No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
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

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court correctly held that the "one-person, one-vote" principle under the Equal Protection Clause allows States to use *total* population, and does not require States to use *voter* population, when apportioning state legislative districts.

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OPINION BELOW

The three-judge district court's decision (J.S. App. 3a–14a) is not yet published in the Federal Supplement.

JURISDICTION

The district court entered judgment on November 5, 2014. A notice of appeal was filed on December 4, 2014. Although this Court would normally have jurisdiction to review a three-judge district court's dismissal under Federal Rule of Civil Procedure

12(b)(6), 28 U.S.C. § 1253, the Court lacks subject-matter jurisdiction in this case under the political-question doctrine. *Nixon v. United States*, 506 U.S. 224 (1993).

STATEMENT

1. The Texas Constitution requires the Texas Legislature to reapportion its Senate districts during the first regular legislative session following the federal decennial census. TEX. CONST. art. III, § 28. The Texas Constitution restricts that apportionment only by requiring that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator." *Id.* art. III, § 25.

Following the 2010 census, the Texas Legislature passed a Senate reapportionment plan known as Plan S148. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 1315, 2011 Tex. Sess. Law Serv. 3748. Federal Voting Rights Act litigation immediately commenced. A three-judge district court enjoined Plan S148, which had not been precleared under VRA § 5, and issued an interim plan known as Plan S172 for the 2012 primary elections. *See Davis v. Abbott*, ___ F.3d ___, No. 14-50042, 2015 WL 1219268, at *2–3 (5th Cir. Mar. 17, 2015). In 2013, the Texas Legislature adopted Plan S172 and repealed Plan S148. *See* Act of June 21, 2013, 83d Leg., 1st C.S., ch. 1, 2013 Tex. Sess. Law Serv. 4889.

2. Plaintiff-Appellant Sue Evenwel lives in Titus County, Texas, which is in Texas Senate District 1.

Plaintiff-Appellant Edward Pfenninger lives in Montgomery County, Texas, which is in Senate District 4. In 2014, plaintiffs sued the Texas Governor and Secretary of State in their official capacities, asserting that Plan S172's apportionment violates the Equal Protection Clause. Because plaintiffs brought a constitutional challenge to the apportionment of a statewide legislative body, the Chief Judge of the Fifth Circuit convened a three-judge district court. *See* 28 U.S.C. § 2284(a).

Plaintiffs alleged that Plan S172 violates the "one-person, one-vote" principle of the Equal Protection Clause by apportioning Texas Senate districts based on total population, so that each district contains a substantially equal number of individuals, without accounting for "the number of electors or potential electors." J.S. App. 18a. Plaintiffs conceded that Plan S172's total deviation from perfectly equal population across districts, using total population, is 8.04%. J.S. App. 5a. They alleged, however, that the districts vary to a larger degree in voter population. *Id.* Plaintiffs sought a judgment declaring that Plan S172 violates the Equal Protection Clause, enjoining the State from using Plan S172 to conduct any election, and an order requiring the Texas Legislature to reapportion the State's Senate districts. J.S. App. 34a.

Defendants moved to dismiss for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), arguing that the Equal Protection Clause does not compel the State to use voter population

rather than total population or a combination of the two.

3. The three-judge district court granted defendants' Rule 12(b)(6) motion to dismiss. J.S. App. 4a. The court's opinion noted that "the Supreme Court has generally used total population as the metric of comparison." J.S. App. 7a (citing *Brown v. Thomson*, 462 U.S. 835, 837–40 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745–50 (1973); *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964)). The district court acknowledged that plaintiffs are "relying upon a theory never before accepted by the Supreme Court or any circuit court: 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." J.S. App. 9a.

The court rejected plaintiffs' assertion that their theory "is consonant with *Burns* [*v. Richardson*, 384 U.S. 73 (1966)]." J.S. App. 10a. The district court explained that *Burns*, in considering a Hawaii apportionment plan, "stated 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." *Id.* This "amount of flexibility is left to state legislatures" because a decision about apportionment base "*involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere*." J.S. App. 11a (quoting *Burns*, 384 U.S. at 92) (emphasis added by district

court). The district court therefore "conclude[d] that Plaintiffs are asking us to 'interfere' with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a.

The three-judge district court then dismissed plaintiffs' lawsuit for failure to state a claim under Rule 12(b)(6), as plaintiffs admitted that Plan S172's "total deviation from ideal, using total population, is 8.04"—which "falls below 10%," the deviation necessary to make out a prima facie case. J.S. App. 8a (citing *Brown*, 462 U.S. at 842–43). The district court did not address subject-matter jurisdiction under the political-question doctrine. Plaintiffs appealed.

ARGUMENT

The district court correctly dismissed plaintiffs' lawsuit for failure to state a claim. This appeal should be dismissed for lack of an unsettled substantial federal question, or the judgment should be summarily affirmed. Plaintiffs cite no case in which a court has accepted their claim that the Constitution compels States to apportion their legislative districts based on voter population, as opposed to or in addition to total population. And multiple precedents from this Court confirm that total population is a permissible apportionment base under the Equal Protection Clause. Nothing in this case warrants a different result.

The district court did not address the political-question doctrine, as it dismissed the lawsuit under Rule 12(b)(6) for failure to state a claim. Summary disposition therefore would say nothing about the political-question doctrine. In all events, the political-question doctrine presents an additional hurdle for plaintiffs.

I. THIS APPEAL DOES NOT PRESENT AN UNSETTLED SUBSTANTIAL QUESTION.

Plaintiffs urge this Court to grant briefing and argument to determine "what measure of population should be used for determining whether the population is equally distributed among the districts." J.S. 12–13 (quoting *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from the denial of certiorari)). Plaintiffs presume that the Equal Protection Clause requires States to apportion their legislative districts based on a particular measure of population. But this Court has recognized that States have a *choice* among multiple apportionment bases; it follows that the Equal Protection Clause does not mandate any particular apportionment base. There is no unsettled question for this Court to consider.

A. In 1964, the Court interpreted the Equal Protection Clause to require that "both houses of a bicameral state legislature . . . be apportioned [substantially] on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). It cautioned, however, that reapportionment remains primarily a matter for the States to resolve through "legislative

consideration and determination," and judicial relief is appropriate only when States fail to heed constitutional constraints. *Id.* at 586.

Two years later, *Burns v. Richardson*, 384 U.S. 73 (1966), considered a challenge to a Hawaii apportionment plan designed to create districts with a substantially equal number of registered voters. The challengers argued that the Equal Protection Clause instead compelled Hawaii to apportion using total population, which was the population base at issue in *Reynolds*. *Burns*, 384 U.S. at 90. Even though a substantial disparity persisted between the districts when measured using total population, the Court refused to constrain Hawaii to any single measure of population. *Id. Burns* reasoned:

> [T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in [*Reynolds*] and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. . . . *The decision to include or exclude any such [non-*

> *voter population] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere*. Unless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.

Id. at 91–92 (internal citations omitted) (emphasis added).

Read in context, *Burns* demonstrates that the Court "left open" the question of how to define "population" not for the Court to decide at some future point, but for the state legislatures to decide by choosing among multiple constitutional measures of population. *Id.* at 91. Were this not so, then there would be no "choice" for state legislatures to make. *Id.* at 92. Thus, *Burns* emphasized that although a State may not choose an unconstitutional population measure, "a State's *freedom of choice* to devise substitutes for an apportionment plan found unconstitutional either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Burns*, 384 U.S. at 85 (emphasis added).

Furthermore, this Court has never interpreted *Burns* to suggest that only one measure of population passes constitutional muster. Although Justice Thomas would have granted certiorari on the question of "what measure of population should be used" to

determine whether the population is equally apportioned, he recognized that the Court could "decide that each jurisdiction can choose its own measure of population." *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari).

B. The Court has denied certiorari in multiple cases rejecting plaintiffs' argument that voter population must be substantially equalized. *Lepak v. City of Irving*, 453 F. App'x. 522 (5th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 1725 (2013); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2020 (2001); *Garza v. Cnty. of L.A.*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

Although these certiorari denials do not connote approval of the underlying decisions, it is unlikely that *Burns* required States to achieve substantial population equality under a single measure of population without identifying that single measure. The better reading of *Burns* is that multiple population measures may satisfy the Equal Protection Clause, and courts will not force a "better" option on a State if its chosen apportionment base is not otherwise prohibited by the Constitution. *See Burns*, 384 U.S. at 89; J.S. App. 11a. In fact, as a practical matter, most apportionment plans use total population and not voter population. *See, e.g.*, J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890 (2012) ("Today, line-drawers across the nation rely almost uniformly on total population . . . ."); M. Davis, *Assessing the Constitutionality of Adjusting Prisoner*

Census Data in Congressional Redistricting: Maryland's Test Case, 43 U. Balt. L. Forum 35, 41 (2012) ("most jurisdictions use total population as the base" (citing Nat'l Conf. of State Legislatures, Redistricting Law 2010, 11 (2009))). This appeal thus presents no issue for the Court to "settle." J.S. 13, 16.

Indeed, there is no split of authority to resolve. Three circuits have considered and rejected the argument that apportionment by total population violates the Constitution because it does not achieve equality of voter population. *See Chen*, 206 F.3d at 522 (Fifth Circuit rejecting argument that City of Houston violated Equal Protection Clause by "improperly craft[ing] its districts to equalize total population rather than citizen voting age population"); *Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996) (rejecting argument that "voting-age population is the more appropriate apportionment base because it provides a better indication of actual voting strength than does total population"); *Garza*, 918 F.2d at 773–74 (Ninth Circuit rejecting argument that decision to "employ[] statistics based upon the total population of the County, rather than the voting population, . . . is erroneous as a matter of law"); *see also Lepak,* 453 F. App'x at 523 (relying on *Chen* to reject argument that Equal Protection Clause requires equalizing districts based on voter population rather than total population).

Plaintiffs' case for plenary review rests significantly on Judge Kozinski's separate opinion in *Garza*. 918 F.2d at 782 (Kozinski, J., concurring in

part and dissenting in part). Judge Kozinski disagreed with the Ninth Circuit's holding that the Equal Protection Clause required Los Angeles County to apportion based on total population and prevented apportioning based on voter population. *Id.* at 779–82. He concluded that the Equal Protection Clause required apportionment based on potential voter population as opposed to total population where the two measures were in conflict, although he acknowledged statements by this Court suggesting otherwise. *See id.* at 782–85.

In the nearly twenty-five years since *Garza*, no court of appeals has adopted Judge Kozinski's position. Although other circuits have expressly considered his reasoning, it has never carried the day in those courts or garnered a dissent on the merits. *See*, *e.g.*, *Chen*, 206 F.3d at 526 (finding Judge Kozinski's position irreconcilable with *Burns*).

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' SUIT FOR FAILURE TO STATE A CLAIM.

The Court can summarily affirm because the district court's opinion correctly applied this Court's equal-protection framework. *Gaffney v. Cummings* establishes that parties may prove that a State's congressional apportionment plan violates the Equal Protection Clause in either of two ways. 412 U.S. 735, 744 (1978); J.S. App. 6a. They may show that the plan (1) fails to achieve substantial equality of population among districts using a permissible population base, *see Gaffney*, 412 U.S. at 744; or (2) actually discriminates against a protected group, *id.* at 751–

52; J.S. App. 6a–7a. Plaintiffs do not dispute the district court's conclusion that they failed to "plausibly" allege a claim under the second theory. J.S. App. 7a n.3. Accordingly, they were required to state a claim under the first theory, which enforces the Equal Protection Clause's "one-person, one-vote" principle. J.S. App. 7a.

The district court correctly concluded that plaintiffs failed to state a claim upon which relief could be granted. Specifically, the district court held that (1) the Equal Protection Clause does not restrict States to a single apportionment base; (2) plaintiffs' preferred apportionment base is not constitutionally mandated; and (3) the apportionment base used by Texas is not constitutionally prohibited. Plaintiffs therefore were required to establish a prima facie case of failure to achieve substantial equality of total population, and they did not.

A. The Equal Protection Clause Does Not Compel the States to Rely Upon a Particular Apportionment Base.

Plaintiffs' cause of action turns upon whether the Equal Protection Clause compels the States to achieve substantial equality on a particular measure of population. If it does not, then a State's choice of a particular measure, or a combination of permissible measures, is simply a policy choice left to the legislative process.

The district court recognized that *Burns* already decided—in the negative—the question whether the

Constitution compels States to use a particular apportionment base. This case presents no reason to reevaluate *Burns*'s holding, which is consistent with both the historical context of the Fourteenth Amendment's ratification and this Court's reapportionment jurisprudence.

1. The district court correctly held that plaintiffs' Equal Protection Clause theory "is contrary to the reasoning of *Burns* and has never gained acceptance in the law." J.S. App. 14a.

The parties agree that the Equal Protection Clause requires that representatives be elected from districts of relatively equal population. Since *Reynolds*, States have apportioned based on total population or voter population, often with the "happy coincidence that eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525. As the Fifth Circuit recognized in *Chen*, the choice may present a "stark" contrast where "potentially eligible voters are unevenly distributed." *Id.*

Plaintiffs urged the district court to adopt Judge Kozinski's view that certain language from this Court's opinions mandates protection of the individual voter, meaning that any conflict between electoral equality and representational equality must be resolved in favor of the former. *See Garza*, 918 F.2d at 782–83 (Kozinski, J., concurring in part and dissenting in part). Judge Kozinski reasoned that "[r]eferences to the personal nature of the right to vote . . . on which the one person one vote principle is founded appear in the case law with monotonous

regularity." *Id.* at 782. And plaintiffs identify references to electoral equality in *Reynolds* and its progeny. *See, e.g., Reynolds*, 377 U.S. at 565–66 ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."); *id.* at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen. . . . [T]he basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives."); *Gaffney*, 412 U.S. at 746 (noting that "if it is the weight of a person's vote that matters, total population . . . may not actually reflect that body of voters").

But that is only part of the story. "[A]s Judge Kozinski admits . . . other language can be found that implies that representational equality is the ideal." *Chen*, 206 F.3d at 525; *see Daly*, 93 F.3d at 1223; *see also Gaffney*, 412 U.S. at 742 (requiring that electoral districts must be "as nearly of equal population as is practicable" (quoting *Reynolds*, 377 U.S. at 577)); *Mahan v. Howell*, 410 U.S. 315, 321 (1973) (reasoning that "the basic constitutional principle [is] equality of population among the districts"), *modified*, 411 U.S. 922 (1973). The language and "tradition" supporting the principle of representational equality even caused Judge Kozinski to admit he would "not be surprised to see [this Court] limit or abandon the principle of

electoral equality in favor of a principle of representational equality." *Garza*, 918 F.2d at 785 (Kozinski, J., concurring in part and dissenting in part).

The Fourth and Fifth Circuits both refused to give controlling significance to statements that plaintiffs read as mandating equality in voter population. *Chen*, 206 F.3d at 526; *Daly*, 93 F.3d at 1223–24. *Chen* reasoned that the statements appearing to favor electoral equality generally refer to "situations in which total population was presumptively an acceptable proxy for potentially eligible voters," so it would not be unexpected for the terms to be "used interchangeably, with perhaps a slight bias toward the more historically resonant phrase—unquestionably, one-person, one-vote." *Chen*, 206 F.3d at 525–26.

This interchangeable usage of terminology explains why passages that plaintiffs highlight, particularly in *Reynolds*, are often "contradicted by statements within the same opinion." *Id.* (citing *Reynolds*, 377 U.S. at 568 ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats . . . must be apportioned on a population basis.")).

Rather than attempting to parse the terminology, the district court correctly went straight to *Burns*—the case that controls the question whether the Constitution compels the use of a particular apportionment base. J.S. App. 10a; *see Chen*, 206 F.3d at 526–27 (finding *Burns* to be dispositive); *Daly*, 93

F.3d at 1224–25 (same). Unlike *Reynolds*, *Burns* "directly confronted an actual differential between the concepts" of electoral equality and representational equality. *Chen*, 206 F.3d at 526. Hawaii had achieved substantial equality in registered-voter population, but there were "large disparities between districts when measured using total population." J.S. App. 10a (quoting *Burns*, 384 U.S. at 90).

The district court correctly refused to interpret *Burns* as "making clear that the right of voters to an equally weighted vote" is not simply *a* relevant, but "*the* relevant constitutional principle." J.S. App. 13a (emphasis added); *see Chen*, 206 F.3d at 526; *Daly*, 93 F.3d at 1224–25. "Quite the contrary," the district court explained, *Burns* "recognized that the precise question presented here—whether to 'include or exclude' groups of individuals ineligible to vote from an apportionment base—'involves choices about the nature of representation' which the Court has 'been shown no constitutionally founded reason to interfere.'" J.S. App. 13a (quoting *Burns*, 384 U.S. at 92). In other words, the Supreme Court in *Burns* refused to force States to require either voter population or total population because neither measure offended the Equal Protection Clause.

This reading of *Burns* finds support in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). *Hadley* simply noted that "[t]here is some question in this case whether school enumeration figures, rather than actual population figures, *can* be used as a basis of apportionment."

Hadley, 397 U.S. at 57 n.9 (citing *Burns*, 384 U.S. at 90–95) (emphasis added). *Hadley* found "no need to decide" the question because "even if school enumeration [was] a permissible basis," the statute at issue "fail[ed] to apportion trustees constitutionally." *Id.* But *Hadley*'s use of the word "can" indicates that States have a choice among multiple apportionment bases, and the question was simply whether the chosen base was among the permissible choices. *Hadley* does not read *Burns* to suggest that there is a single constitutionally compelled apportionment base.

Burns leaves no doubt that the district court correctly "decline[d] [plaintiffs'] invitation" to choose the population base that Texas should use to apportion its Senate districts. J.S. App. 13a. That choice is one of policy, not constitutional imperative, because the apportionment base that Texas has chosen is not constitutionally prohibited. *See id.*; *Chen*, 206 F.3d at 526–27 ("Judge Kozinski argues that *Burns* should be determinative for electoral equality, since there the Court allowed a plan that used an even more nuanced measure of voting strength—registered voters. But we are reluctant to read *Burns*' allowance of such a measure into a command in the face of what appears to us to be a clear statement to the contrary . . . ."); *Daly*, 93 F.3d at 1225 (holding that the "permissive language [in *Burns*] implies that the decision to use an apportionment base other than total population is up to the state").

2. There is no reason to reexamine *Burns*. It is consistent with the historical context of the Fourteenth Amendment's framing and with the principles of federalism that animate this Court's apportionment cases.

Burns's recognition that the Fourteenth Amendment does not mandate the use of a particular apportionment base accords with the Amendment's history. *Chen*, 206 F.3d at 527–28. The Fifth Circuit analyzed that history in *Chen*, and concluded that the "proponents of the Fourteenth Amendment had a meaningful debate on the question" of which population measure should be used in apportionment, but that the debate "cannot be said to have been definitively resolved." *Id.* at 527.

Two historical facts recounted in *Chen* cast doubt on the notion that the Equal Protection Clause requires States to adopt a voter-population metric. First, the "drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated th[e] question, and rejected a proposal rooted in—among other things—the principle of electoral equality." *Id.* A proposed constitutional amendment introduced in December 1865 would have "apportioned congressional representation among the states 'according to their respective legal voters, and for this purpose none shall be named as legal voters who are not either natural born citizens or natural foreigners.'" *Id.* (quoting Joseph T. Sneed III, Footprints on the Rocks of the Mountain: An Account

of the Fourteenth Amendment 35 (1997)). That proposal was not adopted.

Second, the "[d]ebates over the precise basis for apportionment of Congress proved a contentious issue throughout the process that led to the creation of section 2 of the [Fourteenth] Amendment." *Id.* In their "debate over whether to base apportionment on potential voters, citizens, or population," the framers recognized "that aliens were unevenly distributed throughout the country," and that the western States contained an "overabundance of males." *Id.* Thus, northern States opposed using citizenship as a benchmark due to their large alien populations, and New England opposed proposals to use "eligible voters rather than total population" due to the "relative preponderance of women in those States." *See id.* at 527 n.18 (citing Sneed, *supra*, at 103–04, 145).

The drafters did not conclusively settle this debate. *Id.* at 527. The final version of Section 2 instead provides "generally for the use of total population figures for purposes of allocating the House of Representatives among the states" while also including a "mechanism to insure that egregious departures from the principle of *electoral* equality—the disenfranchisement of adult male 'citizens'—would be penalized." *Id.* (discussing U.S. CONST. amend. XIV, § 2). In light of this history, *Chen* expressed "some difficulty in reading the Equal Protection Clause to require the adoption of a particular theory of political equality." *Id.*

This Court's forbearance to "settle" this debate in *Burns* respects the historical context. The drafters of the Fourteenth Amendment debated the representational and electoral theories of political equality, but the Fourteenth Amendment does not endorse either theory as a constitutional mandate.

B. Plaintiffs Did Not State a Prima Facie Claim Under the Equal Protection Clause.

The district court correctly dismissed plaintiffs' suit, because Texas was not required to achieve relative equality of apportionment using a voter-population measure, either alone or in conjunction with a total-population measure. J.S. App. 7a.

Plaintiffs do not dispute that they challenged Texas's apportionment plan on the ground that "the plan does not achieve substantial equality of population among districts when measured using a permissible population base." J.S. App. 6a (citing *Gaffney*, 412 U.S. at 744). Thus, they were required to show that the plan failed to achieve "substantial equality of population." *Reynold*s, 377 U.S. at 579; *see id.* at 577 ("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."). Nor do plaintiffs deny that minor deviations, defined as "a maximum population deviation under 10%," fail to make out a prima facie case under this theory. *Brown*, 462 U.S. at 842.

Plan S172 does not deviate impermissibly from the ideal population when measured by the total-population apportionment base chosen by Texas. J.S. App. 8a; *see Chen*, 206 F.3d at 523. Plaintiffs "admit that Texas redrew its senate districts to equalize total population, and they present facts showing that PLANS172's total deviation from ideal, using total population, is 8.04%." J.S. App. 8a. Thus, "Plaintiffs' own pleading shows that they cannot make out a prima facie case of a violation of the one-person, one-vote principle." *Id.*

The district court correctly rebuffed plaintiffs' attempt to distinguish *Chen* on the ground that plaintiffs "do not ask the court to decide on behalf of the legislature which source of equality—electoral or representational—is supreme," but instead ask the court to rule that "substantial equality of population on both fronts is a constitutionally required choice where both can be achieved." J.S. App. 10a n.4.

This is a "distinction without meaning." *Id.* Plaintiffs still invite the Court "to find PLANS172 unconstitutional based on Plaintiffs' chosen apportionment base, even though the state employed a permissible apportionment base and achieved substantial equality of population doing so." *Id.* But the "possibility of drafting a 'better' plan" does not suffice to "establish a violation of the one-person, one vote principle." *Daly*, 93 F.3d at 1221 (citing *Gaffney*, 412 U.S. at 740–41). Accordingly, plaintiffs have not stated a claim under the Equal Protection Clause, and their suit was properly dismissed.

III. THE DISTRICT COURT DID NOT INVOKE THE POLITICAL-QUESTION DOCTRINE.

Summary disposition would say nothing about the political-question doctrine. The district court did not address it in dismissing under Rule 12(b)(6) for failure to state a claim. J.S. App. 14a.

The political-question doctrine nevertheless presents another hurdle for plaintiffs. The doctrine is a "narrow exception" to the rule that the "Judiciary has a responsibility to decide cases properly before it." *Zivotofsky ex. rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). The doctrine applies "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* (citation and internal quotation marks omitted).

The Court has already recognized that while the Judiciary does have a responsibility to decide many apportionment cases, this implicates a task primarily left to the legislative process: "From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' is primarily a political and legislative process." *Gaffney*, 412 U.S. at 749 (quoting *Burns*, 384 U.S. at 92). And here, the particular decision to select an apportionment base on the basis of electoral equality or representational equality is even closer to the core of this legislative apportionment power than the decisions in previous apportionment cases decided by the Court. *See Chen*, 206 F.3d at 528 ("this

eminently political question has been left to the political process"); *Daly*, 93 F.3d at 1227 ("This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment."). The political-question doctrine therefore presents an additional basis for dismissing plaintiffs' lawsuit, even though the district court did not address this doctrine.

CONCLUSION

The appeal should be dismissed, or the judgment of the district court should be affirmed.

Respectfully submitted.

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