter equality must be the overriding constitutional concern. Those arguments were rejected time and again. The Framers decreed that "the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 705 (1866). As Senator Jacob Howard, one of the chief authors of the Fourteenth Amendment, explained, "[n]umbers, not voters; numbers, not property; this is the theory of the Constitution." *Id.* at 2767. In Article I, § 2 and in the Fourteenth Amendment, the Framers established a fundamental principle about representation that is at the core of the one-person, one-vote rule. Evenwel's argument wrongly rejects as irrelevant this fundamental premise underlying the Constitution's provisions concerning representation.

Consistent with the Constitution's text and history, this Court's one-person, one-vote cases have repeatedly affirmed "our Constitution's plain objective" of ensuring "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). Holding that Article I, Section 2 and the Fourteenth Amendment require states to draw district lines for the House of Representatives and for state legislatures "on a population basis," *Reynolds v. Sims*, 377 U.S. 533, 576 (1964), this Court recognized that a population basis is necessary to "prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). While the standards applicable to congressional and state legislative districting vary, *see, e.g.*, *Mahan v. Howell*, 410 U.S. 315, 322 (1973), both lines of cases derive from the fact that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-61. Under this Court's cases, total population is the benchmark for assessing a one-person, one-vote claim.

Evenwel insists that she can disregard what the Constitution says about representation, as well as this Court's repeated holdings using total population as the benchmark, because the Equal Protection Clause of the Fourteenth Amendment demands a focus on voter, not population, equality. But the Fourteenth Amendment's sweeping guarantee of equality protects all persons, not merely voters. Indeed, the Equal Protection Clause contained in Section 1 of the Fourteenth Amendment mirrors the guarantee of equal representation contained in Section 2, securing equal treatment to citizen and noncitizen alike. Both

Section 1's Equal Protection Clause and Section 2's mandate that representation be based on total population recognize that "[a]ll the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." Cong. Globe, 39th Cong., 1st Sess. 2962 (1866). The Equal Protection Clause is not a license to strip noncitizens and others who lack access to the ballot of equal representation in state legislatures.

When a state draws legislative districts composed of substantially equal numbers of persons, it ensures equal representation for all persons and thereby acts in accord with—not contrary to—the constitutional guarantee of equal protection of the laws for all persons. Evenwel's argument cannot be squared either with the plain terms of the equal protection guarantee or the Constitution's provisions explicitly concerning representation.

ARGUMENT

I. THE CONSTITUTUTION'S FOUNDERS ESTABLISHED TOTAL POPULATION AS THE STANDARD FOR APPORTIONING REPRESENTATIVES TO CONGRESS IN ORDER TO GUARANTEE EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE.

In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 21 (Jonathan Elliot ed., 1836), Article I, Section 2 provides that the "House of Representatives shall be composed of Members chosen every second Year by

the People of the several States" and that "[r]epresentatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 1, 3. To ensure a proper count of the nation's total population, Article I requires an "actual Enumeration" of the people of the nation. *Id.* at cl. 3.

In choosing the total population standard, our Constitution's eighteenth-century Framers decreed "that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives." 1 *The Records of the Federal Convention of 1787*, at 179 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*] (James Wilson). While the Senate was ultimately designed to represent the several States, the House of Representatives would be "the grand depository of the democratic principle of the Govt." and "ought to know & sympathise with every part of the community," *id.* at 48 (James Mason), serving as "the most exact transcript of the whole Society." *Id.* at 132 (James Wilson). As Madison observed, "the Representatives of the people ought to be in proportion to the people." 2 *id.* at 8.

Article I, Section 2's requirement that members of Congress be chosen by the people from districts "founded on the aggregate number of inhabitants," *The Federalist No. 54*, at 306 (James Madison) (Clinton Rossiter ed., 1961), included both citizens who enjoyed the right to vote as well as those who lacked access to the ballot. "The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the

insane, and, at a later time, aliens. Nevertheless, they declared that government should represent *all* the people." *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990).

Ensuring representation for all had deep roots in America's bid for independence from England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Farrand's Records*, *supra*, at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all[.]" Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). In 1767, the King's Privy Council prevented colonial assemblies from adding seats to take account of population growth, prompting the Declaration of Independence's charge that the King had refused to "accommodat[e] . . . large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776). The colonists that revolted from England understood that "equal representation," as John Adams observed, meant that "equal interests among the people should have equal interests in it." John Adams, *Thoughts on Government* (1776), *in The Political Writings of John Adams* 83, 86 (George A. Peek, Jr. ed., 1954). "More than anything else, this equality would prevent the 'unfair, partial, and corrupt elections' and the 'monstrous irregularity' of the English representational system . . . ." Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 170 (1969).

A number of Revolution-era State Constitutions incorporated the principle of equal representation

based on an actual count of the people. For example, the Pennsylvania Constitution of 1776 provided that "representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land" and required the legislature to conduct a census every seven years and to allocate seats "in proportion to the number of taxables." Pa. Const. of 1776, §17; *see also* Wood, *supra*, at 171-72 (discussing early state constitutions). In writing the Constitution to guarantee equal representation for equal numbers of people based on an actual count of the people, the Framers worked off of these earlier state constitutions.

During the debates over Article I's representation provisions, the Framers explained that the total population standard reflected that "every individual of the community at large has an equal right to the protection of government." 1 *Farrand's Records*, *supra*, at 473 (Alexander Hamilton); *id.* at 477 ("[T]he people shd. be repre[se]nted in proportion to yr. numbers, the people then will be free." (Alexander Hamilton)). As James Madison explained, the total population standard "is understood to refer to the personal rights of the people, with which it has a natural and universal connection." *The Federalist No. 54*, *supra*, at 304.

Over the course of the Convention, the Framers rejected other, more-restrictive provisions for apportioning representatives in favor of a rule counting all individuals. During the debates over Article I, § 2, Pierce Butler urged a rule of representation based on wealth or property, claiming that "property was the only just measure of representation" and the "great object of Governt." 1 *Farrand's Records*, *supra*, at 542. Others agreed that "ye. number of inhabitants was not the proper index of ability & wealth; that

property was the primary object of Society" and urged that "in fixing a ratio this ought not to be excluded from the estimate." *Id.* at 541 (Rufus King). These proposals to depart from the rule of equal representation for equal numbers of people were overwhelmingly rejected, and the government was "thus . . . prevented from openly basing apportionment on wealth, or devising some other sly formula to entrench themselves against demographic shifts in the outside world." Akhil Reed Amar, *America's Constitution: A Biography* 84 (2005).

The Framers overwhelmingly concluded that "[t]he number of inhabitants" was the "only just & practicable rule," determining that a wealth-based standard of representation "must be too changeable" and "too difficult to be adjusted." 1 *Farrand's Records*, *supra*, at 542 (Charles Pinckney); *see also id.* at 587 (urging "propriety of establishing numbers as the rule" (Nathaniel Ghorum)); *cf. id.* at 593 (arguing that "ye. number of people ought to be established as the rule" since "population" was "the best measure of wealth" (William Johnson)). James Wilson denied that "property was the sole or the primary object of Govrnt. & Society. The cultivation & improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural & precise measure of Representation." *Id.* at 605. Further, he pointed out, "if numbers be not a proper rule, why is not some better rule pointed out. No one has yet ventured to attempt it. Congs. have never been able to discover a better. No State . . . has suggested any other." *Id.* Immediately following Wilson's speech, the Convention unanimously voted to strike out proposed language that would have permitted representation to be based on wealth. *Id.* at 606.

Article I's rule that representatives would be apportioned based on an "actual Enumeration" of the "respective Numbers" of people—designed to guarantee equal representation for equal numbers of people—however, was undercut by the Three-Fifths Clause, which guaranteed to the slaveholding states additional representation in Congress based on the number of slaves held in bondage. "The more slaves the Deep South could import from the African continent—innocents born in freedom and kidnapped across an ocean to be sold on auction blocks—the more seats it would earn in the American Congress." Amar, *supra*, at 90.

During the debates in the Convention, Gouverneur Morris and others argued strenuously against the adoption of the Three-Fifths Clause, pointedly asking "[u]pon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?" 2 *Farrand's Records*, *supra*, at 222 (Gouverneur Morris). Opponents of the Clause argued that Southern states should not have their representation increased on account of the slave population since slaves are "no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master." 1 *Farrand's Records*, *supra*, at 561 (William Patterson). The upshot of the Clause, Morris charged, was that "the inhabitant of Georgia and S. C. who goes to the coast of Africa, and . . . tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind." 2 *Farrand's Records*, *supra*, at 222. Despite these arguments, the

Convention approved the Three-Fifths Clause as a compromise necessary to ensure the Constitution's ratification.

Nearly 80 years later, following a bloody Civil War fought over slavery, the Framers of the Fourteenth Amendment revisited the Constitution's system of representation in the wake of the abolition of slavery, which rendered the Three-Fifths Clause a nullity. The next section examines the text and history of the Fourteenth Amendment.

II. THE FOURTEENTH AMENDMENT REAFFIRMED THE TOTAL POPULATION STANDARD IN ORDER TO ENSURE EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE.

Reaffirming the Founding-generation's commitment to equal representation for equal numbers of people, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. To redress racial discriminating in voting by state governments, Section Two further provides a penalty of reduced congressional representation "when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States." *Id.*

The Fourteenth Amendment's guarantee of equal representation for equal numbers of people emerged

after seven months of heated debate over the Constitution's promise of equal representation for all. Over the course of the 39th Congress, the Framers of the Fourteenth Amendment debated whether to base representation on total population or on the number of voters, with many members of Congress introducing proposals to change the basis of representation from total population to voter population. Following these lengthy debates, the Framers reaffirmed total population as the Constitution's basis for representation. As Jacob Howard explained in introducing the Fourteenth Amendment, "numbers," i.e., total population, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

A comprehensive review of these debates demonstrates that Evenwel's claim that states must draw districts composed of equal numbers of voters finds no basis in the Fourteenth Amendment's text and history. In fact, the Framers of the Fourteenth Amendment considered and rejected Evenwel's voter-equality theory of representation in favor of ensuring equal representation for an equal number of persons.

When the 39th Congress met in December 1865, questions of representation were front and center. With the Three-Fifths Clause a nullity, the Framers of the Fourteenth Amendment were concerned that the newly freed slaves would now be counted as full persons, giving the Southern states far more representation in Congress and in the Electoral College than they had before they had seceded from the Un-

ion. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 357 (1866) ("Shall the death of slavery add two fifths to the entire power which slavery had when slavery was living?"). As the Joint Committee on Reconstruction, which was tasked with writing the Fourteenth Amendment, explained, "[t]he increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative." *Report of the Joint Committee on Reconstruction at the First Session Thirty-Ninth Congress* xiii (1866).

Even before the Joint Committee began its work, members of Congress proposed constitutional amendments aimed at changing the Constitution's basis of representation. On December 5, 1865, Rep. Thaddeus Stevens introduced an amendment, which provided that "[r]epresentatives shall be apportioned among the States . . . according to their respective legal voters" and required Congress to provide a "true census of the legal voters." Cong. Globe, 39th Cong., 1st Sess. 10 (1865). Stevens's proposed amendment, as well as other similar proposals, met fierce objection. On January 8, 1866, Rep. James Blaine explained that "population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Id.* at 141 (1866). Stripping non-voters of their right to representation guaranteed by the Constitution, Blaine argued, would lead to "gross inequalities of representation" in "the loyal States." *Id.* Rather than changing the Constitution's system of representation, Blaine preferred a targeted amendment

reducing congressional representation in states that denied the right to vote on account of race.

On the following day, January 9, the Joint Committee convened to consider proposed constitutional amendments. Rep. Stevens immediately proposed the same amendment he had proposed in the House. See Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction 39th Congress, 1865-1867*, at 41 (1914). Several days later, the Committee, by a vote of 8-6, voted down a resolution that proposed that "representatives should be apportioned among the several States according to their respective numbers of legal voters." *Id.* at 45. On January 16, the Joint Committee approved a constitutional amendment that reaffirmed Article I's mandate that representation be apportioned "according to their respective numbers, counting the whole numbers of persons in each State, excluding Indians not taxed" and added a proviso that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." *Id.* at 51-52, 53. Although the amendment initially provided for basing representation on the "whole number of citizens of the United States in each State," *id.* at 50, the Joint Committee overwhelmingly voted to change this language to conform to the Constitution's language requiring counting of all persons, citizens and non-citizens alike. *Id.* at 52; *see also* Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (explaining Committee's amendment from counting "citizens" to counting "persons" because "'[p]ersons,' and not 'citizens,' have always constituted the basis" (Rep. Roscoe Conkling)).

When the Joint Committee's amendment was debated before the House, many objected to basing rep-

resentation on total population, making arguments similar to those made here by Evenwel. Rep. Godlove Orth insisted that "the true principle of representation in Congress is that voters alone should form the basis, and that each voter should have equal political weight in our Government." *Id.* at 380; *see also id.* at 379 (insisting that "those who are authorized to vote, who elect Representatives to this House, and they alone, shall constitute the basis of representation" (Rep. Ithamar Sloan)); *id.* at 404 (urging an amendment that "representation shall be based on citizens of the United States who may be male adult voters" so that "every voter should be equal in political power all over the Union" (Rep. William Lawrence)). These views were decisively rejected. Proponents of the amendment in the House argued that such a change in our Constitution's system of representation would be "an abandonment of one of the oldest and safest landmarks of the Constitution" and would "introduce[] a new principle in our Government, whose evil tendancy and results no man can measure to-day." *Id.* at 377 (Rep. James Blaine). Instead, the Reconstruction Framers insisted on "leav[ing] the primary basis of representation where it was placed by our fathers, the whole body of the people." *Id.* at 385 (Rep. Elihu Baker).

Elaborating on why the basis of representation should remain total population, Rep. John Bingham argued that it would be unwise to "strike from the basis of representation the entire immigrant population not naturalized," observing that "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation." *Id.* at 432. In his view, the "whole immigrant population should be numbered with the people and counted as part of

them." *Id.*; *see also id.* at 411 (arguing that representation based on number of voters "takes from the basis of representation all unnaturalized foreigners" (Rep. Burton Cook)). In addition, Rep. Roscoe Conkling emphasized that counting only voters in determining representation "would shut out four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and who are, and always have been, represented," *id.* at 358, resulting in some regions of the country receiving more representation than others. *Id.* at 411 (observing that "the voters of the country are unequally distributed" (Rep. Burton Cook)); *see also id.* at 434 ("[W]hat becomes of that large class of non-voting tax-payers that are found in every section? Are they in no manner to be represented? They certainly should be enumerated in making up the whole number of those entitled to a representative." (Rep. Hamilton Ward)).

Other members in the House argued that changing the basis of representation to voters would inevitably lead to errors, emphasizing that "[i]t is difficult to enumerate voters accurately," *id.* at 411 (Rep. Burton Cook), and that "it would be utterly impossible for the census-taker to ascertain the exact number of those really entitled to the right of suffrage; and thus the injustice of the proposition is still further aggravated." *Id.* at 536 (Rep. John Benjamin).

On January 31, 1866, the House of Representatives approved the amendment by a vote of 120-46, and sent the measure to the Senate. Debate in the Senate, as it had in the House, focused considerably on the question whether the Constitution's system of representation should be based on total population or on voting population. Supporters of the amendment urged that representation should be based "on the largest basis of population, counting every man,

woman, and child," *id.* at 1280, explaining that "[t]he principle of the Constitution, . . . is that it shall be founded on population; that the people who are voters, . . . are not the whole people of a State; . . . . [W]e are attached to that idea, that the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution." *Id.* at 705 (Sen. William Fessenden). The amendment's proponents refused to "throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women," *id.* at 1256 (Sen. Henry Wilson), insisting that "[a] community may be represented, every man in the community may be represented, and every woman and child in the community may be represented, and yet not every man twenty-one years of age be a voter." *Id.* at 1279-80 (Sen. William Fessenden). As in the House, opponents of the amendment urged a change to a voter basis of representation, claiming that the "representative system is the agent of legal voters." *Id.* at 1229 (Sen. Charles Sumner). Ultimately, for other reasons, the amendment failed to garner a 2/3 super-majority. On March 9, 1866, a number of Radical Republicans, led by Senator Charles Sumner, joined with Democrats to prevent approval of the Amendment.

In April 1866, the Joint Committee approved and sent to Congress a new proposed amendment—which would become the Fourteenth Amendment—containing provisions guaranteeing individual rights and rules for apportioning representation in Congress. This new amendment reaffirmed total population as the basis for representation and added a penalty provision reducing representation in states that denied African Americans the right to vote. With this round of debates, only the Senate engaged in extended discussion of the Constitution's system of repre-

sentation. The House, which had lengthy debates on total population as the Constitution's basis of representation only months earlier, did not debate these matters again.

In the Senate debates, Senator Jacob Howard explained that the Fourteenth Amendment's "basis of representation is numbers, whether the numbers be white or black," *id.* at 2766, calling representation in accordance with total population "the only true, practical, and safe republican principle." *Id.* at 2767. Explaining the penalty provision, Howard observed that "[f]ormerly under the Constitution, while the free States were represented only according to their respective numbers of men, women, and children, . . . the slave States had the advantage of being represented according to their number of the same free classes, increased by three-fifths of the slaves whom they treated not as men but as property." *Id.* at 2766. The Amendment's penalty provision ensured that the former slave states could not "persist in refusing suffrage to the colored race," *id.* at 2767, while claiming extra representation because "they have lost the property which they once possessed, and which served as a basis in great part of their representation." *Id.* at 2766.

Opponents of the Fourteenth Amendment urged that only "the voting population of the country should be represented," insisting on a change in the Constitution's system of representation so that "voters should have an equal voice." *Id.* at 2942, 2944 (Sen. James Doolittle). The Framers of the Fourteenth Amendment rejected such efforts to eliminate the Constitution's guarantee of equal representation for equal numbers of people. As Senator Luke Poland argued, the Constitution's "existing basis is the only true one, the only one consistent with the true idea of

a representative republican government. . . . All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." *Id.* at 2962; *see also id.* at 2987 (describing proposal to change basis of representation from total population to voting population as "a blow which strikes the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation from that basis"). By a 31-7 vote, Senator Doolittle's proposals to base representation on the number of voters were rejected. *Id.* at 2986, 2991.

As these debates reflect, the Fourteenth Amendment featured a great debate over the nature of representation. Following more than seven months of debate in Congress, Congress adopted the Fourteenth Amendment, insisting that total population, not voter population, was the basis for our Constitution's system of representation. The Fourteenth Amendment, which was approved by the people and became a part of the Constitution in 1868, reaffirmed that our Constitution's system of equal representation for all depends on a count of the nation's entire population, including not only citizens, but also non-citizens and others without access to the ballot. The Framers of the Fourteenth Amendment rejected the argument of those—like Evenwel here—who insisted that voter equality demands a counting of the nation's voting population, not its broader population.

Evenwel's argument depends on willful blindness to these basic facts of Fourteenth Amendment history. As these lengthy debates make clear, the Fourteenth Amendment reaffirmed our Constitution's promise of equal representation for equal numbers of people, ensuring that representation in Congress

would be based on total population, not the numbers of voters in a state. Evenwel's argument would tear this Court's one-person, one-vote cases from their mooring in the Constitution on the basis of a system of representation specifically rejected by the Framers of the Fourteenth Amendment.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT STRIP NONCITIZENS AND OTHER PERSONS WHO LACK THE VOTE OF EQUAL REPRESENTATION IN STATE LEGISLATURES.

Evenwel insists that the Constitution's explicit provisions guaranteeing equal representation for equal numbers of people are irrelevant to the question presented here because the Equal Protection Clause of the Fourteenth Amendment requires a focus on voter, not population, equality. Evenwel's argument, here too, cannot be squared with the Fourteenth Amendment's text and history.

The Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, protects all persons, not merely voters. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."); *see also Plyler v. Doe*, 457 U.S. 202, 212 (1982) ("The Fourteenth Amendment . . . is not con-

fined to the protection of citizens"). As Senator Howard explained, the Amendment's text "disable[s] a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of . . . the equal protection of the laws of the State." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

Like the total population standard for representation codified in Section 2 of the Amendment, Section 1's Equal Protection Clause guarantees equality for the total population residing in a state, including the noncitizens whom Evenwel seeks to strip of equal representation. The Framers recognized that immigrants, who faced pervasive discrimination in the Western United States, needed the protection of equal laws as well.

Congressman John Bingham, one of those responsible for drafting the Fourteenth Amendment, demanded that "all persons, whether citizens or strangers, within this land, . . . have equal protection in every State in this Union in the rights of life and liberty and property." Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Indeed, in 1870, two years after the Fourteenth Amendment's ratification, Congress used its express constitutional power to enforce the Amendment's guarantee of equality under the law to all persons by passing the Enforcement Act of 1870. This Act secured to "all persons within the jurisdiction of the United States" the "same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and protected against the "deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien." Enforcement Act of

1870, 16 Stat. 140, 144; Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by all the laws and the same laws that other men are."); *id.* at 3871 (observing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws").

In this respect, Section 1's guarantee of equal population and Section 2's guarantee of equal representation for equal numbers of people are joined at the hip, each protecting citizens and noncitizens alike. Indeed, when the Framers explained the total population rule for representation in Congress, their reasoning sounded in basic notions of equality that are reflected in the Equal Protection Clause. "All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." Cong. Globe, 39th Cong., 1st Sess. 2962 (1866); *see also id.* at 141 (explaining that "women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot"). Evenwel's argument misses this essential feature of the Fourteenth Amendment's guarantees of equal representation and equal protection.

IV. THIS COURT'S ONE-PERSON, ONE-VOTE CASES CORRECTLY USE TOTAL POPULATION AS THE BENCHMARK FOR JUDGING THE CONSTITUTIONALITY OF FEDERAL AND STATE LEGISLATIVE DISTRICTING.

Consistent with the Constitution's text and history, this Court's one-person, one-vote cases use total

population as the benchmark, interpreting both Article I, Section 2 and the Fourteenth Amendment to guarantee equal representation for equal numbers of persons. A review of this Court's precedent demonstrates that the one-person, one-vote rule ensures "population equality between electoral districts," by requiring that "seats in legislative bodies be apportioned to districts of substantially equal populations." *Bd. of Estimate of New York v. Morris*, 489 U.S. 688, 693, 694 (1989); *see also Mahan*, 410 U.S. at 321 (describing the "basic constitutional principle" as "equality of population among districts").

In *Wesberry*, this Court first struck down a state statute that prescribed malapportioned congressional districts as a violation of the one-person, one-vote command. Setting out at length the history that led the Framers to insist on apportioning representation on the basis of total population, the *Wesberry* Court held that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." 376 U.S. at 18; *Kirkpatrick,* 394 U.S. at 531 ("[T]he command of Art. I, s 2, that States create congressional districts which provide equal representation for equal numbers of people permits only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."); *Karcher v. Daggett*, 462 U.S. 725, 732 (1983) (requiring that "absolute population equality" be "the paramount objective" in congressional districting).

Several months after the Court's decision in *Wesberry*, this Court in *Reynolds v. Sims* held that the Equal Protection Clause of the Fourteenth Amend-

ment required states to abide by the constitutional command of one-person, one-vote. Observing that "*Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State," Chief Justice Warren's opinion in *Reynolds* asked "whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." 377 U.S. at 560-61. *Reynolds* concluded that, notwithstanding the differences between Article I, Section 2 and the Equal Protection Clause of the Fourteenth Amendment, "the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Id.* at 567. Accordingly, *Reynolds* held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577.[2]

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[2] Evenwel makes much of the language in *Reynolds* that speaks of the rights of voters, Appellants' Br. at 14, 24-26, hoping to fashion the Court's loose language into a holding that the Constitution requires states to draw districts containing an equal number of voters. No court has ever accepted that reading of *Reynolds*, and for good reason. The language of *Reynolds*'s holding that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis," 377 U.S. at 568, and its heavy reliance of Article I, Section 2, as construed in *Wesberry*, make clear that the "basic constitutional principle" is "equality of population among districts." *Mahan*, 410 U.S. at

Consistent with the constitutional principle of equal representation for equal numbers of people, this Court's cases judging the constitutionality of challenges under *Reynolds* have focused on how far the state's redistricting plans deviated from total population, and whether there was a legitimate government justification for the deviation from the ideal of population equality. *See, e.g.*, *Mahan*, 410 U.S. at 329 (concluding that maximum deviation of 16.4% from total population equality "may well approach tolerable limits"); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (holding that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima face case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State"); *Connor v. Finch*, 431 U.S. 407, 418 (1977) (noting that "maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as de minimis"); *Brown v. Thomson*, 462 U.S. 835, 843-44 (1983) (concluding that plan's "deviation from population equality—60% below the mean—is more than minor" but finding deviations from total population equality justified by the "consistent and nondiscriminatory application of a legitimate state policy"); *see also* Appellees' Br. at 28-31 (collecting cases). This basic approach properly treats total population as the benchmark for analysis of a one-person, one-vote claim, measuring whether a state's plan comports with "the

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321. Indeed, in applying its holding to the facts of the case, *Reynolds* noted that "although about 43% of the State's total population would be required to comprise districts which could elect a majority . . ., only 39 out of the 106 House seats were actually to be distributed on a population basis," concluding that "the deviations from a strict population basis are too egregious . . . to be constitutionally sustained." *Reynolds*, 377 U.S. at 569.

fundamental principle . . . of equal representation for equal numbers of people." *Reynolds*, 377 U.S. at 560-61.

Indeed, this Court recognized in *Gaffney* that total population figures—though inherently imperfect—nevertheless form the "basic statistical materials which legislatures and courts usually have to work with." 412 U.S. at 745. Total population remains the touchstone for assessing state compliance with the Constitution's principle of equal representation even though, as *Gaffney* explained, "total population—even if stable and accurately taken—may not actually reflect th[e] body of voters . . . . The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." *Id.* at 746-47; *see also Daly v. Hunt*, 93 F.3d 1212, 1224 (4th Cir. 1996) ("The *Gaffney* Court used total population figures to analyze the legislative apportionment plan at issue there even after observing that the congressional districts from the same state contained significant variations in terms of age-eligible voters."). Notwithstanding this recognition, this Court has continued to use total population as the basic measure of analysis. This reflects that, as the Framers of Article I, Section Two and the Fourteenth Amendment understood, total population is the "natural & precise measure of Representation," 1 *Farrand's Records*, *supra*, at 605, and "the only true, practical, and safe republican principle." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866). When a state strives to ensure equal representation for all persons by drawing districts of substantially equal persons, it comports with the command of the one-person, one-vote principle.

To be sure, "state reapportionment is the task of local legislatures or of those organs of state government selected to perform it," *Gaffney*, 412 U.S. at 751; *see also Mahan*, 410 U.S. at 322 (observing that "broader latitude has been afforded the States under the Equal Protection Clause"), and states may have some leeway to deviate from the total population standard where local state concerns warrant such a departure. *See Gaffney*, 412 U.S. at 748-49 (noting that "[f]air and effective representation . . . does not depend solely on mathematical equality among district populations" and that there are "other relevant factors to be taken into account and other important interests that States may be legitimately mindful of"); *Burns v. Richardson*, 384 U.S. 73, 94-95 (1966) (approving state districting plan where, because of tourist and military population included in the census, "[t]otal population figures . . . constitute a substantially distorted reflection of the distribution of state citizenry"). But, as this Court's cases reflect, total population remains the benchmark for enforcing the Constitution's guarantee of equal representation for equal numbers of people.

Evenwel's basic position—that the Constitution requires districts composed of equal numbers of voters—ignores the total population standard reflected in the Constitution's text and history, is inconsistent with the broad sweep of the equal protection guarantee, has no basis in this Court's precedents from *Wesberry* on, and would seriously hamstring efforts by state governments to ensure equal representation for all persons. In Evenwel's view, the total population standard the Constitution mandates when it comes to congressional redistricting is constitutionally forbidden in state and local redistricting. No court in American history has ever adopted this radical re-

writing of the basic constitutional principle of equal representation for equal numbers of people. This Court should not do so now. Because the districting plan here comports with the principle of substantial population equality, the judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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