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 *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Linda C. Goldstein
Neil A. Steiner
Rachel B. Swartz
Cara Schmidt
Mari C. Stonebraker
Diana C. Wang
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036

G. Eric Brunstad, Jr.
Counsel of Record
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

(*additional counsel listed on reverse of page*)

Jon M. Greenbaum
Robert A. Kengle
Ezra D. Rosenberg
M. Eileen O'Connor
Dorian Spence
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee" or "Committee") is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and inequality of opportunity. The principal mission of the Committee is to secure equal justice for all through the rule of law.

Since 1965, the Lawyers' Committee has endeavored to protect the right to vote and to ensure that the right is afforded equally. The Lawyers' Committee has a strong interest in protecting the voting rights of all communities and in opposing efforts to undermine the voting strength of historically under-represented groups. As a nonprofit organization that represents the private bar and marshals its leadership and skills in service to this cause, the Committee is uniquely well-suited to address the question presented.

SUMMARY OF THE ARGUMENT

This case involves a thoroughly settled question. The decision below does not conflict with any authority from this Court or any court of

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Appellants and Appellees have consented to the filing of this brief. Appellants' and Appelles' blanket consents have been filed.

appeals. Nor is there a real disagreement among the states. For decades, the overwhelming majority of states have adhered to apportionment by total population as the hallmark of the one-person, one-vote principle that protects one of our most cherished and fundamental rights—the right to vote. In seeking to dislodge the total population standard, Appellants would unsettle the foundation on which the one-person, one-vote principle has long rested. If successful, Appellants' efforts would force forty-one states to scuttle to re-write their apportionment laws in order to comply with some new, untested standard. Not only have Appellants failed to show that their preferred approach is a superior, constitutionally required directive, but adopting it would spawn decades of protracted litigation over its implementation.

In the half-century since this Court first announced the one-person, one-vote principle in *Gray v. Sanders,* 372 U.S. 368 (1963), and *Reynolds v. Sims,* 377 U.S. 533 (1964), not a single court has held that the use of total population as the basis for apportionment is *impermissible.* To the contrary, both the lower courts and the states have consistently relied on this Court's sanctioning of total population apportionment in *Reynolds* and its progeny. The near-completeness of this reliance cannot be overstated. Forty-one states use total population as their sole basis for apportionment; thirty-two do so through constitutional provisions. Moreover, thirty-three states amended their constitutional provisions or statutes after *Reynolds* was decided to hew to this Court's seminal rulings.

As this Court's precedents establish, analysis of whether it is appropriate to overturn prior law in order to institute the new approach Appellants prefer requires the consideration of a number of important jurisprudential factors. Critically, these factors are designed specifically to guard against upending important, established practices, particularly those based on this Court's prior constitutional rulings. In this instance, none of the factors favors abandoning the status quo. Indeed, they all counsel strongly against it. In particular, the relevant circumstances are not materially different from when this Court decided *Reynolds*, the relevant precedents have not been eroded, and the total population metric has proved neither to be unworkable nor in conflict with other relevant precedents.

In addition, Appellants' resort to the "political question" doctrine is a smokescreen. The district court did not once mention a "political question" and the law is well-settled—the doctrine does not apply to the conduct of state elections.

Over the last fifty years, the total population metric has been a successful, neutral redistricting criterion that has long vindicated the values underlying the one-person, one-vote standard and mitigated the inequalities it was designed to overcome. Under this Court's standards for reconsidering its own prior decisions, there is no justification for forbidding the states from continuing to use it.

For these reasons, the decision below should be affirmed.

ARGUMENT

I. THIS COURT'S JURISPRUDENCE COUNSELS AGAINST CHANGING ENTRENCHED LAW ON STATE LEGISLATIVE APPORTIONMENT.

This Court has long recognized the need for stability and restraint when asked to overrule a prior precedent, particularly one that has formed the foundation for the states' subsequent legislative choices. Under the doctrine of *stare decisis*, and in deference to the states' legislative powers and prerogatives, the default presumption is to uphold a precedent absent a "special justification."[2] Though each instance is unique, the Court has looked repeatedly to three factors in particular when faced with a request to reverse a previous holding: (1) changed factual assumptions, (2) erosion of legal precedent; and (3) conflicting or unworkable legal precedent. Conversely, the

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[2] "While 'stare decisis is not an inexorable command,' particularly when we are interpreting the Constitution, 'even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.'" *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000)(internal citations omitted). *See also*, *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015)("[I]t is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'")(internal citation omitted).

absence of any of these factors weighs heavily in favor of retaining a prior precedent. Indeed, even where a special justification for overruling a prior precedent may exist, entrenched reliance on a clear legal rule is a sufficient reason, in and of itself, to refrain from reversing a prior decision.

Viewed from this perspective, it is clear that this Court's precedents permitting states to use total population as an apportionment metric should not be overruled.

A. This Court's Well-Established Precedents Have Long Permitted Legislative Apportionment Based on Total Population.

The state of the law is unquestionably settled—apportionment based on total population has been approved by this Court and the Courts of Appeals in each and every instance in which the question has been considered. Since this Court first addressed the issue in *Reynolds*, every court to have addressed the question has upheld the constitutionality of apportionment using total population as a base. This is unsurprising because the total population metric is the very remedy designed to address the problem of vote dilution faced in *Reynolds*. The practical effect of these decisions has been overwhelming: Forty-one of the fifty states use total population apportionment and none use the citizen voting age population ("CVAP") measure that Appellants advocate.

Reynolds established that the Equal Protection Clause requires states to equalize the

populations of their election districts to protect the right to vote from dilution. At issue in *Reynolds* was Alabama's then-current apportionment scheme and two competing apportionment proposals. Despite a state constitutional requirement to do so, Alabama had failed to reapportion its legislative districts since 1901. *Reynolds*, 377 U.S. at 540.

The Court expressly evaluated equalization, and therefore the constitutionality of the three apportionment schemes, based on *total* population and not some other standard. In reciting the relevant facts necessary to its decision, the court relied on the 1960 census,[3] which did not include citizenship data. *See* 1960 Long-Form Census Questionnaire at http://www.census.gov/history/.pdf/1960censusquestionnaire-2.pdf. The Court noted: (1) under each of the three schemes, each senatorial district would have only one senator, no matter the population of the district according to the 1960 census; *Reynolds,* 377 U.S. at 545; and (2) under the proposed constitutional amendment, "serious disparities from a population-based standard remained. Montgomery County, with 169,210 people, was given only four seats, while Coosa County, with a population of only 10,726, and Cleburne County, with only 10,911, were each allocated one representative." *Id.* at 549. In addition, (3) under the proposed statute, "about 37% of the State's *total population* would reside in

[3] "The evidence adduced at trial before the three-judge panel consisted primarily of figures showing the population of each Alabama county and senatorial district according to the 1960 census." *Reynolds,* 377 U.S. at 545.

counties electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1." *Id.* at 549–50 (emphasis added).

Discussing the disparity between the various counties' representation and their *total population*, the Court opined 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," *id.* at 560–61, citing *Wesberry v. Sanders*, 376 U.S. 1 (1964), and further held that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Reynolds,* 377 U.S. at 567. Critically, the "population" explicitly discussed and relied upon was *total* population.[4] The law, as set forth in *Reynolds,* is thus clear: apportionment on a total population basis protects the one-person, one-vote principle and is constitutional.

Moreover, at the time the Court decided *Reynolds* and sanctioned total population as an apportionment base, it understood that districts of equal population would not necessarily be districts of equal numbers of citizens or equal numbers of qualified voters. In *Baker v. Carr*, 369 U.S. 186 (1962), relied upon in *Reynolds*, the Court held that

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[4] "[T]otal population figures were in fact the basis of comparison in th[e] [*Reynolds v. Sims*] case and most of the others decided that day." *Burns v. Richardson*, 384 U.S. 73, 91 (1966).

challenges to a state's apportionment presented justiciable controversies under the Equal Protection Clause. At issue in *Baker* was Tennessee's 1901 apportionment statute. At the time, Tennessee's Constitution required apportionment based on "qualified voters" but actually apportioned based on persons 21 years of age or older. *Id.* at 192. The Court specifically noted the disparity between Tennessee's "population" and its eligible voters. *Id.* ("In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote.").[5]

Just three years later, in *Burns v. Richardson*, the Court specifically held that states may choose among several acceptable apportionment bases, including total population. 384 U.S. 73, 92 (1966) ("the decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere"). This holding was based on the expressly stated understanding that various metrics would yield differing results:

> For example, on a total population basis, Oahu's ninth and tenth representative

[5] In reliance on *Baker* and *Reynolds*, Tennessee changed its Constitution to require apportionment by total population in 1966. TENN. CONST. art. II, § 4 (Amendment adopted in Convention Dec. 9, 1965, approved at election Nov. 8, 1966, and proclaimed by Governor Dec. 2, 1966).

> districts would be entitled to 11 representatives, and the fifteenth and sixteenth representative districts would be entitled to eight. On a registered voter basis, however, the ninth and tenth districts claim only six representatives and the fifteenth and sixteenth districts are entitled to 10.

Id. at 90–91.

And finally, ten years after *Reynolds*, in *Gaffney v. Cummings*, the Court reiterated its awareness that substantial deviations in voting eligible population may occur across districts when total population is used as an apportionment base, yet it continued to endorse total population as a constitutionally permitted method of equalization for the purposes of a one-person, one-vote analysis. The Court explained: "[t]he 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." *Gaffney v. Cummings*, 412 U.S. 735, 746–47 (1973).[6] The Court, however, did not find that

[6] This Court later recognized that equalizing total population among districts does not necessarily equalize the districts based upon other population measures. *See*, *e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 771–72 (1983) (White, J. Dissenting) (noting that "[s]econd, far larger differences among districts are introduced because a substantial percentage of the total population is too young to register or is disqualified by alienage" and arguing that "[a]ccepting that the census, and the districting plans which are based upon it, cannot be perfect represents no backsliding in our commitment to assuring fair and equal representation in the election of Congress"), *aff'd*, 467 U.S. 1222 (1984).

such deviations in any way reduced the fairness or constitutionality of total population as a method of apportionment. *Gaffney* rejected that argument in a holding that has remained undisturbed for forty years.

In the fifty years since *Reynolds,* rulings from the courts of appeals have consistently applied this above set of unambiguous precedents. Every Court of Appeals that has addressed the issue has held that apportionment by total population is constitutional and protects the one-person, one-vote principle. Specifically, the Fourth, Fifth, and Ninth Circuits have all rejected challenges to the constitutionality of apportionment by total population. *Daly v. Hunt,* 93 F.3d 1212 (4th Cir. 1996) (rejecting argument that one-person, one-vote analysis must be based on voting-age population and relying on *Reynolds* and *Gaffney*); *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (rejecting argument that Houston "improperly crafted its districts to equalize total population rather than [CVAP]"); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 773–75 (9th Cir. 1990) (upholding use of total population as basis for district apportionment and finding that "[t]he 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") (internal citations omitted).[7]

Appellants do not cite a single case standing for the proposition that states *may not* use total population as their apportionment base. This Court's precedents on the issue are clear, and the use of total population apportionment remains unquestioned. The Courts of Appeals to have addressed this issue all agree, and forty-one of the fifty states follow this court-sanctioned approach. The ruling that Appellants seek would thus represent a seismic doctrinal shift. Yet as discussed below, Appellants have provided no justification for making this dramatic move and the Court should reject their invitation to transform the use of the total population metric from a bedrock compliance principle to a suspect and uncertain litigation risk.

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[7] *See also*, *Brown v. US*, 486 F.2d 658, 661–62 (8th Cir. 1973)(noting that "[t]he Tribe's Constitution provides that apportionment may be based on either 'population' or 'qualified voters.' Use of either basis is permissible under the Supreme Court's decision in *Burns v. Richardson*"); *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1263 n.6 (11th Cir. 2002) ("[i]deal population size of a district is the quotient of the population of a county divided by the number of its electoral districts").

B. Forty-one States Have Relied on the Well-Settled Principle that the Total Population Metric is Valid and Have Used it to Apportion Legislative Districts.

States have relied on *Reynolds* and the decisions applying it for over half a century. The number of states that have updated their redistricting laws and instituted the total population method since *Reynolds* illustrates the workability of the approach. To be sure, it is not the only approach. In the wake of *Reynolds, Gaffney*, and *Burns*, states have had the right to choose a redistricting method that worked best for them, provided the chosen method otherwise complied with applicable constitutional requirements. And forty states have done just that, changing their laws after *Reynolds* to adopt a new method of apportionment. In many instances, the states' reliance on this Court's precedents was explicit.[8] Thirty-three of those states adopted the

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[8] *See, e.g.*, *Below v. Gardner*, 963 A.2d 785, 789 (N.H. 2002) ("In 1964, a resolution was introduced at the Constitutional Convention seeking to change the basis for senate apportionment from taxes to population. The matter came to the convention "[a]s a result of recent decisions by the United States Supreme Court") (citing Journal of Constitutional Convention); MICH. COMP. LAWS ANN. § 4.261 ("(d) Senate and house of representatives districts shall have a population not exceeding 105% and not less than 95% of the ideal district size for the senate or the house of representatives unless and until the United States Supreme Court establishes a different range of allowable population divergence for state legislative districts."); *Wilson v. Fallin*, 262 P.3d 741, 746 (Okla. 2011) ("As to section 9A, it is clear that the county-based apportionment formula is rendered a nullity by the basic

total population method, while only seven states adopted another method following this Court's holding in *Burns* that the Equal Protection Clause does not necessarily require total population to be used.

More than anything else, this history demonstrates reliance on the Court's decision in *Reynolds*. Moreover, of the forty-one states that now use total population as their apportionment base, thirty-two, including Texas, have mandated the use of the total population method in their respective constitutions. Four states have done so by statute. Four additional states have established the total population metric by case law, and one state has done so by means of its redistricting commission guidelines. In addition, it should be noted that, of the remaining nine states that do not allow for total population as a method for redistricting, a significant majority permit aliens to be counted. Four of the nine states exclude non-resident prisoners. Two states exclude non-resident military, and one of those states also excludes non-resident students. Only two states exclude aliens from their apportionment base.[9] Thus, forty-eight states use a method of calculation for redistricting that does *not* exclude aliens. The charts below list each state and the relevant law

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constitutional standard that state legislative districts must be based on equality in the total population under the Equal Protection Clause of the Fourteenth Amendment and *Reynolds v. Sims*, 377 U.S. at 533, 84 S. Ct. at 1362, and its progeny.").

[9] In addition, Hawaii includes only permanent residents in districting.

associated with its redistricting method.

1.a States that have incorporated the total population metric in their constitution.

State	Constitutional Provision
Alabama	ALA. CONST. §§ 198, 200 (amended in 1901).
Alaska	ALASKA CONST. art. VI, §§ 3 & 6 (amended in 1998).
Arizona	ARIZ. CONST. art IV, Pt. 2 § 1 (amended in 2000).
Arkansas	ARK. CONST. art. VIII, §§ 2–3 (enacted in 1874 and amended in 1937).
Colorado	COLO. CONST. art. V, §§ 46–47 (enacted in 1967 and amended in 1975).
Florida	FLA. CONST. art. III, § 21 (amended in 2010).
Illinois	ILL. CONST. art. IV, § 3 (amended in 1970). 10 ILL. COMP. STAT. 91/5 (2011).
Indiana	IND. CONST. art. IV, § 5 (amended in 1984).
Iowa	IOWA CONST. art. III, § 34 (amended in 1968). IOWA CODE § 42.4(1)(a)(1980).
Kentucky	KY. CONST. § 33 (enacted in 1891).
Louisiana	LA. CONST. art. III, § 6 (enacted in 1974).
Massachusetts	MASS. CONST. pt. 2 art. CI (enacted in 1974).

State	Constitutional Provision
Minnesota	MINN. CONST. art. IV, § 2 (enacted in 1857).
Missouri	MO. CONST. art. III, §§ 2 & 5 (enacted in 1966).
Montana	MONT. CONST. art. V, § 14 (enacted in 1972). MONT. CODE ANN. § 5-1-115 (2003).
Nevada	NEV. CONST. art. IV, §§ 5 & 13 (amended in 1970).
New Hampshire[10]	N.H. CONST. Pt. 2, art. IX & XXVI (amended in 1964).
New Jersey	N.J. CONST. art. IV, § 2, ¶ 1 (enacted in 1995). *Id.* ¶ 3 (enacted in 1966).
North Carolina	N.C. CONST. art. II, §§ 3 & 5 (enacted in 1970).
Ohio	OHIO CONST. art. XI, §§ 2, 4, 9, & 11 (amended in 1967).
Oklahoma	OKLA. CONST. art. V, § 9A (enacted in 1964).

[10] New Hampshire's constitution permits non-resident military or student personnel to be excluded when redistricting. N.H. CONST. Pt. 2, art. IX.a. However, subsequent case law has interpreted that provision to require the use of the total population metric. *See Below*, 963 A.2d at 795 (holding that a legislative plan was flawed because "it d[id] not rest *entirely* upon the federal census data, as required by law")(emphasis added); *McGovern v. Sec'y of State*, 635 A.2d 498, 500 (N.H. 1993)(holding that the state constitution "established only one yardstick as a legislative guide in making an apportionment . . . 'the last general census'" when considering a claim that art. IX.a should have been taken into account). For this reason, *amici*'s tally differs from the one offered by Appellees at App. Brief 28, n.8.

State	Constitutional Provision
Oregon	OR. CONST. art. IV, § 6 (amended in 1986). OR. REV. STAT. ANN. § 188.010 (West 1979).
Pennsylvania	PA. CONST. art. II, § 16–17 (enacted in 1968).
Rhode Island	R.I. CONST. art. VII, § 1 & art. VIII, § 1 (enacted in 1994).
South Carolina	S.C. CONST. art. III, §§ 3 & 6 (enacted in 1895).
South Dakota	S.D. CONST. art. III, § 5. (amended in 1982). S.D. CODIFIED LAWS § 2-2-41 (2011).
Tennessee	TENN. CONST. art. II, §§ 4 & 6 (amended in 1966).
Virginia	VA. CONST. art. II, § 6 (enacted in 1971). VA. CODE ANN. § 30-265 (2004).
West Virginia	W. VA. CONST. art. VI, §§ 4 & 7 (enacted in 1872).
Wisconsin	WIS. CONST. art. IV, § 3 (amended in 1982).
Wyoming	WYO. CONST. art. III, § 3 (enacted in 1889).

1.b States that have incorporated the total population metric through statute, regulation, or case law.

State	Relevant Law
Connecticut	CONN. CONST. art. III, § 5–6 (amended in 1980). Connecticut uses census data to equalize the districts on a total population basis. *See, e.g.*, *Miller v. Schaffer,* 320 A.2d 1, 8 (Conn. 1972).
Georgia	GA. CONST. art. III, § 2 (enacted in 1976). Georgia case law shows that "total population" based on U.S. Federal census data is the metric of apportionment. *See, e.g.*, *Toombs v. Fortson*, 241 F. Supp. 65, 70–71 (N.D. Ga. 1965), *aff'd*, 384 U.S. 210 (1966).
Idaho	IDAHO CODE ANN. § 72-1506 (West 2009).
Michigan	MICH. COMP. LAWS ANN. § 4.261 (1997).

State	Relevant Law
Mississippi	MISS. CONST. art. 13, § 254 (enacted in 1963 and amended in 1979). *Connor v. Johnson*, 330 F. Supp. 506, 507-08 (S.D. Miss. 1971) (using federal census data and interpreting reapportionment plans to require "*as nearly as possible*, equality in population among the several districts").
New Mexico	N.M. CONST. art. IV, § 3 (enacted in 1975). *Maestas v. Hall*, 274 P.3d 66, 72–73, 75 (N.M. 2012)(noting that legislative policy makes reference to using total population).
North Dakota	N.D. CENT. CODE § 54-03-01.5(5) (1975).
Utah	Utah has adopted state redistricting committee guidelines, which require that "districts must be as nearly equal as practicable" as determined by the federal census. OFFICE OF LEGISLATIVE RESEARCH & GEN. COUNSEL, REDISTRICTING COMM. REPORT, p. 3 (2001).
Vermont	VT. CODE ANN. § 1902–03. (1965).

2. States that use an alternative method.

State	Alternative Provision
California	CAL. CONST. art. XXI, § 2 (amended in 2010). CAL. ELEC. CODE § 21003 (West 2013) (excluding nonresident prisoners).
Delaware	DEL. CODE ANN. tit. 29, § 804. (1964). *Id.* § 804A (2010) (excluding nonresident prisoners).
Hawaii	HAW. CONST. art. IV, §§ 4 & 6 (enacted in 1959 and apportioning districts using permanent residents).
Kansas	KAN. CONST. art. X, § 1 (amended in 1988 and excluding non-resident military personnel and nonresident students attending college in the state).
Maine	ME. CONST. art. IV, Pt. 1, § 2 & Pt. 2, § 2 (enacted in 1986 and excluding not-naturalized foreigners).
Maryland	MD. CONST. art. III, §§ 4–5 (amended in 1970). MD. CODE ANN., ELEC. LAW § 8-701 (amended in 2010) (excluding nonresident prisoners).
Nebraska	NEB. CONST. art. III, § 5 (enacted in 1920 and excluding aliens).

State	Alternative Provision
New York	N.Y. CONST. art. III, §§ 4–5 (amended in 1970). N.Y. LEGIS. LAW § 83-m (McKinney 2010) (excluding nonresident prisoners).
Washington	WASH. CONST. art. II, § 43 (amended in 1983). WASH. REV. CODE ANN. § 44.05.090 (West 1990) (excluding nonresident military personnel).

These state law provisions give life to this Court's pronouncement in *Reynolds* that "as nearly as is practicable one man's vote in [an] election is to be worth as much as another's."[11] As noted, thirty-three states actually changed their laws after *Reynolds* to require the use of the total population method, and seven wrote the "nearly as practicable" standard from *Reynolds* into their constitutions.[12] In addition, two states that have amended their constitutions after *Reynolds*, Iowa and Oregon, have incorporated the same standard into their state code. Also, North Dakota, which enacted the total population metric by statute after

[11] *Reynolds* drew this language from *Wesberry*, 376 U.S. at 7–8, in which this Court held that Georgia's federal congressional districts violated U.S. CONST. art I, § 2 because there were vast inequalities in the populations of the districts.
[12] Those seven states are Alaska, ALASKA CONST. art. VI, § 3 & § 6, Arizona, ARIZ. CONST. art IV, Pt. 2 § 1, Louisiana, LA. CONST. art. III, § 6, Montana, MONT. CONST. art. V, § 14, Pennsylvania, PA. CONST. art. II, § 16–17, South Dakota, S.D. CONST. art. III, § 5, and Virginia, VA. CONST. art. II, § 6.

the *Reynolds* decision, has incorporated the "nearly as practicable" standard into its state code. And, finally, Utah uses the same standard in its redistricting commission guidelines.

Thus, were the Court to overrule *Reynolds* and its progeny and hold that total population was an impermissible method by which to apportion districts, the vast majority of states would have to amend their constitutions or codes and, in some cases, both. Moreover, new methods of apportionment would need to go through the protracted process of constitutional amendment, legislative enactment, and judicial review, disrupting countless election cycles. In short, what is currently a workable standard would be wiped out, to be replaced with a massive rewriting campaign likely followed by years of litigation.

The states' reliance on *Reynolds* is exactly the kind of deeply entrenched reliance that the Court endeavors to respect when it refuses to depart from prior precedent. For example, in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), the Court was again persuaded to uphold *Roe v. Wade*, 410 U.S. 113 (1973), in part, because of "two decades of economic and social developments" that had developed in reliance on *Roe* and that affected personal relationships, women's economic and social roles, and women's ability to plan their futures. *Planned Parenthood*, 505 U.S. at 856. More recently, the Court has declined to overrule warnings established by *Miranda v. Arizona*, 384 U.S. 436 (1966), even while expressing some doubt about the

decision's reasoning. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now"). The *Dickerson* Court noted that *Miranda* has "become embedded in routine police practice to the point where the warnings have become part of our national culture" and that reviving the law enforcement practice in place prior to *Miranda* would be "more difficult . . . for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Id.* at 443–44. The states' reliance upon *Reynolds* and its progeny is no different and, in many ways, more compelling than the reliance interests the Court has acknowledged in the past, since the rationale of *Reynolds* has been approved time and again. Thus, because the rationale of *Reynolds* remains sound, the states' half century of reliance on it is all the more sufficient to uphold the decision.

Indeed, the use of total population for apportionment promotes fairness and is, in many instances, required by the Equal Protection Clause and Voting Rights Act. *See, e.g., Garza*, 918 F.2d at 775 ("The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'") (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969)). Total population is the basis of apportionment that is "least manipulable" to political will and legislators should be responsible for "bringing resources" and benefits to "roughly the same number of persons." J. Fishkin,

Weightless Votes, 121 Yale L.J. 1888, 1906–07 (2012).

C. There Has Been No Change in Factual Circumstances that Would Justify Upending the States' Reliance Interest.

One of the additional factors the Court looks to in considering whether to overturn a prior precedent is whether there has been a change in the relevant underlying factual circumstances. For example, in *Patterson v. McLean*, the Court declined to reverse *Runyon v. McCrary*, 427 U.S. 160 (1976) (guaranteeing equal rights protection to contracts between private parties) because there had been no change in society's view on the acceptability of discrimination, its effects, or the necessity of legal protection against it. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). And in *Bay Mills Indian Community*, the Court upheld tribal immunity from suit established in *Kiowa Tribe of Okla. v. Manuf. Techs., Inc.*, 523 U.S. 751 (1998), in part because the circumstances alleged to have been different—the increasing number of Native American casinos on non-Indian lands—was something the Court had been aware of previously and did not, in fact, constitute a difference. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).[13]

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[13] Compare *Bay Mills* with *Brown v. Board of Ed. of Topeka, Shawnee Cnty, Kan.*, 347 U.S. 483 (1954), which acknowledged that new information about the psychological effects of segregation had surfaced, showing that separate facilities can never be equal.

In this instance, the use of the total population apportionment method is not premised on circumstances that did not exist, or that were unknown by the Court at the time *Reynolds* and *Burns* were decided. Rather, as has always been the case, significant non-citizen populations were also present, just as they are today.

1. There has been no change in factual circumstances because immigrants have historically clustered in metropolitan areas.

Historically, we have always largely been, and largely remain to this day, a "nation of immigrants,"[14] many of whom are not citizens and are not eligible to vote. Persons born in other countries have always made up a significant portion of the total population of the United States. *See generally* Grieco, Trevelyan, et al., *The Size, Place of Birth, and Geographic Distribution of the Foreign-Born Population in the United States: 1960 to 2010*, Population Division Working Paper No. 96, U.S. Census Bureau (2012) (showing that percentage of foreign-born population has increased only from 9.7% in 1850 to 11.1% in 2010, with fluctuations ranging from 4.7% to 11.1%).[15] Because immigrants have not been evenly distributed throughout each state, but have tended

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[14] John F. Kennedy, Jr., *A Nation of Immigrants* (1964).

[15] The most pronounced difference in immigration statistics is not the percentage of immigrants in the total population, but rather, their origin. Formerly, most immigrants came from European countries; now, most come from Latin America. *See Historical Census Statistics*, Table 3.

to cluster in ports of entry and other large metropolitan areas, disparities between voting-eligible population and total population have existed since well before the concept of one-person, one-vote became the law of the land. United States census data shows that immigrants have lived disproportionately in metropolitan areas since at least the time of *Reynolds*. *See generally* Gibson and Jung, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000,* Population Division Working Paper No. 81, U.S. Census Bureau, (2006) (hereinafter *Historical Census Statistics*). Moreover, this has been true in each decade since 1960.

	Foreign-born population in metropolitan areas	Overall population in metropolitan areas
1960	83.8%	63.3%
1970	88.0%	69.0%
1980	91.8%	74.8%
1990	94.3%	77.5%
2000	94.4%	80.3%

Population patterns in the State of Texas follow this historic norm. For example, the foreign-born population percentage in Houston is currently 19.0%, as opposed to the overall foreign-born

population within Texas at 13.9%. In the earliest census data available, Houston had 16.7% foreign-born population in 1870, compared to Texas's 7.5% at the time. *See Historical Census Statistics*, Tables 14 and 26. The same holds true in other states. In 1870, New York City's foreign population was at 44.5%, compared to the state's overall foreign-born population of 26.0%. San Francisco in 1870 had a foreign population of 49.3%, while California overall had 37.5%. *Id.* This would suggest that districts with large metropolitan areas have frequently had higher percentages of non-eligible population. In sum, aliens have always been unevenly distributed in Texas and the other states since before *Reynolds* was decided. Because this has always been the case, that disparity does not justify rejecting established precedent because, in reality, there is no changed circumstance.

2. This Court has acknowledged the clustering effect of immigrants on apportionment in its previous decisions.

Nor did the Court fail to recognize these facts in its previous decisions. As discussed above, in *Baker,* for example, the Court noted the difference between Tennessee's "population" and eligible voters. *Baker*, 369 U.S. at 192 ("The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote."). Yet, neither the *Baker* Court nor the *Reynolds* Court took this information to mean that total population might be an improper basis for apportionment or

that it contravenes the one-person, one-vote doctrine.

Gaffney further recognized that "'census persons' are not voters." *Gaffney*, 412 U.S. at 746–47. In addition, the Court noted that 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 . . . [a]nd these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, nonresident military personnel, nonresident students, for example." *Id.* Yet the Court was untroubled by these variations when it held that there was "no constitutionally founded reason to interfere" with using total population for apportionment. *Id.* at 746 n.12 (citing *Burns*, 384 U.S. at 92). Nowhere in *Gaffney* did the Court even suggest that these potential deviations might render the total population metric unconstitutional.

Similarly, the Court in *Gaffney* noted that such deviations may be especially significant in metropolitan areas or immigration-heavy states: "New York has a 29% variation in age-eligible voters among congressional districts, while California has a 25% and Illinois a 20% variation." *Id.* at 747 n.13. Significantly, the comparative deviations in age-eligibility that this Court found acceptable in *Gaffney* are substantially similar to those Appellants complain of here. Appellants contend there is at least a 30.8% deviation in the Texas plan between CVAP and total population,

and that this deviation constituted a facially invalid apportionment method. But if that were so, then the same would also apply to the disparity accepted in *Gaffney*. Yet the Court has properly taken a different path. In *Reynolds*, the Court held that redistricting measures must be based on "substantial equality of population." 377 U.S. at 559. In *Burns*, the Court determined that states' decisions to include "aliens, transients, [or] short-term or temporary residents" are independent choices with which there was "no constitutionally founded reason to interfere." 384 U.S. at 92. And in *Gaffney*, the Court recognized—and expressed no concern about—substantial deviations between total population and voter-eligibility. In *Gaffney*, deviations as large as 29% did not warrant condemnation. On this basis, there is no reason why Appellants' allegation of a 30.8% deviation now should prompt a different response. Appl. Br. at 49.

D. Mandating CVAP Would Inevitably Increase Judicial Involvement in State Legislative Apportionment.

1. This Court has repeatedly found judicial manageability to be an important criterion in determining whether to depart from previous precedent.

Appellants urge the Court to upend long-standing, reliable precedent in favor of a less judicially manageable test guaranteed to breed litigation challenges. This is not the first time this

Court has been faced with such a choice. Time and again the Court has considered judicial manageability in its *stare decisis* analysis, and time and again the Court has given judicial manageability significant weight.

Most recently, in *Kimble*, the Court refused to adopt the "elaborate inquiry" recommended by the plaintiff, even after acknowledging its potential merit. 135 S. Ct. at 2411. Instead, the Court, adhering to the principles of *stare decisis*, stood by its prior decision in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), not only because the Court found no change of circumstances worthy of the proposed abandonment, but importantly because the Court recognized that *Brulotte*'s holding presented a judicially manageable option. In *Kimble*, the plaintiff alleged that the defendant had improperly stopped making contracted-for-payments to use the plaintiff's patent after the patent had expired. The plaintiff urged the Court to abandon *Brulotte*, its prior precedent rejecting enforcement of post-expiration royalty clauses and, instead, to adopt a flexible, "rule of reason" analysis.

In rejecting this request, the *Kimble* Court explained that its prior holding was "simplicity itself to apply." 135 S. Ct. at 2411. In contrast, the plaintiff's proposed alternative involved an "elaborate inquiry" "which c[ould] produce high litigation costs and unpredictable results." *Id.* at 2404. The Court held that "trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now," and that in such instances, "the case for sticking with long-settled

precedent grows stronger." *Kimble,* 135 S. Ct. at 2411. *Compare West Coast Hotel, Co. v. Parrish*, 300 U.S. 379 (1937) (reversing prior decision invalidating a minimum wage law, finding Court's prior decision to be inconsistent with subsequent and prior holdings). Here, the same concern about judicial manageability supports continued adherence to total population apportionment.

2. Total population is the established, judicially manageable metric for redistricting.

Perhaps one of the most compelling reasons for adhering to the status quo is that the statistical information necessary to apply it is readily available. Full-count decennial census data are universally available and yield consistent and predictable results based upon an "enumeration" of the population. Every ten years, the Federal Census Bureau, operating under Title 13 and Title 26 of the U.S. Code, tabulates this country's population. Specific information is provided for every state—allowing state legislators to obtain information easily and reliably, from a single comprehensive source. Unsurprisingly, it is the method mandated by the Constitution for apportioning Congressional districts. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV.

In contrast, Appellants' proposed use of sampling data in the redistricting context would force courts to engage in highly technical analyses over which sampling protocols are most appropriate in calculating the CVAP distributions. Unlike total

population Census data, which is based on an actual count of total population, CVAP is always determined by means of statistical sampling.[16] *See* Jorge Chapa, et al., *Redistricting: Estimating Citizen Voting Age Population*, The Chief Justice Earl Warren Institute On Law and Social Policy, Research Brief, September 2011, at 2–4. Unquestionably, a CVAP metric would invite judicial challenge over the methodology used to determine CVAP, including lengthy expert submissions regarding sampling errors and statistical significance. Courts would unnecessarily be forced to resolve these difficult and technical disputes.

Reflecting its ease of use, forty-one state constitutions and statutes expressly call for use of the U.S. federal decennial census data and require new redistricting plans to be made on the U.S. Federal Decennial Census timeline. Today, the Census does not contain CVAP data. If this Court were to adopt CVAP as the appropriate population metric, it would be mandating these states to amend their respective Constitutions or nullify their respective statutes to not only apply a new districting metric but to use new and unfamiliar

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[16] As of 2010, the U.S. Federal Decennial Census no longer includes information about the number of non-citizens inhabiting the country at large or the number of those inhabiting any of the specific states or census tracts. Moreover, this Court held "that the Census Act prohibits the use of sampling for apportionment purposes." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342 (1999).

data sources. This factor also counsels against the use of Appellants' preferred standard.

3. Appellants' proposed standard is otherwise highly problematic.

In contrast with the total population metric, the eligible voter standard that Appellants propose has countless problems, not the least of which is its sheer complexity.

Appellants make only conclusory assertions that their eligible voter standard is workable, judicially manageable, and readily usable. Critically, Appellants did not present a proposed plan to the district court, nor did they state the specific standard they seek to employ. Should the Court accept Appellants' claim, numerous technical difficulties will bedevil the states and their political subdivisions.

To begin with, there are several significant potential biases inherent in Appellants' proposed approach. To the extent Appellants reference voter registration as a possible proxy for the voter-eligible population, the biases inherent in using voter registration as an apportionment means have led it to be treated as suspect, at best, for that purpose. See *Burns*, 384 U.S. at 96 (1966) (noting "hazards" of apportionment by voter registration).

Further, Appellants' proposed use of CVAP also carries embedded biases because it has a strong correlation with racial and ethnic minority populations. *See supra* C.1. Appellants'

alternative could, in effect, force the redistribution of Latino population using districting artifices that on their face would be difficult to distinguish from the unconstitutional gerrymandering in *Bush v. Vera*, 517 U.S. 952 (1996).

Redistricting based on CVAP also has the distinct capability to dilute Latino voting strength. *See, e.g., Garza*, 918 F.2d at 774–75 (noting that "the *Reynolds* Court recognized that the people, including those who are ineligible to vote, form the basis for representative government" and finding that "basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district"). For this reason alone, it is not a viable alternative to the use of total population.

II. THE APPLICABILITY OF THE POLITICAL QUESTION DOCTRINE IS NOT PRESENTED IN THIS APPEAL.

Appellants' "Question Presented" states in part that "[t]he district court held that Appellants' constitutional challenge is a judicially unreviewable political question." App. Brief at i. Appellants similarly argue elsewhere that the district court found their claim to be "non-justiciable" under the political question doctrine.[17] These assertions are simply incorrect.

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[17] *See also* App. Brief at 30 ("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.").

The district court's judgment rested upon routine Equal Protection analysis and cannot reasonably be read to have relied upon the political question doctrine. The district court correctly dismissed Appellants' claim because the law is clear: There is no constitutional right to have electoral districts equalized on a particular metric of population. Nor is the political question doctrine otherwise implicated in this case.

A. There is No Basis in the Language of the District Court's Decision to Conclude that It Invoked the Political Question Doctrine.

The district court's decision did not mention the political question doctrine by name, nor did it use the terms "justiciable" or "non-justiciable" with respect to Appellants' Equal Protection Claim. Moreover, the district court's stated rationale for dismissing Appellants' claim on the merits was their failure to state a claim upon which relief can be granted, under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). The district court's identification of Rule 12(b)(6) as the basis for dismissal leaves little doubt that it did not apply the political question doctrine. Had the district court actually concluded that the case was non-justiciable under the political question doctrine, it almost certainly would have ruled that it lacked subject matter jurisdiction and dismissed Appellants' claim under Federal Rule of Civil Procedure 12(b)(1), rather than reaching the merits of Appellants' claim under Rule 12(b)(6).

The district court explained that its decision was based on this Court's rejection of Appellants' theory that "the metric of apportionment employed by Texas [total population] results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." *Evenwel v. Perry*, No. A–14–CV–335–LY–CH-MHS, 2014 WL 5780507, at *3 (W.D. Tex. Nov. 5, 2014). The district court expressly followed the reasoning in *Burns*, noting that "a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group." *Evenwel*, 2014 WL 5780507, at *3. (quoting *Burns*, 384 U.S. at 92).

Thus, the district court's decision and analysis were consistent with *Burns*, which did not employ the political question doctrine when it ruled that a state's choice of apportionment base is an issue best left to the states. The district court specifically noted that a state's choice of apportionment base "'involves choices about the nature of representation' with which [the Court has] 'been shown no constitutionally founded reason to interfere.'" *Evenwel*, 2014 WL 5780507, at *4 (quoting *Burns*, 384 U.S. at 92). As a result, the court concluded that Appellants were asking the court "to 'interfere' with a choice that the Supreme Court has unambiguously left to the states." *Evenwel*, 2014 WL 5780507, at *4.

B. Regardless of the District Court's Rationale, the Political Question Doctrine is Not Implicated.

Burns left the choice of an apportionment base to the states due to longstanding federalism principles, and *Burns*, by itself, neither directly nor indirectly reflects the political question doctrine. This Court has repeatedly admonished lower courts to leave redistricting choices to the states, except where intervention is required to protect a federal interest. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37 (1982) (holding that a court must defer to legislative judgments on reapportionment as much as possible); *Growe v. Emison* 507 U.S. 25 (1993) (holding failure to defer to state court's timely efforts to redraw legislative and congressional districts an error); *Perry v. Perez*, 132 S. Ct. 934, 944 (2012) ("The District Court also appears to have unnecessarily ignored the State's plans in drawing certain individual districts."). The choice of apportionment base at issue here is no different in this regard than other redistricting choices left to the states in the first instance.

Furthermore, it is questionable whether the political question doctrine has any remaining vitality with respect to federal/state allocation of powers, including the conduct of state elections.[18] Since *Baker*, the Court has, on several occasions,

[18] This Court's decisions invoking the political question doctrine in disputes concerning the coordinate branches of the federal government, which comprise the vast bulk of political question cases, are not relevant here.

specifically rejected the applicability of the political question doctrine to cases involving federal constitutional claims against state election practices. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004) (while four Justices would have held that the issue of political gerrymandering was a non-justiciable political question, the view did not command a majority of the Court.); *Davis v. Bandemer,* 478 U.S. 109, 110 (1986) (rejecting the application of the political question doctrine: "Disposition of the case does not involve this Court in a matter more properly decided by a coequal branch of the Government"). Thus, the political question doctrine is not a barrier to reaching the merits of whether the Equal Protection Clause constrains the states' choice of apportionment base for redistricting.

Appellants' claim should be rejected because they offer "no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 92. And based on this Court's sound precedents, it is clear that the judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

Linda C. Goldstein
Neil A. Steiner
Rachel B. Swartz
Cara Schmidt
Mari C. Stonebraker
Diana C. Wang
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036

Jon M. Greenbaum
Robert A. Kengle
Ezra D. Rosenberg
M. Eileen O'Connor
Dorian Spence
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

Counsel to Amicus Curiae

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