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* COMMON CAUSE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Common Cause is a nonpartisan, grassroots organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people. Founded by John Gardner in 1970 as a "citizens lobby," Common Cause has over 400,000 members nationwide and local organizations in 35 states. Common Cause is a leader in the fight for open, honest, and fair elections. Common Cause is also a leading proponent of redistricting reforms and a vigorous opponent of partisan gerrymanders and voter suppression by both political parties.[1]

SUMMARY OF THE ARGUMENT

"State legislatures are, historically, the fountainhead of representative government in this country." *Reynolds v. Sims*, 377 U.S. 533, 564 (1964). The "clearly established . . . fundamental principle of representative government in this country is one of equal representation for equal numbers of people." *Id.* at 560-61 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964)). This uniform principle controls the apportionment of both congressional districts under Article I, Section 2,

[1] Pursuant to Rule 37, *Amicus* hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution toward its preparation or submission. The parties have filed their consent to the filing of this brief with this Court.

Wesberry, 376 U.S. at 18, and state legislative districts under the Equal Protection Clause, *Reynolds*, 377 U.S. at 564. It requires single-member congressional and state legislative districts to contain approximately equal numbers of persons, without regard to their status as citizens or voters.

In Plan S172, the Texas legislature redistricted Texas's senate districts on a total-population basis. Like every other state, Texas redistricted its single-member legislative districts to contain substantially equal numbers of persons based on the decennial census. The question before this Court is not whether the Texas legislature might have chosen another basis of apportionment – for example, the total number of citizens or registered voters. The only question before this Court is whether Texas's apportionment of its Senate districts to contain equal numbers of people violates the Equal Protection Clause of the Fourteenth Amendment. The answer is "no," for a straightforward reason: Equal protection *requires* that states apportion single-member legislative districts to contain roughly equal numbers of persons.

In *Reynolds*, this Court interpreted the Equal Protection Clause to apply the fundamental principle of "equal representation for equal numbers of people" to the states. 377 U.S. at 560-61. *Reynolds* ruled that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," *id.* at 568, and "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. The *Reynolds* Court held, on the facts before it, that the legislative districts created by three Alabama redistricting schemes at issue violated equal protection because they contained unequal numbers of persons. In light of its *holding*, when the *Reynolds*'s Court said "equal in population," it meant simply that.

Reynolds established a rule for representation in the state legislatures under the Equal Protection Clause that is substantially equivalent to the rule established by *Wesberry* for representation in the House of Representatives under Article I, Section 2. Every *person*, independent of citizenship and voting status, is subject to the laws of the state in which she inhabits. The Equal Protection Clause guarantees to every *person* subject to a state's jurisdiction, independently of her citizenship or voting status, "the equal protection of the laws." U.S. Const. amend. XIV, § 1. *Reynolds* and its progeny make clear that equal representation – "the fundamental principle of representative government in this country" – is a constitutional requirement of the Equal Protection Clause that works to achieve its guarantee. When persons are equally represented in the law-making of their representative government, the government is less likely to enact laws that create arbitrary or invidious classifications among them. *See Avery v. Midland Cnty.*, 390 U.S. 474, 485-86 (1968); *Reynolds*, 377 U.S. at 560-61.

The appellants offer a different reading of *Reynolds*. In their view, *Reynolds* held that equal protection requires state legislative redistricting to be conducted on a voter basis, such that each legislative district contain equal numbers of registered or eligible voters. This is incorrect: The Equal Protection Clause could not have required Alabama to have redistricted its state legislative districts on a registered-voter or eligible-voter basis in 1964, when a huge percentage of Alabama's minority population was neither registered nor eligible to vote because of discriminatory state action. If Alabama had been constitutionally required to redistrict its legislative districts on an eligible-voter or registered-voter basis, the result would have perpetuated the disadvantage of Alabama's minority population in the state legislature. In *Burns v. Richardson*, this Court warned against exactly that kind of entrenchment of "underrepresentation of groups constitutionally entitled to participate in the electoral process." 384 U.S. 73, 92-93 (1966). The appellants' suggestion that *Reynolds* established a constitutional standard that state legislative districts be apportioned to contain equal numbers of registered or eligible voters misunderstands the holding of that case and misapprehends the meaning of equal protection.

The appellants' rights to equal representation in the Texas Senate have not been infringed because the total population of each senate district is roughly equal. So, the appellants build their claim on their right to cast a vote of the same weight and subject to the same treatment – a right customarily summarized

by the slogan, "one person, one vote." *Chisom v. Roemer*, 501 U.S. 380, 402 n.31 (1991). Appellants claim that this right is violated by Plan S172 because their respective senate districts contain more people who are eligible to vote than other equally-populated senate districts. The appellants complain that their votes *may* have less influence on the outcome of a senate election in their districts, as compared to votes cast in other senate elections held in other districts for other candidates for the Texas senate.

The right to cast a vote of the same weight, however, does not require each district in a legislative body to contain an equal number of eligible voters. As this Court made clear in *Gray v. Sanders* – which gave birth to the "one person, one vote" principle – the Equal Protection Clause guarantees the right of a voter to cast a ballot of the same weight as every other ballot cast by a voter of the same constituency, "[o]nce the geographical unit for which a representative is to be chosen is designated." 372 U.S. 368, 379 (1963). In holding that Georgia's county-unit system for statewide elections violated the Equal Protection Clause, the *Gray* Court made clear that the right to a vote of equal weight was constituency-specific. *Id.* at 379, 381-82. An elector's right to a vote of the same weight is not implicated by the votes cast by other electors, residing in other electoral districts, voting for other sets of candidates, vying for other offices. The right to an equally-weighted vote is measured against the treatment and counting of other voters and ballots within the same election unit or district.

Further, *Burns v. Richardson* does not remotely support the appellants' contention that equal protection requires Texas to apportion its senate districts on an eligible-voter or registered-voter basis. In fact, the *Burns* Court explicitly disclaimed that view of its holding. 384 U.S. at 96. *Burns* held under the Equal Protection Clause that Hawaii was *permitted* to apportion its legislative districts on a registered-voter basis *because* its apportionment approximated an apportionment on a total-population basis and did not underrepresent any group in the state legislature. *Burns* allowed an exception to *Reynolds*'s constitutional standard only under narrow conditions. Because equal protection does not always permit a scheme by which state legislative districts are apportioned to contain equal numbers of registered voters, *a fortiori*, it does not require it. Moreover, because Texas redistricted its senate districts on a total-population basis, this case does not present the question – as presented in *Burns* – whether a state's redistricting may permissibly depart from the constitutional rule of equal representation for equal numbers of people. *Burns* is unavailing for the appellants.

A ruling in favor of the appellants would unsettle equal protection doctrine: It would mean that the legislatures of every state are unconstitutionally apportioned, requiring that both houses of those state legislatures be reapportioned based on estimates of registered or eligible voters, which is subject to arbitrariness and the abuse of perpetuating underrepresentation. *Burns*, 384 U.S. at 92-93. It would also

create an indefensible situation in which states would be required by Article I, Section 2 to use total population as the basis for the redistricting of congressional districts, but be prohibited by the Equal Protection Clause from using the same standard when redistricting state legislative districts. Finally, it would break the structural link between the right of every *person* to equal protection under the laws enacted by the state legislature and the right of every *person* subject to those laws to equal representation in the houses of that legislature.

The appellants have not stated a claim under the Equal Protection Clause. Equal protection guarantees rights to persons to equal representation. *See, e.g.*, *Reynolds*, 377 U.S. at 568, 577. Plan S172 does not infringe that right because it creates senate districts containing roughly equal numbers of persons. Equal protection also guarantees rights to electors to cast a vote of the same weight and treatment as the votes cast by other electors voting in the same, pre-defined constituency for the same set of candidates vying for the same office. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Gray*, 372 U.S. at 379. Plan S172 does not infringe that right because it does not unequally weigh or disparately treat the votes cast in any given constituency for candidates vying for the same seat in the Texas Senate. And Plan S172 does not conflict with *Burns* because that decision neither holds nor even implies that equal protection requires a registered-voter basis for the apportionment of state legislative districts. Appellant's equal-protection

challenge to Plan S172 necessarily fails. The ruling of the district court should be affirmed.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE REQUIRES THAT SINGLE-MEMBER STATE LEGISLATIVE DISTRICTS, LIKE CONGRESSIONAL DISTRICTS, BE APPORTIONED TO CONTAIN EQUAL NUMBERS OF PEOPLE.

A. "Equal Representation For Equal Numbers Of People" Is The Fundamental Principle Of Representative Government.

"[T]he 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. This constitutional principle requires an equipopulous apportionment of single-member districts comprising a federal, state, or local governmental body. *Avery*, 390 U.S. at 485-86 (requiring equal population among local government districts); *Reynolds*, 377 U.S. at 577 (requiring equal population among state legislative districts); *Wesberry*, 376 U.S. at 18 (requiring equal population among districts comprising the House of Representatives).

The principle of equal representation for equal numbers of people truly is "fundamental." *Reynolds*, 377 U.S. at 560. In our constitutional system, both the federal and state governments derive their authority from the people they govern. *See* U.S. Const. Preamble (deriving authority from "We the People"); The Declaration of Independence para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed."). The sovereignty of the people is and remains one in which each person has an equal share. *See* U.S. Const. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"); U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility"). Representation is the conduit through which the inherent, equally-divisible authority of the people is transmitted to government.

Conversely, each person in the United States is equally subject to the authority of federal and state government. Because those governments are republican in form, representation is essential to legitimately subject persons to the laws they enact. *See Reynolds*, 377 U.S. at 565 (finding that "[s]ince legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will"); *see also Twining v. New Jersey*, 211 U.S. 78, 106 (1908), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1 (1964), ("[I]n a free representative government nothing is more fundamental than the right of the people through their appointed servants

to govern themselves in accordance with their own will.").

"[T]he achieving of fair and effective representation . . . is concededly the basic aim of legislative apportionment." *Reynolds*, 377 U.S. at 565-66. The Founders achieved that aim with respect to the apportionment of representatives among the States by requiring that representation be allocated by the numbers of people in each State. U.S. Const. art. I, § 2. "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13; *see also id*. at 13-14 ("'numbers of inhabitants' should always be the measure of representation in the House of Representatives" (quoting I THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed. 1911) 579-80)).

The Founders were clear that seats in the national legislature would be apportioned according to numbers of persons, not according to the number of electors. In Federalist 54, Madison was explicit about the distinction:

> It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a fœderal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted

> number in each State is to be exercised by such part of the inhabitants, as the State itself may designate. . . . In every State, a certain proportion of inhabitants are deprived of this right [to vote] by the Constitution of the State, who will be included in the census by which the Fœderal Constitution apportions the representatives.

THE FEDERALIST NO. 54, 369 (James Madison) (Jacob Cooke ed., 1961). This principle of apportionment according to total population would become a common standard: "The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population." *Reynolds*, 377 U.S. at 573 (internal citation omitted). Furthermore, "[t]he Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population." *Id.*; *see also* Northwest Ordinance, art. II, 32 Journals of the Continental Congress 340 (U.S. 1787) ("The inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the legislature.").

In *Wesberry*, this Court relied on this history and interpreted Article I, Section 2 to hold that congressional districts drawn by state legislatures must contain substantially the same numbers of persons. 376 U.S. at 18; *see also Reynolds*, 377 U.S. at 559 (finding that *Wesberry* "determine[d] that the constitutional

test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives"). Although *Wesberry* considered congressional apportionments under Article I, Section 2, and not the apportionment of state legislatures, the decision "clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." *Reynolds*, 377 U.S. at 560-61.

B. Each Person's Right To "Equal Representation For Equal Numbers Of People" Is Carried Forward To The States By The Equal Protection Clause Of The Fourteenth Amendment.

All persons within a state's jurisdiction are subject to the laws enacted by its legislature, without regard to their citizenship or eligibility to vote. In representative government, legislators are elected to represent all persons in their districts, not merely those who are citizens or eligible to vote. Accordingly, *all* persons are represented when a legislature exercises its power to enact law. The Fourteenth Amendment applies this axiom of representative government with respect to representation in Congress and in the state legislatures.

Section 2 of the Fourteenth Amendment apportions representatives in the national legislature among the states on the basis of the number of persons residing in each state. U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . ."). The choice of apportionment of Members of the House of Representatives among the states according to numbers of persons, as opposed to voters, was deliberate. When introducing the proposed Fourteenth Amendment to the Senate on behalf of the joint committee of fifteen that drafted it, Senator Jacob Howard said:

> Nor did the committee adopt the principle of making the ratio of representation depend upon the number of voters, for it so happens that there is an unequal distribution of voters in the several States, the old States having proportionally fewer than the new States. It was desirable to avoid this inequality in fixing the basis. The committee adopted numbers as 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, I think, after all, 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) (Senator Jacob Howard on behalf of the joint committee) (emphasis added). Section 2 of the Fourteenth Amendment confirms that it is persons who are the basis of representation.

The Equal Protection Clause of Section 1 of the Fourteenth Amendment not only applies this basic axiom of representative government to the state legislatures, but also links it to the principle of equality that the clause creates. The guarantees of equal protection are accorded to "persons" – not only to "citizens" or to a subset of citizens, such as qualified "electors." The Fourteenth Amendment makes reference to all three groups, but its guarantee of "the equal protection of the laws" is expressly accorded to *persons* within a state's jurisdiction. U.S. Const. amend. XIV, § 1.

Thus, it is *persons* who are represented and *persons* who are accorded equal protection. The symmetry is not fortuitous. The guarantee to *persons* of "equal protection of the laws" entails that those charged with enacting laws equally represent those persons subject to law and on whose behalf the law is made. But equal representation is not only a requirement of equal protection; it is also a constitutional structure by which the full guarantee of "the equal protection of the laws" is achieved. When the people are equally represented in the law-making of their representative government, the government is less likely to enact laws that create arbitrary or invidious classifications among them. For this reason,

the Equal Protection Clause applies the "fundamental principle . . . of equal representation for equal numbers of people" to the redistricting of state legislative districts. *Reynolds*, 377 U.S. at 560-61.

C. *Reynolds* Held That State Legislative Districts Must Be Redistricted On A Total-Population Basis.

Consistent with the Equal Protection Clause's emphasis on persons, *Reynolds* held that state legislative districts be redistricted to contain equal numbers of persons. *Reynolds*, 377 U.S. at 568. *Reynolds* held "that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*; *accord Mahan v. Howell*, 410 U.S. 315, 321 (1973) (recognizing "[t]he basic constitutional principle [of] equality of population among the districts" (citing *Reynolds*, 377 U.S. at 578)); *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973) ("More fundamentally, *Reynolds* recognized that 'the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment,' and it was for that reason that the decision insisted on substantial equality of populations among districts.") (internal citation omitted).

The *Reynolds* Court decided that state legislative districts must be apportioned "on a population basis," and it meant simply that. "By holding that as a federal constitutional requisite both houses of a state

legislature must be apportioned on a population basis, we mean 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." 377 U.S. at 577 (emphasis added). The requirement that states must create districts of "as nearly of equal *population* as is practicable" means that states must create districts that contain roughly *equal numbers of persons*. *Id*. (emphasis added).

In *Burns v. Richardson*, the Court clouded the clarity of *Reynolds*'s holding. According to *Burns*'s dicta, *Reynolds* "left open the question what population was being referred to" – whether it be persons, citizens, eligible voters, registered voters – because "[t]he 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." *Burns*, 384 U.S. at 91-92. The seeming aperture, however, is illusory; *Burns*'s reading of *Reynolds* cannot be correct.

First, when this Court decided *Baker v. Carr*, 369 U.S. 186 (1962), *Wesberry*, and *Reynolds* it "crossed the Rubicon" with respect to choices involving the nature of representation. *Branch v. Smith*, 538 U.S. 254, 278 (2003). By the time *Burns* was decided, this Court had resolved that the basis of representation in Congress and the state legislatures was not a political question reserved to the states. *Wesberry*, for example, made an unmistakable choice about the nature of representation in the House of Representatives –

namely, that the fundamental principle of representative government is one of equal representation for equal numbers of people. 376 U.S. at 18. Although this Court had ruled that claims under the Guarantee Clause concerning the nature of representation presented nonjusticiable questions, *see*, *e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946), this Court reached a different conclusion under the Equal Protection Clause, which "can and does require more," *Reynolds*, 377 U.S. at 582.

Second, the *Reynolds* Court did not "leave open" the question of which population it referred to. *Reynolds* held that Alabama's state legislative districts violated the guarantees of equal protection because they contained unequal numbers of persons. A review of the record facts in *Reynolds* permits no other conclusion. At issue was the constitutionality of the 1911 apportionment of – and two legislatively proposed plans to redistrict – the Alabama Senate and House of Representatives. The apportionment plan set forth in the 1901 Alabama Constitution required the legislature, after each decennial census, to apportion the Alabama Senate and House districts among Alabama's counties, "according to the number of inhabitants in them." *Id*. at 538 (quoting Ala. Const. art. IX, §§ 199-200 (1901)). Alabama had not apportioned its legislative districts since 1911, and, by 1962, the apportionments among the counties was nowhere near to their respective "number of inhabitants." *Id*. at 540.

The district court took "judicial notice of the facts that there had been population changes in Alabama's counties since 1901, [and] that the present representation in the State Legislature was not on a population basis." *Id*. at 542. After the district court's finding, the Alabama Legislature adopted two new reapportionment plans – a proposed constitutional amendment (the "67-Senator Amendment") and a back-up (the "Crawford-Webb Act") that would take effect in the event that the former failed to gain the approval of the statewide electorate or the federal courts. *Id*. at 543-44. At trial, the three-judge district court heard evidence regarding all three apportionment plans at issue and held that none satisfied the requirements of equal protection. *Id*. at 545, 547.

This Court affirmed. *Id*. at 588. When reviewing the findings of the district court, this Court emphasized that the three Alabama reapportionment plans allocated representatives to unequal numbers of *persons*. With respect to the 1911 Alabama apportionment, this Court noted the district court's finding:

> Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 *people*, had only seven representatives. With respect

> to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giving of more than one Senate seat to any one county, Jefferson County, with over 600,000 *people*, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 *people*.

Id. at 545-46 (emphasis added).

With respect to the proposed "67-Senator Amendment," this Court found that "[u]nder the 67-Senator Amendment . . . '[t]he present control of the Senate by members representing 25.1% of the *people* of Alabama would be reduced to control by members representing 19.4% of the *people* of the State.'" *Id*. at 547 (third alteration original) (emphasis added). The *Reynolds* Court found that the 67-Senator Amendment increased the representation of inhabitants of the urban counties in the Alabama House, but noted "[e]ven so, serious disparities from a population-based standard remained." *Id*. at 549. *Reynolds* noted that "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.

And, with respect to the proposed "Crawford-Webb Act," this Court found:

> Under this plan, about 37% of the State's *total population* would reside in counties

> electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1. Each representative from Jefferson and Mobile Counties would represent over 52,000 *persons* while representatives from eight rural counties would each represent less than 20,000 *people*.

Id. at 549-50 (emphasis added). When the *Reynolds* Court discussed a population-based standard, it manifestly referred to a quantum of persons. *See id*.

The facts upon which the *Reynolds* Court explicitly grounded its decision concerned disparities in the representation of numbers of *people* – not voters. *See id*. at 545-50. On the record facts before it, the *Reynolds* Court held that the three Alabama reapportionment plans at issue violated the Equal Protection Clause because they allocated legislative seats to unequal numbers of people.

Third, *Reynolds could not* have left open the question of relevant population. Contrary to the appellants' reading, it certainly could not have meant that the Equal Protection Clause required that state legislative districts contain equal numbers of registered voters. In Alabama in 1964, an apportionment based on equal numbers of registered voters would not have created "fair and effective representation for all citizens." *Id*. at 565-66. At the time *Reynolds* was decided, a very large number of Alabamians of voting age were prevented from registering to vote by state officials. According to the United States Commission

on Civil Rights, in 1960, there were 214,804 nonwhite persons of voting age in Alabama; by May 1964, only 31,732 nonwhite persons of voting age (19.3%) were registered to vote. United States Comm'n on Civil Rights, *Political Participation*, 223 (1968). At the time *Reynolds* was argued and decided there was widespread arbitrary and disparate treatment of nonwhite persons of voting age across Alabama. For example, by May of 1964, in Walker County, 1,710 out of the 2,890 nonwhite persons of voting age were registered to vote. By contrast, there was not a single registered nonwhite voter in Lowndes and Wilcox counties, despite their minority populations of 5,122 and 6,085, respectively. *Id*. at 224-27.

Equal protection could not have required Alabama state legislative districts to be redistricted based on voters in 1964, when over eighty percent of Alabama's 214,804 nonwhite persons of voting age were not registered because of arbitrary and discriminatory state action. If, as the appellants suggest, Alabama had been constitutionally *required* to reapportion its legislative districts on a registered-voter basis in 1964, the result would have entrenched the disadvantage of Alabama's minority population in the state legislature. *Accord Burns*, 384 U.S. at 92 (finding that the use of an actual or registered-voter basis is "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process"). The appellants' implication that the Equal Protection Clause

required Alabama in 1964 to apportion its legislative districts on a registered-voter or eligible-voter basis gravely misapprehends the meaning of equal protection. The Equal Protection Clause did not permit (much less require) Alabama in 1964 to entrench discriminatory voter-registration or voter-eligibility laws by apportioning its legislative districts on a registered-voter or eligible-voter basis. The *Reynolds* Court did not so hold, and *Reynolds* cannot be read to have required that state districts be apportioned on a voter basis.

D. When Governmental Units Are Chosen By Single-Member Districts, "Fair And Effective Representation" Requires That Each District Contain Roughly Equal Numbers Of People.

The application of the "fundamental principle of representative government in this country . . . of equal representation for equal numbers of people" does not end at state legislative districts. *Reynolds*, 377 U.S. at 560-61. Rather, "fair and effective representation" of every person subject to the jurisdiction of a governmental entity means that even local governmental units must "not be apportioned among single-member districts of substantially unequal population." *Avery*, 390 U.S. at 485-86. This Court's decision in *Avery* further focuses the equal-protection requirement that single-member districts comprising a governmental body must be apportioned to contain substantially the same number of persons.

In *Avery*, this Court interpreted the Equal Protection Clause to hold that if an entity exercises general governmental powers over a geographical area comprised of single-member districts, then those districts must be apportioned to contain substantially equal populations. *Id.* In that case, four elected officials of a county commissioner's court were drawn from four single-member districts of disparate population. Even though one urban district contained 67,906 people and another rural district contained only 414 people, each district was represented by a single commissioner. On these facts, the *Avery* Court held that the Equal Protection Clause "permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." *Id.* at 485.

Avery did not ground its holding on the fact that the four single-member districts contained unequal numbers of voters. *See id.* Rather, the *Avery* Court identified the "relevant fact . . . [to be] that the powers of the Commissioners Court include the authority to make a substantial number of decisions *that affect all* citizens. . . ." *Id.* at 484 (emphasis added). Because each person within the jurisdiction of the commissioners' court was affected by its decision (irrespective of their citizenship or eligibility to vote), equal protection required that each person have "fair and effective" representation in its decision-making. And because the commissioners' court was comprised of single-member districts, fair representation meant

that each commissioner was constitutionally required to represent substantially equal numbers of people residing within "the entire geographic area served by the body." *Id.* at 484-85.

Avery's holding confirms the central holding of *Reynolds*: County commissioners, like legislators, are elected to represent all of the persons in their districts, not only those who happen to be eligible voters. Persons, independently of their citizenship or voting status, are subject to the jurisdiction of their representative governments; persons are affected by the decisions taken; and persons are guaranteed equal protection under the laws enacted. *See Avery*, 390 U.S. at 484. Thus, it is persons that elected officials represent and to whom they are responsive. *Reynolds*, 377 U.S. at 565 (finding that "[s]ince legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will"). To achieve the basic aim of fair and effective representation in the apportionment of single-member districts comprising any governmental entity, equal protection requires equal representation for equal numbers of people – *i.e.*, that each district contain substantially equal number of persons.

Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970), on which the appellants rely, illustrates an exception that proves the rule of "equal representation for equal numbers of people." In *Hadley*, six trustees of a regional junior college school district were apportioned among eight

separate local school districts based on "the number of persons between the ages of six and 20 years" residing therein, most of whom were not eligible to vote. *Id.* at 51. Although the apportionment was not based on total population, its basis was understandable because children, ages six to twenty, were most directly affected by the decisions of the elected trustees. One of the six separate districts, the Kansas City school district, contained sixty percent of the apportionment base, but was only accorded three trustees. *Id.* at 51-52. On those facts, *Hadley* held that the apportionment scheme violated the Equal Protection Clause: Representation in the governmental unit was allocated disproportionally to those persons most affected by its decisions.

Hadley's holding also confirms the core teaching of *Reynolds* and *Avery*: Equal protection of the laws requires equal representation of the persons subject to law. When a person lives in an overpopulated district, her representative necessarily represents her interests or voice to a lesser degree in law-making than a representative representing other persons residing in an underpopulated district. That is an equal-protection injury; but, it is not an injury that the appellants allege.

II. THE RIGHT TO AN EQUALLY-WEIGHTED VOTE, AS GUARANTEED BY THE EQUAL PROTECTION CLAUSE, DOES NOT REQUIRE THAT STATE LEGISLATIVE DISTRICTS BE REDISTRICTED TO CONTAIN EQUAL NUMBERS OF ELIGIBLE VOTERS.

The appellants see *Wesberry*, *Reynolds*, and their progeny differently, viewing those cases only through the prism of "one person, one vote." The "one person, one vote" principle was first set forth in *Gray v. Sanders*, 372 U.S. at 381. In *Gray*, this Court ruled that the Equal Protection Clause requires that each vote cast in the same election in the same constituency must be of the same weight as every other vote cast in that constituency. *See id.* While this Court has employed "one person, one vote" as a shorthand for other constitutional principles, *see, e.g.*, *Wesberry*, 376 U.S. at 18, in the main, "the rule has been interpreted to mean that 'each person's vote counts as much, insofar as it is practicable as any other person's'" in the same constituency, *Chisom*, 501 U.S. at 402 n.31 (quoting *Hadley*, 397 U.S. at 54).

The appellants suggest that the right to a vote of the same weight uniquely justifies the *Reynolds* Court's opinion. To be sure, there is dicta in *Reynolds* that refers to an elector's right "to have his vote weighted equally with those of all other citizens." 377 U.S. at 576. And *Reynolds* relates its holding to the constitutional protection of the right to vote. There, the Court ambiguously said, "the overriding objective [of legislative apportionment] must be substantial

equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.[2]

The *Burns* Court made use of *Reynolds*'s mention of a right to a vote of the same weight to support its reading that *Reynolds* left open the issue of the population base by which states may apportion their legislative seats. *Burns*, 384 U.S. at 91 n.20. The appellants, however, read *Reynolds*'s dicta for a far stronger conclusion. Going well beyond *Burns*'s reading, the appellants contend that *Reynolds* established that the right to a vote of the same weight requires state legislative districts to contain equal numbers of eligible voters, even if that apportionment results in an unequal apportionment of persons.

Neither conclusion is correct. The Equal Protection Clause guarantees to voters in the *same* constituency the right to cast an equally-weighted vote. As *Gray* and other cases applying the right to a vote of equal weight have clarified, the right presupposes an already-determined constituency. It does not limit how states define the constituencies of their legislatures.

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[2] "So that" in the *Reynolds* dicta could either be read to mean "and as a result" or "in order to achieve that." *Id.* at 576. Only the former is consistent with the *Reynolds* Court's holding.

A. The Right To A Vote Of The Same Weight Presupposes An Already-Defined Constituency And The Geographical Unit From Which A Representative Is Chosen.

The Equal Protection Clause applies to how votes are cast and counted. Once a State grants the franchise to the electorate, "[it] may not, by later arbitrary and disparate treatment, value one person's vote over that of *another*." *Bush*, 531 U.S. at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). For instance, a State may not restrict the right to vote by subjecting the voter to an arbitrary or discriminatory classification. *See, e.g.*, *Harper*, 383 U.S. at 665; *Carrington v. Rash*, 380 U.S. 89, 96-97 (1965); *United States v. Mosley*, 238 U.S. 380, 383 (1915). Nor may a State permit a ballot to be cast, but count it differently from other votes cast by members of the same constituency in the same election – either by subjecting the ballot to arbitrarily disparate criteria to determine for whom it is cast, *Bush*, 531 U.S. at 104-05, or by according it lesser weight when tallying the votes to determine a winner, *Gray*, 372 U.S. at 381.

Gray established the right of a qualified voter to cast a vote of equal weight. In *Gray*, this Court considered an equal-protection challenge to Georgia's county-unit system as the method for counting votes in Democratic primaries for the nomination of candidates for statewide offices. Under this system, the votes that ultimately counted were the "unit votes"

assigned to each county, not the votes cast by individual voters. While individual voters within each county determined how the "unit vote" of that county should be cast, it was the "unit vote" of each county, not the popular vote, which determined the outcome of the election. "Unit votes" were not allocated to counties in proportion to their population. As a result, Georgia's county-unit system gave rural voters a disproportionate political influence over statewide primary elections. *Id.* at 379. This Court invalidated Georgia's county-unit system, holding that the Equal Protection Clause guarantees to every qualified elector in a statewide election a right to have her vote counted as having equal weight as every other vote cast in the election. *Id.* at 381.

Gray made clear that the right to cast an equally-weighted vote is constituency-specific: It is held by electors voting in *the same constituency* for candidates competing for the same offices. The *Gray* Court explained that under the Equal Protection Clause, "[*o*]*nce the geographical unit for which a representative is to be chosen is designated*, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit." *Id.* at 379 (emphasis added); *see also id.* at 381 ("*But once the class of voters is chosen* and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.") (emphasis added); *id*. at 382 (Stewart, J., concurring) (internal citation omitted) (confirming that "[*w*]*ithin a given constituency*, there can be room for but a single

constitutional rule – one voter, one vote") (emphasis added). Equal protection requires an elector's vote be counted the same as the votes of other electors of the same constituency, voting in the same election, for the same sets of *candidates* vying for the same offices.

B. Because The Right To A Vote Of The Same Weight Is Constituency-Specific, It Does Not Require That Separate Constituencies Have The Same Number Of Voters.

Thus, the appellants read *Gray* for too much. The right to a vote of equal weight in the same election does not imply that legislative districts must contain equal numbers of voters. The *Gray* Court – the same Court that decided *Reynolds* – said so itself. Noting that the case before it was "only a voting case," not a reapportionment case, the *Gray* Court explained that its holding under the Equal Protection Clause did not address any question about the constitutionality of state legislative apportionments. *See* 372 U.S. at 378 ("Nor does the question here have anything to do with the composition of the state or federal legislature."); *see also id.* at 381-82 (Stewart, J., concurring) ("This case does not involve the validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present."). Further, *Gray* emphasized that the cases on which it relied dealt with the right to vote within a

single constituency. *See id.* at 380 ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several *competing* candidates, underlies many of our decisions.") (emphasis added) (citations omitted).

The guarantee of equal protection undoubtedly informs the determination of the constituencies that comprise single-member districts; however, the Equal Protection Clause performs that work through the right of equal representation. Then, once the constituencies are defined, the "one person, one vote" principle applies: Each vote cast by a member of a constituency must be counted and treated the same as every other vote cast in that constituency. Accordingly, a person who resides in a comparatively overpopulated single-member district suffers an equal-protection injury to her right of equal representation. But, assuming she is a voter, so long as her vote is treated and counted the same as each vote cast for candidates vying to represent that district, she would not suffer an *extra* injury *qua* voter.

Further, even under appellants' conception of their alleged injury, it is not clear how the right to an equally-weighted vote would support an apportionment basis of eligible voters, some of whom may never register or cast a ballot. An eligible voter does not suffer a vote-dilution injury if they are not registered and cannot or do not vote. An injury to the right to an equally-weighted vote presupposes, if nothing else, a vote.

The appellants incorrectly read the cases. Neither in *Gray*, nor in any other case, has this Court applied the right to a vote of the same weight and subject to the same treatment across different constituencies. *Avery*, *Reynolds*, and *Wesberry* applied rights to equal representation. *Bush* and *Gray* applied the right to a vote of the same weight and subject to equal treatment, but not across separate constituencies voting for separate sets of candidates seeking separate offices. In *Bush v. Gore*, for example, voters in Florida did not suffer an equal-protection injury because their ballots were not assessed the same as ballots in other states. Their injury was predicated on the fact that their ballots were being treated differently from the ballots of voters in the same constituency, *i.e.*, Florida electors voting for candidates for President. 531 U.S. at 104-05.

III. NOTHING IN *BURNS V. RICHARDSON* SUGGESTS THAT PLAN S172 VIOLATES THE EQUAL PROTECTION CLAUSE.

Neither the right to equal representation for equal numbers of people nor the right to a vote of the same weight requires that state legislative districts be apportioned on a registered-voter or eligible-voter basis. In other words, neither *Reynolds* nor *Gray* supports the appellants' claim. Sorting through the appellants' arguments, only *Burns v. Richardson* is left as a proposed ground for appellant's novel reading of the Equal Protection Clause.

Burns, however, does not remotely hold that the Equal Protection Clause requires that state legislative districts be apportioned to contain equal numbers of registered or eligible voters. The *Burns* Court reviewed the apportionment of Hawaii's House of Representatives, set forth in Hawaii's Constitution, and an interim legislative plan for the apportionment of Hawaii's Senate, enacted by statute. 384 U.S. at 82-83. The apportionment of both Hawaii's House members and the apportionment of Hawaii's senatorial seats had been based on the number of registered voters. *Id.* at 77, 81. For reasons unrelated to the apportionment base, the district court disapproved of the plan set forth by statute for the apportionment of Hawaii's Senate. On appeal, this Court vacated the district court's order, holding that the statute apportioning the Senate and the extant House apportionment together constituted an interim apportionment plan that did not contravene the requirements of the Equal Protection Clause. *Id.* at 86.

In reaching its holding, the *Burns* Court considered whether an apportionment based on numbers of registered voters is consistent with the guarantees of equal protection. The *Burns* Court noted skepticism, recognizing that apportionments based on the number of registered voters are subject to arbitrariness and abuse. The *Burns* Court found that the use of a registered-voter apportionment base was problematic because "registration figures derived from a single election are made controlling for as long as 10 years" and such figures are subject to "fluctuations . . .

caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions." *Id.* at 93 (internal citation and quotation marks omitted). *Burns* also found that voter-based apportionment creates perverse incentives for legislatures to depress voter registration because of the strategic effect on future legislative apportionment. The *Burns* Court acknowledged that the use of a registered voter or actual voter basis "is . . . susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of prior malapportionment.'" *Id.* at 92-93 (internal citation omitted).

Because of the potential for abuse of an apportionment based on voters, the *Burns* Court held that Hawaii's registered-voter basis for apportionment "satisfie[d] the Equal Protection Clause *only* because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93 (emphasis added); *accord id.* at 98-99 (Harlan, J., concurring in the judgment) ("As I read today's opinion, registered voter figures are an acceptable basis for apportionment *only* so long as they substantially approximate the results that would be reached under some other type of population-based scheme of apportionment.") (emphasis added). For *Burns*, therefore, a total-population basis was still the gold standard. The

Burns Court permitted a deviation from that standard because it found that, according to Hawaii's 1950 constitutional convention report, a registered-voter basis was chosen as a reasonable approximation of a total-population basis, while avoiding the issue that census tracts did not necessarily overlap with traditional local boundaries. *Id.* at 93-94.

Burns also justified a deviation from a total-population basis on the finding that Hawaii's interim use of a voter basis did not raise concerns of arbitrary or invidious discrimination. The *Burns* Court noted that, on the record before it, Hawaii had used a registered-voter basis to discount the large military presence on Oahu, yet had not sought to lock military personnel out of representation in the state legislature by denying them the vote. *Burns* pointed to the district court's finding "that military population of Oahu, and its distribution over that island, was sufficient to explain the already noted differences between total population and registered voters apportionments . . . [and that] no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise . . . [was] aimed at disenfranchising the military or any other group of citizens." *Id.* at 95 (internal citation and quotation marks omitted). Significantly, the *Burns* Court also recalled the district court's finding that because "Hawaii's Constitution and laws actively encourage voter registration . . . [a] high proportion of the possible voting population is registered." *Id.* at 96 (internal citation and quotation marks omitted).

The *Burns* Court, therefore, found that Hawaii's registered-voter basis produced a districting plan that was not very different from the plan that would have been produced using a total-population base. And, where those two apportionment bases created disparities, *Burns* found that those differences were not intended to lock a particular group out of representation in Hawaii's legislature. On those facts, *Burns* held that, "with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards." *Id.* at 97. This is a narrow holding.

Under *Burns*, a registered-voter apportionment base is neither required by, nor always permissible under, the Equal Protection Clause. As the *Burns* Court explicitly said, "We are not to be understood as deciding that the validity of the registered voter basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere." *Id.* at 96. Yet, following Judge Kozinski's dissent *dubitante* in *Garza*, the appellants suggest the contrary. *Garza v. County of Los Angeles*, 918 F.2d 763, 784 (9th Cir. 1990) (Kozinski, J., dissenting). For the appellants, as for Judge Kozinski's *Garza* dissent, *Burns* can only be explained as an application of the principle of "electoral equality" – *viz.*, that state legislative districts must contain equal numbers of voters. Not so. The *Burns* Court explained its decision, not as a new rule, but as an *exception* to the use of a total-population basis made permissible because, first, Hawaii's apportionment approximated the result that would have

been achieved by the use of total population and, second, the record indicated that Hawaii's use of a registered-voter basis would not frustrate any group's representation in the state legislature. Nor did Hawaii adopt a voter basis to achieve "electoral equality." Rather, as *Burns*'s review of the record shows, Hawaii adopted a voter basis because the means to establish total population presented problems novel to Hawaii: The census tracts were not faithful to traditional boundaries in Hawaii, and the census included persons who were not fairly considered as part of the total population. *Burns* allowed Hawaii to depart from a total-population basis, but not because this Court rejected that basis in principle.

In contrast to the appellant's reading, the logic of *Burns* is consistent with *Reynolds*'s holding that the Equal Protection Clause requires that single-member state legislative districts be apportioned to contain equal numbers of persons. *Burns* permits the use of a non-total-population apportionment basis, but only so long as it approximates the results achieved by an apportionment according to total population and does not work to frustrate the representation of a particular group. Such limiting conditions mean that the Equal Protection Clause does not always permit a scheme by which state legislative districts are apportioned to contain equal numbers of registered voters; *a fortiori*, it does not require it.

It follows that *Burns* is unavailing for the appellants.

IV. THIS COURT SHOULD NOT HOLD THAT THE APPELLANTS HAVE STATED AN EQUAL-PROTECTION CLAIM.

The appellants have not stated a claim under the Equal Protection Clause. Consistent with the holding of *Reynolds*, Texas, like every other state, elected not to use voter registration or eligible-voter estimates as its apportionment base for seats in the Texas Senate. Plan S172 creates senate districts containing roughly equal numbers of persons and, therefore, does not infringe the appellant's right to equal representation. Nor does Plan S172 violate the principle of "one person, one vote." Plan S172 does not unequally count or disparately treat the votes cast in any given constituency for candidates vying for the same seat in the Texas Senate. Accordingly, Plan S172 violates no right that equal protection guarantees to the appellants.

For additional reasons, this Court should not hold that the Equal Protection Clause requires that state legislative districts be redistricted to contain equal numbers of registered or eligible voters. First, such a holding would mean that the legislatures of every state are unconstitutionally districted, requiring redistricting on a voter basis, which, as *Burns* found, would be subject to arbitrariness and abuse.

Second, such a holding would create an "indefensible tension" in which states are *required* by Article I, Section 2 of the Constitution to use total population as the basis for the drawing of congressional districts,

but are *prohibited* by the Equal Protection Clause from using the same standard when redistricting state legislative districts. Brief for the United States, at 6, *County of Los Angeles v. Garza*, 498 U.S. 1028 (1991) (No. 90-849) (denying certiorari). The appellants offer no convincing reason why the seats of the national legislature must be redistricted to contain equal numbers of persons, but that, in some cases, the seats of state legislatures must not be. There is none.

Finally, the appellants advocate for an interpretation of the Equal Protection Clause that would jettison the equal representation of persons in state legislatures. A ruling in their favor would break the link between the right of every *person* to equal protection under the laws enacted by the state legislature and the right of every *person* subject to those laws to equal representation in that legislature. The constitutional guarantee to all persons of the equal protection of the laws is achieved, in the main, by equal representation in the legislative bodies that enact the laws under which they are subject. This Court should refrain from pulling down that constitutional structure.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

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