No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, ET AL., APPELLANTS

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
VANITA GUPTA
Principal Deputy Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
MARK L. GROSS
ERIN ASLAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment requires the State of Texas to equalize "eligible voters" rather than total population when creating state legislative districts.

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INTEREST OF THE UNITED STATES

This case involves a claim that the Equal Protection Clause of the Fourteenth Amendment requires States to equalize the number of eligible voters across state legislative districts. The United States participated as *amicus curiae* in this Court's cases establishing the legal framework for claims of malapportioned state legislative districts under the Equal Protection Clause. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962). In addition, the United States, through the Attorney General, has primary responsibility for enforcing Section 2 of the Voting Rights Act of 1965, 52 U.S.C. 10301 *et seq.* (Voting Rights Act), and therefore has a substantial interest in ensuring that States and localities draw legislative districts that comply with both the Equal Protection Clause and the Voting Rights Act. Finally,

the United States is responsible for conducting the decennial census, which provides the total population data States use to draw federal congressional and state legislative districts. U.S. Const. Art. I, § 2; Amend. XIV, § 2; 13 U.S.C. 141(a).

STATEMENT

1. Drawing state legislative districts is a sovereign function of the States. *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975). States therefore have considerable discretion to engage in the balancing and compromises inherent in the often difficult districting process. *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995); *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977). That discretion is constrained, however, by the Constitution and by federal law. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347-348 (1960).

The Equal Protection Clause requires States to draw legislative districts that are substantially equal in population and prohibits States from unjustifiable discrimination or undue reliance on certain characteristics when redistricting. *Gaffney* v. *Cummings*, 412 U.S. 735, 744, 751-752 (1973); *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964). Through Section 2 of the Voting Rights Act, 52 U.S.C. 10301, Congress prohibited States from implementing voting practices (including redistricting) that, based on the totality of circumstances, result in a racial group or language minority "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b); *Thornburg* v. *Gingles*, 478 U.S. 30, 43 (1986).

2. Texas has a bicameral legislature consisting of a Senate and a House of Representatives. Tex. Const. Art. III, § 1. The Texas Constitution requires the legislature to reapportion the State's legislative districts during the first regular session following publication of the United States decennial census. *Id.* § 28; J.S. App. 4a. The state constitution specifies that members of the Texas House of Representatives must be apportioned among counties "according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed." Tex. Const. Art. III, § 26.

The Texas Constitution does not, however, specify any population requirement for drawing state senatorial districts. It merely requires that the State shall be divided into districts of "contiguous territory" and that "each district shall be entitled to elect one Senator." Tex. Const. Art. III, § 25. Until 2001, the state constitution required the legislature to divide the State into senatorial districts "according to the number of qualified electors." Tex. Const. Art. III, § 25 (1964). Through a constitutional amendment, the Texas legislature removed that requirement. H.R.J. Res. 75, § 1.01, 2001 Tex. Gen. Laws 6709.[1]

In 2013, the Texas legislature adopted, and the Governor signed into law, the state senatorial redistricting plan at issue in this case, Plan S172. J.S. App.

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[1] In 1981, the Attorney General of Texas had concluded that the requirement that senatorial districts be divided on the basis of qualified electors violated the federal Constitution. 1981 Op. Tex. Att'y Gen. 1156, 1157, No. MW-350 (May 30, 1981) (citing *Reynolds*, 377 U.S. at 577).

5a, 17a-18a. This plan used total population as the basis to draw state senatorial districts and sought to equalize the number of people across those districts. *Id.* at 18a. The total deviation from the ideal population under the plan was 8.04%. *Id.* at 5a.

3. Appellants are registered voters and residents of two different Texas senate districts. In 2014, they sued the Governor and the Secretary of State of Texas in their official capacities (Texas) to enjoin the enforcement of Plan S172. J.S. App. 5a, 17a-35a. Appellants alleged that Plan S172 violated the "one-person, one-vote" principle of the Equal Protection Clause because, although the state senatorial districts were roughly equal in total population, the districts were malapportioned when measured by what appellants refer to as "eligible voters." See Appellants' Br. 2, 8-12; J.S. 6-11; J.S. App. 5a-6a, 18a-19a, 25a-32a.

4. The district court convened a three-judge panel pursuant to 28 U.S.C. 2284(a) and granted Texas's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. J.S. App. 3a-14a. The court found that appellants had not alleged a *prima facie* violation of the Equal Protection Clause because their complaint admitted that Plan S172 had achieved substantial population equality using total population, Texas's chosen redistricting metric. *Id.* at 8a.

The district court rejected appellants' argument that Texas was required to achieve equality in the number of eligible voters, concluding that the argument lacked legal support and was inconsistent with this Court's decision in *Burns* v. *Richardson*, 384 U.S. 73 (1966). J.S. App. 9a-14a.

SUMMARY OF ARGUMENT

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Court held that, under the Equal Protection Clause, "the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. A State satisfies that constitutional command when it draws state legislative districts that equalize total population—as all 50 States currently do—even if the districts contain unequal numbers of eligible voters.

A. The Equal Protection Clause does not require States to draw legislative districts that equalize "eligible voters" rather than total population. Appellants' claim must therefore fail.

The holding in *Reynolds* rested on the premise, recognized in the Court's decision addressing congressional districting in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), 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 560-561 (emphasis added). Equalizing total population across districts vindicates that principle. It ensures that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives.

Appellants' insistence that States equalize voter population is impossible to reconcile with the Constitution's treatment of congressional districting. As *Wesberry* makes clear, the same principles of representative government that underlie *Reynolds* are also embodied in the constitutional provisions governing the apportionment of the federal House of Representatives. U.S. Const. Art. I, § 2; Amend. XIV, § 2.

Those constitutional provisions were purposely drafted to apportion congressional seats based on the actual number of inhabitants in each State, not the number of voters, and the Court has held that those provisions require congressional districts to be drawn on the basis of total population. *Wesberry*, 376 U.S. at 7-9. It cannot be the case that Section 1 of the Fourteenth Amendment sometimes forbids States from using the population metric for state legislative districts that Section 2 of the Fourteenth Amendment requires States to use when districting for federal elections.

There are, moreover, practical reasons to respect the States' uniform practice of using total population for districting. Total population is the only figure for which there is precise data, collected every ten years through the federal census.

B. The Court should not reach Texas's argument that States are not required under the Equal Protection Clause to equalize total population. Texas has chosen to redistrict in a manner that equalizes total population, and the parties do not dispute that if total population is a permissible benchmark, appellants' claims must fail. This Court thus lacks the full adversarial presentation from the parties to make resolution of the issue appropriate. Any such resolution should await a case in which a State has chosen to redistrict based on a metric other than total population, so that the State's justifications for doing so can be considered in a concrete context.

Restraint is, moreover, particularly warranted here where there are at the very least reasons to doubt the correctness of Texas's position. Texas's position is in tension with this Court's recognition that elected

officials are responsible to their entire constituency, not just to those who can or do vote. Allowing States the unfettered discretion that Texas seeks to choose the relevant population base for purposes of the Equal Protection Clause multiplies the opportunities for gerrymandering and other gamesmanship that entrenches incumbents and limits participatory democracy. And equalizing total population across districts is consistent with the current practice throughout the Nation.

Existing Equal Protection Clause doctrine already affords States substantial latitude to pursue a range of policies in redistricting; indeed, Texas may use a range of data and population measures in its redistricting as long as the resulting districts equalize total population. A requirement that States equalize total population is not inconsistent with the holding in *Burns* v. *Richardson*, 384 U.S. 73 (1966), which, despite broad language, set forth a narrow holding. The Court upheld Hawaii's use of registered voters as an apportionment base only because the resulting districts reflected more accurately the distribution of the overall population of Hawaii residents than did the 1960 federal census data.

Even if Texas is correct that States retain discretion under the Equal Protection Clause to choose which population base to equalize, the Court should recognize that federal statutes—most particularly the Voting Rights Act—place limits on that choice. Thus, States could not pursue the goal of equal distribution of eligible voters if doing so would minimize or cancel out the voting strength of racial minority groups, in violation of Section 2 of the Voting Rights Act.

C. In this case, the district court properly dismissed appellants' complaint. Texas equalized the total population across its state senatorial districts within a permissible deviation of 8.04%.

ARGUMENT

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THE STATES TO EQUALIZE "ELIGIBLE VOTERS" RATHER THAN TOTAL POPULATION WHEN CREATING STATE LEGISLATIVE DISTRICTS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court set forth the constitutional framework for evaluating claims of malapportionment in state legislative districts. The Court held that, under the Equal Protection Clause, "the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568.

In subsequent cases, the Court has recognized that, in applying that general rule of population equality, "more flexibility may * * * be constitutionally permissible with respect to state legislative apportionment than in congressional districting." *Gaffney* v. *Cummings*, 412 U.S. 735, 743-744 (1973) (citation omitted); see *Mahan* v. *Howell*, 410 U.S. 315, 324-325 (1973). Thus, although congressional districting for purposes of electing members to the federal House of Representatives requires States to justify "each significant variance between districts," *Karcher* v. *Daggett*, 462 U.S. 725, 731 (1983); see *Tennant* v. *Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 8 (2012) (per curiam), state legislative redistricting plans with a population

deviation of less than 10% are presumptively constitutional, *Brown* v. *Thomson*, 462 U.S. 835, 842 (1983); *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1340-1341 (N.D. Ga.) (three-judge court) (per curiam), aff'd, 542 U.S. 947 (2004).

In *Burns* v. *Richardson*, 384 U.S. 73 (1966), the Court stated that it had "carefully left open" in *Reynolds* "the question what population was being referred to" when it held that state legislative districts must be apportioned substantially on a population basis. *Id.* at 91. The question in this case is whether a state legislative apportionment based on total population satisfies the Equal Protection Clause. The answer to that question is yes.

A. Equalizing Total Population Across State Legislative Districts Satisfies The Equal Protection Clause

Appellants contend (Br. 19-29, 37-41) that the Equal Protection Clause requires States to equalize "eligible voters" rather than total population when redistricting for state and local offices. Appellants' argument—which would upend long-established practice in all 50 States—ignores core principles that animate this Court's Equal Protection Clause jurisprudence, creates anomalies when compared to the Constitution's treatment of districting for federal offices, and overlooks practical difficulties that States would face if they were required to base redistricting decisions on measures of voter population.[2]

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[2] In addition to the district court in this case, every court of appeals to have considered the question has concluded that States are not required to equalize the voting-age population or citizen-voting-age population among state legislative districts. See *Loeber* v. *Spargo*, 391 Fed. Appx. 55, 58 (2d Cir. 2010), cert. denied, 131 S. Ct. 2934 (2011); *Chen* v. *City of Hous.*, 206 F.3d 502, 522-528 (5th

1. The Court has consistently evaluated redistricting plans for compliance with the Equal Protection Clause by examining equality of total population

a. An unbroken line of cases from *Reynolds* to *Board of Estimate of New York* v. *Morris*, 489 U.S. 688 (1989), establishes a "general rule of population equality between electoral districts." *Id.* at 692-693; see *Chapman* v. *Meier*, 420 U.S. 1, 22 (1975); *Mahan*, 410 U.S. at 324-325; *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971); *Avery* v. *Midland Cnty.*, 390 U.S. 474, 484-485 (1968).

In *Reynolds*, the Court considered an equal protection challenge to the apportionment of seats in the Alabama legislature. 377 U.S. at 537. The plaintiffs alleged that because "the population growth in the State from 1900 to 1960 had been uneven," their county and other counties "were now victims of serious discrimination with respect to the allocation of legislative representation." *Id.* at 540. The Court also considered an amendment included in an alternative plan that would have allotted one senator to each county in the State, similar to the United States Senate. *Id.* at 571. The Court held that, under the Equal Protection Clause, "both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568.

The Court's holding rested on the premise—recognized in the Court's decision in *Wesberry* addressing districting for the United States House of Representatives under Section 2 of the Fourteenth

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Cir. 2000), cert. denied, 532 U.S. 1046 (2001); *Daly* v. *Hunt*, 93 F.3d 1212, 1227-1228 (4th Cir. 1996); *Garza* v. *County of L.A.*, 918 F.2d 763, 773-776 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

Amendment—that "the fundamental principle of representative government in this country is one of *equal representation for equal numbers of people*, without regard to race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-561 (emphasis added). The Court stated that a districting scheme that "give[s] the same number of representatives to unequal numbers of constituents" is no different from a state law requiring that the votes of residents in one part of a State be counted twice (or five times, or ten times). *Id.* at 562-564.

Although the Court subsequently stated in *Burns* that it had never clarified what population must be equalized among state legislative districts, the Court has continued to uphold apportionments that are based on total population. *E.g.*, *Brown*, 462 U.S. at 838-840; *Connor* v. *Finch*, 431 U.S. 407, 416-418 (1977); *White* v. *Regester*, 412 U.S. 755, 761 (1973). Indeed, in *Gaffney*, the Court upheld an apportionment based on total population while explicitly recognizing that using that metric may not precisely equalize the number of voters in each district. 412 U.S. at 746-747. The Court nevertheless reviewed Connecticut's redistricting plan by looking at total population, while acknowledging that using a total population baseline to review the congressional districts in some States would produce considerable (20% to 29%) variation in the distribution of age-eligible voters. *Id.* at 747 & n.13.

The States have responded accordingly. To our knowledge, all States use total population data collected through the federal census to measure their compliance with constitutional requirements for both congressional and state legislative redistricting.

See, *e.g.*, Nat'l Conf. of State Legislatures, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Sept. 24, 2015).[3] Apportionment plans that equalize total population satisfy the Equal Protection Clause because they ensure equal representation for equal numbers of people—and thereby vindicate the core principle that

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[3] Hawaii and Kansas seek to adjust census data to exclude certain non-permanent residents. See Haw. Const. Art. IV, §§ 4, 6; Kan. Const. Art. 10, § 1(a). California, Delaware, New York, and Maryland seek to adjust for prisoners' last known residence rather than where they are incarcerated. See Cal. Election Code § 21003 (West Supp. 2015) (effective 2020); Del. Code Ann. tit. 29, § 804A (2015) (effective 2020); N.Y. Legis. Law § 83-m(13) (McKinney 2015); Md. Code Ann., State Gov't, § 2-2A-01 (LexisNexis 2014). A list of the known adjustments to census data in state legislative redistricting is available at Redistricting Data, http://www.census.gov/rdo/data/113th_congressional_and_2012_state_legislative_district_plans.html (last visited Sept. 24, 2015).

The appendix to Texas's brief indicates that the constitutions of Maine, Nebraska, and New York appear to exclude aliens from the apportionment base for state legislative districts. See Tex. Br. App. 16a, 23a, 28a. None of those provisions is operational as written. See *In re 1983 Legislative Apportionment of House, Senate, and Congressional Districts*, 469 A.2d 819, 827-829 (Me. 1983); Michael Shepherd, *Maine Commission Unanimously Approves Redistricting*, Kennebec J., May 31, 2013, http://www.pressherald.com/2013/05/31/bipartisan-panel-approves-maine-legislative-redistricting/ (last visited, Sept. 24, 2015) (commission drew current legislative districts based on total population data from the 2010 census); L.R. 102, 102d Leg., 1st Sess. (Neb. 2011) (directing commission to use population data from the 2010 census); N.Y. Const. Art. III, § 5-a (nullifying constitutional provision excluding aliens from apportionment base).

animates the Court's equal-protection holding in *Reynolds*.

b. Appellants' contention that the Equal Protection Clause requires States to equalize the number of eligible voters across districts to protect against debasement of voting power is based on language in the Court's opinions stating that districting must ensure that "equal numbers of voters can vote for proportionally equal numbers of officials." *E.g.*, *Hadley* v. *Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970). But such language should not be understood to mean that the Equal Protection Clause requires States to equalize the number of voters across districts. The Court made many comparable references to voter equality in *Wesberry*, in the course of holding that congressional districts must be drawn on the basis of total population. See 376 U.S. at 7 ("If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand."). But votes cast for members of Congress will not necessarily be "given as much weight as any other vote" as appellants see it, because congressional districts are drawn on the basis of total population without necessarily containing equal numbers of eligible voters. See Part A.2, *infra*.[4]

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[4] The "one-person, one-vote" principle is relevant to both congressional and legislative redistricting. See *Brown*, 462 U.S. at 848 (O'Connor, J., concurring) ("the 'one-person, one-vote' principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes"); *White* v. *Weiser*, 412 U.S. 783, 799 (1973) (Marshall, J., concurring) (referring to "the constitutional requirement of 'one man, one vote'" in a congressional districting case); *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 527-528 (1969) (stating that "Art. I, § 2, of the Constitution requires that 'as nearly as is

Moreover, redistricting plans that equalize total population do protect against debasement of voting power. A voter in an overpopulated district (measured by total population) suffers vote debasement as compared with a voter in a neighboring district, even when the two districts have the same voter population, because the voter in the first district secures a representative whose attention is spread more thinly. As the Court put the point in *Board of Estimate*, "[i]f districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts." 489 U.S. at 693-694; see *Reynolds*, 377 U.S. at 563-564 (it would "run counter to our fundamental ideas of democratic government" to allow "a vote [to be] worth more in one district than in another" because of the "varied numbers of inhabitants" in each) (quoting *Wesberry*, 376 U.S. at 8).

Accordingly, nothing about the Court's discussion of "vote debasement" requires the conclusion that the Equal Protection Clause requires equality of voter population rather than total population. See *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969) (explaining that "[e]qual representation for equal numbers of people is a principle designed to prevent" both "debasement of voting power *and* diminution of access to elected representatives") (emphasis added).

c. Appellants further contend (Br. 19-29) that the primacy of the Court's concern about voting strength is reflected in the fact that the plaintiffs in this

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practicable one man's vote in a congressional election is to be worth as much as another's.'") (quoting *Wesberry*, 376 U.S. at 7-8).

Court's redistricting cases had standing to bring their claims based on their status as voters. But the conclusion does not follow from the premise. Standing to bring an equal-protection claim as a voter could be based on the voter's placement in a district of greater total population than other districts. See, *e.g.*, *Reynolds*, 377 U.S. at 540. Indeed, the Court found that voters had standing in *Wesberry* on precisely this basis, as appellants acknowledge. See Appellants' Br. 23-24 (describing that the plaintiffs in *Wesberry* had standing as "citizens and qualified voters" challenging a congressional map that deprived them of a constitutional right "to have their votes for Congressmen given the same weight as the votes of other Georgians") (citing *Wesberry*, 376 U.S. at 2-3).[5]

d. Appellants next posit (Br. 27-29, 38) that the Court has always meant to equalize voting power rather than equality of representation under the Equal Protection Clause, but that the Court never had any need to clarify that point because "[i]n the 1960s, the distribution of the voting population generally did not deviate from the distribution of total population." That contention is misconceived.

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[5] In any event, contrary to appellants' assertions (Br. 22-26), this Court has never held that being a voter is the only source of standing for a challenge to a state redistricting plan. This Court described the plaintiffs in *Reynolds* and subsequent cases in terms that do not depend on their being voters. *Reynolds*, 377 U.S. at 537 (residents, taxpayers, and voters); accord *Miller* v. *Johnson*, 515 U.S. 900, 909 (1995) (residents); *Wise* v. *Lipscomb*, 437 U.S. 535, 537 (1978) (residents); *Whitcomb* v. *Chavis*, 403 U.S. 124, 128 (1971) (residents); *Hadley*, 397 U.S. at 51 (1970) (residents and taxpayers); *Avery*, 390 U.S. at 475 (taxpayer and voter); *Burns*, 384 U.S. at 75 (residents and qualified voters).

It has long been true—and the Court has long been aware—that total population and voter population need not go hand in hand. When *Reynolds* was decided, immigrants not only lived throughout the United States, but were also unevenly distributed. See Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990*, tbl. 13, (U.S. Census Bureau, Population Division Working Paper No, 29, 1999), http://www.census.gov/population/www/documentation/twps0029/tab13.html (showing number and percentage of foreign-born persons in different States in 1960 and 1970); U.S. Dep't of Justice, Immigration & Naturalization Serv., *Annual Report of the Immigration and Naturalization Service* 10-11 (1961), http://archive.org/stream/annualreportofim1961unit#page/10/mode/2up (map showing the number of alien address cards received in each state and reporting that the "alien population center continues to move toward the Southwest").

Furthermore, the Court was well aware of large disparities between minority and white communities with respect to the number of eligible voters when it first announced the rule of population equality in *Reynolds*. In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the plaintiffs had alleged that before Tuskegee enacted its unconstitutional racial gerrymander, the municipality contained 5397 African Americans (400 of whom were "qualified electors") and 1310 whites (600 of whom were "qualified electors"). Pet. Br., *Gomillion*, *supra* (No. 32), at 4. In other words, approximately 7% of African Americans in the municipality were eligible voters, as compared to approximately 46% of whites.

Contemporaneously with the decision in *Reynolds*, the Court noted congressional findings that across the country, States and localities were using literacy and "good character" tests, poll taxes, and grandfather clauses to render racial minorities ineligible to vote and to facilitate whites' eligibility to vote. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310-311 (1966). Appellants' suggestion that the Court in *Reynolds* did not differentiate between persons residing in a State and persons eligible to vote because such a distinction was unnecessary is simply incorrect. Cf. *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 235-236 (1996) (Breyer, J., concurring in the judgment).

In sum, a state legislative redistricting plan that equalizes total population across districts ensures equal representation for equal numbers of people, consistent with the theory of representative government that animates *Reynolds*. Certainly *Reynolds* and its progeny do not foreclose a State's approach that is consistent with both the language and foundations of *Reynolds* itself.

2. The principle of equality of representation is embodied in the Constitution

The concept of representative government underlying *Reynolds* is embodied in the constitutional provisions governing the apportionment of members of the House of Representatives, including the Fourteenth Amendment. Although those constitutional provisions do not apply directly to state legislative redistricting, appellants' argument would leave the Constitution at war with itself, sometimes prohibiting under the Equal Protection Clause for state offices the very approach that the Constitution requires for federal

offices. The Fourteenth Amendment cannot plausibly be read to produce such an odd result.

a. The Constitution provides that members of the House of Representatives are apportioned among the States "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed," U.S. Const. Amend. XIV, § 2, and that "[t]he actual Enumeration" of such persons must be made every ten years as directed by Congress, U.S. Const. Art. I, § 2. Those provisions were purposely drafted to refer to "persons," rather than to voters, and to include people who could not vote. See Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. Blaine) ("As an abstract proposition no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot"); *id.* at 359 (1866) (statement of Rep. Conkling) (stating that "persons" and not "citizens of the United States" should be the basis of representation and apportionment because "[p]ersons" have always constituted the basis in the Constitution and because "it would narrow the basis of taxation and cause considerable inequalities in this respect, because the number of aliens in some States is very large, and growing larger now, when emigrants reach our shores at the rate of more than a State a year"); *The Federalist No. 54* (James Madison).

That choice of constitutional language reflects the historical fact that when the Constitution was drafted and later amended, the right to vote was not closely correlated with citizenship. In most places, many segments of the populace, including African Ameri-

cans and women, could not vote. U.S. Const. Amend. XV, § 1; Amend. XIX; *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 172 (1875). In contrast, from the Colonial period through the 1920s, some States extended the right to vote to non-citizens. *Id.* at 176-177; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1399-1417 (1993). As a consequence, the federal government acted in the name of (and thereby represented) all people, whether they were voters or not, and whether they were citizens or not. Article I, Section 2 and Section 2 of the Fourteenth Amendment reflect the judgment that "in allocating Congressmen the number assigned to each State should be determined * * * by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13; see *Federation for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576-577 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980) (relying on the fact that Article I, Section 2 and Section 2 of the Fourteenth Amendment require the enumeration of all people to reject a claim that including people not lawfully present in the United States in the decennial census would result in congressional malapportionment).

b. In *Wesberry*, the Court considered a Georgia congressional redistricting plan that divided the State's population unequally among ten congressional districts. The Court held that the plan "debas[ed] the weight of appellants' votes" because the congressman in their district "ha[d] to represent from two to three times the number of people" as congressmen in some other districts. 376 U.S. at 2-4. Based on a historical understanding of Article I, Section 2 and Section 2 of

the Fourteenth Amendment, the Court held that "our Constitution's plain objective [was] making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18. Congressional districting must be accomplished on the basis of total population, and States must justify even minimal variations among districts. *Tennant*, 133 S. Ct. at 8; *White* v. *Weiser*, 412 U.S. 783, 790 (1973); *Kirkpatrick*, 394 U.S. at 527-528; *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969); *Mahan*, 410 U.S. at 324-325.

When the Court reached its population-equality holding in *Reynolds*, it explained that although the constitutional provisions governing congressional apportionment and state legislative apportionment are separate (the former is governed by Article I, Section 2 and Section 2 of the Fourteenth Amendment, and the latter is governed by Section 1 of the Fourteenth Amendment), *Wesberry* had "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 560-561.

c. The Court's analysis in *Wesberry* disposes of Appellants' claims. There is simply no basis for concluding that the Fourteenth Amendment requires States to apportion congressional districts based on total population, but simultaneously forbids them from apportioning state legislative districts on the same basis in some circumstances.

Appellants raise two principal arguments in response. First, they contend (Br. 42) that "the Constitution's formula for apportioning Congressional seats *across* States has no bearing on the requirements for

creating districts *within* each State." This Court rejected that argument long ago. In *Wesberry*, the Court stated that "[i]t would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." 376 U.S. at 14.

Second, appellants contend (Br. 42-44) that the Court "rejected the 'so-called federal analogy'" in *Reynolds*. That is a considerable overstatement. The Court in *Reynolds* rejected the analogy only to the parts of the federal plan that compromised the principle of equality to the principle of state sovereignty, *i.e.*, the provisions that each State would have two Senators and at least one Representative. 377 U.S. at 571-577; see also *Gray* v. *Sanders*, 372 U.S. 368, 371, 378-379 (1963) (rejecting Georgia's county-unit system that operated similar to the Electoral College). The Court's holding that States must apportion legislative districts on a population basis, on the other hand, was explicitly based on the principle of "equal representation for equal numbers of people" established in *Wesberry* for federal congressional districting and reflected in Article I, Section 2 and Section 2 of the Fourteenth Amendment. *Reynolds*, 377 U.S. at 560-561. Equality of representation is not a "byproduct" (Appellants Br. 39) of the Court's principal concern of equalizing the number of voters across districts in apportionment cases. Rather, equality of representation is explicit in the constitutional provisions governing apportionment of the House of Representatives,

and it was the animating principle behind the Court's population-equality holding in *Reynolds*.

3. Data on total population collected through the federal census are the most precise data for use in redistricting

There is a practical reason as well for States and courts to use total population data. Census data on total population are the most precise population statistics. The decennial census is a 100% enumeration of a jurisdiction's population and consists of a single value for each geographic area. See *Klutznick*, 486 F. Supp. at 567. The redistricting data, published as a specific tabulation at the census block level (the base unit of redistricting plans), are contained in one of the first data sets released by the U.S. Census Bureau after each decennial census. 13 U.S.C. 141(c); U.S. Census Bureau, *Strength In Numbers: Your Guide to Census 2010 Redistricting Data From the U.S. Census Bureau* 4 (July 2010), http://www.census.gov/rdo/pdf/StrengthInNumbers2010.pdf. The U.S. Census Bureau must release this redistricting data by April 1 of the year following each decennial census, specifically so that States can use it for redistricting purposes. 13 U.S.C. 141(c).

Other population measures, even those compiled by the U.S. Census Bureau, are not nearly so precise. Citizen voting-age population estimates, for example, are drawn from the American Community Survey as a rolling statistical estimate with accompanying margins of error. See generally U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know* (Oct. 2008) (*American Community Survey Data*), https://www.census.gov/content/dam/

Census/library/publications/2008/acs/ACSGeneral Handbook.pdf. The U.S. Census Bureau explicitly cautions against using American Community Survey data as the basis for redistricting, given that these data are not an official population count. *Id.* at 4; see *Pope* v. *County of Albany*, No. 11-CV-0736, 2014 WL 316703, at *13 n.22 (N.D.N.Y. Jan. 28, 2014).

The relative size of the margin of error surrounding American Community Survey estimates grows as the geographic unit of analysis decreases in size. As a result, the U.S. Census Bureau releases block group data only as a five-year rolling average; it does not release data for individual census blocks. *American Community Survey Data* 3, 5, 10.

Furthermore, even if the American Community Survey were a 100% enumeration of the United States citizen population similar to the census, that would still not produce data sufficient to analyze the impact of redistricting on "eligible voters." Appellants identify no data that would identify which United States citizens are ineligible to vote due to state disenfranchisement laws. Counting the number of people who have registered to vote or who actually voted would exclude ineligible voters, but the Court in *Burns* properly warned against the use of registered voters or actual voters as an apportionment base. See 384 U.S. at 92-93; see also, *Thornburg* v. *Gingles*, 478 U.S. 30, 38-39 (1986); *Ely* v. *Klahr*, 403 U.S. 108, 118 (1971) (Douglas, J., concurring).

Appellants thus have not identified any data set that the States could use to implement their understanding of the Equal Protection Clause. The fact that such data are not available (and were not available at the time *Reynolds* was decided) further con-

firms that States are not required to use eligible voter data to satisfy the population-equality requirement of the Equal Protection Clause.

4. The Voting Rights Act does not suggest that reliance on voter population should be required.

Finally, appellants' amici contend that the use of voting-age population and citizen voting-age population data in Voting Rights Act litigation suggests that equalization of voter population rather than total population is appropriate. That argument is incorrect.

To be sure, when courts consider Section 2 challenges, they ask whether it would be possible to create districts in which a minority group constitutes a "numerical, working majority of the voting-age population," *Bartlett* v. *Strickland*, 556 U.S. 1, 13-20 (2009) (opinion of Kennedy, J.), or the pool of citizens of voting age, *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 429 (2006). See Cato Inst. & Reason Found. Amicus Br. 8-9 (jurisdictional); Demographers Amicus Br. 15-20; Mountain States Legal Found. Amicus Br. 13-19 (jurisdictional), 15-23 (merits). That analysis is, however, undertaken against the "background rule" of a Section 2 inquiry that "districts have approximately equal populations." *Alabama Legis. Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1271 (2015).

The use of voting-age or citizen voting-age population data in the context of creating a majority-minority district does not imply that eligible voter data must be used for all redistricting purposes. The Equal Protection Clause and Section 2 of the Voting Rights Act protect distinct interests. The Equal Protection Clause ensures equality of representation, while Section 2 ensures that minorities have access to

the political process. See *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc) ("[A]though population is the proper measure of equality in apportionment * * * , the Supreme Court [has] announced that access to the political process and not population [i]s the barometer of dilution of minority voting strength."), aff'd 424 U.S. 636 (1975). Based on that understanding, courts have consistently rejected arguments that Section 2 demonstrative or remedial plans containing districts of substantially equal population are invalid because the districts do not contain equal numbers of eligible voters. See *Lepak* v. *City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011); *Garza* v. *County of L.A.*, 918 F.2d 763, 773-776 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Montes* v. *City of Yakima*, 40 F. Supp. 3d 1377, 1396-1399 (E.D. Wash. 2014). In short, nothing in the distinct minority vote-dilution inquiry in Section 2 cases suggests that voter population rather than total population must be equalized for legislative redistricting.

* * * * *

Equalizing total population across districts is a longstanding practice that all 50 States follow. That practice reflects the theory of representative government underlying the Court's population-equality holding in *Reynolds* and embodied elsewhere in the Constitution, and it relies on the only apportionment base for which precise data are available. Texas's equalization of total population across districts in Plan S172 does not violate the Equal Protection Clause.

B. This Court Should Decline To Address Texas's Argument That States Are Not Required to Equalize Total Population

A ruling by this Court that Texas's districting plan satisfies the requirements of the Equal Protection Clause by equalizing total population fully answers the question presented in this case. Texas nonetheless asks (Br. 43-49) this Court to go further and hold that the Equal Protection Clause would likewise be satisfied had Texas equalized (some unspecified measure of) voter population instead. We respectfully submit that the Court should not do so because this case does not present a concrete controversy with respect to that issue. And restraint is particularly appropriate here because there are at the very least reasons to doubt that Texas is correct.

1. Texas's position is not the subject of full adversarial presentation

Texas's suggestion that the Equal Protection Clause does not require it to equalize total population is not ripe for review. Texas has chosen to apportion on the basis of total population, and the parties do not dispute that if total population is an appropriate benchmark for Equal Protection analysis, then Texas's plan is constitutional and appellants' claim must fail. In the absence of the plenary treatment that full adversarial briefing provides, the Court should decline to decide the issue. See, *e.g.*, *City & Cnty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1774 (2015) (declining to reach issue argued by the parties in light of the "absence of adversarial briefing").

The Court's usual caution is, moreover, particularly appropriate here, where Texas claims the need for state flexibility and discretion to depart from a dis-

tricting approach that reflects the current practice in all States and a principle of representative government embodied in our Constitution. Rather than decide the issue in the abstract, the Court should await a case in which a State has actually chosen to depart from the prevailing total population approach, so that the Court can consider the question in light of the concrete reasons the State has offered as justification.

2. There are at the very least reasons to doubt the correctness of Texas's position

The Court should likewise decline to address Texas's contention because there are at the very least reasons to doubt its correctness.

a. The principle of "equal representation for equal numbers of people" animates *Reynolds* and its progeny. Adopting Texas's hypothetical approach risks rendering residents of this country who are ineligible, unwilling, or unable to vote as invisible or irrelevant to our system of representative democracy. But this Court has recognized in a variety of contexts that elected officials are responsible to the popular will and represent their entire constituency, including those who do not vote. See *Shaw* v. *Reno*, 509 U.S. 630, 648, 650 (1993); *Davis* v. *Bandemer*, 478 U.S. 109, 131-132 (1986) (opinion of White, J.); *Reynolds*, 377 U.S. at 565-566; cf. *Karcher*, 462 U.S. at 748 (Stevens, J., concurring) ("When a State adopts rules * * * defining electoral boundaries, those rules must serve the interests of the entire community."); see also *Garza*, 918 F.2d at 774. A redistricting plan based on voters alone risks sending the distinct message that the political system is responsive to no one else.

"Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973). This principle likewise applies to eligible non-voters and, to a lesser extent, minors. Viewing people who do not vote as irrelevant to our system of representation would be especially inappropriate given that distribution of public resources tends to correlate with the distribution of political representation. See Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 Am. Pol. Sci. Rev. 767, 775-776 (2002).

The Court has long recognized that the Equal Protection Clause encompasses all persons—voters and non-voters, citizens and non-citizens alike. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982); *Truax* v. *Raich*, 239 U.S. 33, 39 (1915); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 368-369 (1886). Equalizing total population across legislative districts ensures that our system of representative government provides equal representation to all people.

Allowing States to choose which populations to equalize for Equal Protection analysis would have other unfortunate consequences. It would, for example, exacerbate existing redistricting problems—problems this Court has recognized—by multiplying the opportunities for gerrymandering and other political gamesmanship that entrenches incumbents and excludes particular groups from full participation in the political process. And it could complicate enforcement and implementation of the Voting Rights Act. See Part B.3, *infra*.

On top of that, as noted above, equalizing total population comports with current state practice and the principle of representation reflected in the constitutional requirements in the context of redistricting for federal offices.

b. Texas contends (Br. 43) that adherence to a total population approach would deprive States of needed flexibility. Texas is correct that the Equal Protection Clause permits States flexibility, but it does not follow that flexibility requires that a State be permitted to district in a manner that results in dramatic differences in the total population of the resulting districts.

In contrast to congressional redistricting, the Court has consistently recognized that, in applying the general rule of population equality, "more flexibility may * * * be constitutionally permissible with respect to state legislative apportionment." *Gaffney*, 412 U.S. at 743-744; see *Mahan*, 410 U.S. at 324-325. State legislative redistricting plans may therefore take into account factors such as respecting municipal boundaries, preserving the cores of prior districts, drawing districts with regular boundaries, ensuring political fairness, and promoting particular representational goals. See, *e.g.*, *Karcher*, 462 U.S. at 740; *Connor*, 431 U.S. at 415-416; *Abate*, 403 U.S. at 185.

But current Equal Protection Clause doctrine provides States that flexibility for state offices. Thus, the Court has typically permitted States to deviate from total population equality among state legislative districts by up to 10% to accommodate districting decisions reflecting the States' history and legitimate political values. See *Brown*, 462 U.S. at 838-840, 842-844; *Connor*, 431 U.S. at 418; *Regester*, 412 U.S. at 761; *Abate*, 403 U.S. at 185. And even deviations of

greater than 10%—which establish a prima facie case of a constitutional violation—may be permissible if the State can show sufficient justification for the deviations.

Moreover, in the course of districting, the States may look to a range of data and population measures and may seek to equalize any number of populations, and that is true even if the resulting districts must also equalize total population. The need for state flexibility to pursue a range of legislative policies is reflected in current doctrine.

c. Texas also contends (Br. 18-23, 45) that any requirement that States equalize total population cannot be squared with this Court's decision in *Burns*. See also Appellants Br. 34-38. To be sure, there is considerable language in *Burns* that supports Texas's position here. But requiring States to equalize total population (with appropriate deviations) is fully consistent with the actual holding in *Burns*.

In *Burns*, the Court considered a Hawaii redistricting plan that used registered voters as the apportionment base, even though that metric distributed seats in the legislature differently than if "total population, as measured by the federal census figures" had been used. 384 U.S. at 90. The 1960 federal census data created "special population problems" for Hawaii because it included large numbers of military members and tourists that were not residents of the State. *Id.* at 94. Those tourists and military personnel were also "highly concentrated on Oahu" and "largely confined to particular regions of that island." *Ibid.*

The Court held that the Equal Protection Clause did not "require [Hawaii] to use *total population figures derived from the federal census*" as the basis for

measuring population equivalency. *Burns*, 384 U.S. at 91 (emphasis added). But the Court upheld Hawaii's use of registered voters as an apportionment base "*only* because on th[e] record it was found to have produced a distribution of legislators not substantially different from" that which would have resulted from the use of "state citizens or another permissible population base." *Id.* at 93, 95 (emphasis added).[6] The Court thus upheld Hawaii's plan because it reflected more accurately the distribution of the overall population of Hawaii residents than did the 1960 federal census data due to Hawaii's "special population problems." *Id.* at 94.[7]

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[6] The "state citizens" apportionment base that the court concluded was permissible was not shorthand for "[s]tate citizen population eligible to vote," as appellants contend, Br. 35-36 (quoting *Burns*, 384 U.S. at 84 n.12), nor does it refer to United States citizenship, as Texas suggests (Br. 21-23). The footnote on which appellants' rely distinguishes among "[s]tate citizen population eligible to vote (*i.e.*, voter population)," "citizen population," and "total population." *Burns*, 384 U.S. at 84 n.12. That excerpt actually suggests that "state citizen population" is *not* the same as "state citizen population eligible to vote." A more plausible definition of "state citizen" is a permanent resident or person domiciled in Hawaii. See *Kostick* v. *Nago*, 960 F. Supp. 2d 1074, 1093 (D. Haw. 2013), aff'd, 134 S. Ct. 1001 (2014) ("Hawaii's definition of 'permanent residents' constitutes 'state citizens' by another name.").

[7] In the brief for the United States in opposition to the petition for a writ of certiorari to review the Ninth Circuit's decision in *Garza*, the government stated that, in *Burns*, the Court had "rejected [the] contention that [a] deviation from total population was inconsistent with *Reynolds*" and "relied on *Reynolds* to hold that a state may legitimately choose any one of three apportionment bases—eligible voters, citizen population, or total population." U.S. Br. in Opp. 15, *County of L.A.* v. *Garza*, No. 90-849 and A-422 (Dec. 1990). The government further explained, however, that the Court had subsequently made clear in *Karcher* that although

In short, in light of the substantial arguments that are left undeveloped by the parties, this Court should resist Texas's invitation to decide an important legal question before it is squarely presented.

3. States cannot draw legislative districts that attempt to equalize eligible voters if the resulting plan violates the Voting Rights Act

Even if a State decided to pursue the equalization of eligible voters among districts as a policy choice—which Texas did not do—the State must still comply with the Voting Rights Act. Thus, even if the Equal Protection Clause did not require Texas to equalize total population, the Voting Rights Act might still limit Texas's choice as to which population to equalize if the resulting redistricting plan, "designedly or otherwise," will "operate to minimize or cancel out" the voting strength of racial minority groups. *Burns*, 384 U.S. at 88 (quoting *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965)).

In the context of single-member districts, there are two ways a minority group's voting power can be improperly diluted: either by "[d]ividing the minority group among various districts" (referred to as "cracking") or by "packing" members of a minority group "into districts where they constitute an excessive majority." *Voinovich* v. *Quilter*, 507 U.S. 146, 153-154 (1993) (internal quotation marks and citation omitted); *Gingles*, 478 U.S. at 46 n.11; see also *Vieth* v. *Jubelirer*, 541 U.S. 267, 286 n.7 (2004) (opinion of Scalia,

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"various state interests, including the desire to equalize voting strength, may justify small deviations from population equality," "equal representation for equal numbers of people is still the basic constitutional imperative." *Id.* at 15 n.5.

J.). Section 2 of the Voting Rights Act prohibits either cracking or packing a minority community when the consequence of that practice is to deny minority voters an equal opportunity to participate in the political process and elect representatives of their choice. 52 U.S.C. 10301; *Voinovich*, 507 U.S. at 153-154.

The starting point for understanding why the equalization of eligible voters will in some circumstances require cracking or packing minority communities is demographic reality. In many jurisdictions, the voter population diverges from the total population because of racially- and ethnically-correlated differences related to age, citizenship, and socioeconomic factors. A higher proportion of the United States' minority population consists of children under the age of 18, and differences in citizenship rates create further disparities.[8] Even among citizens of voting age, African Americans and Hispanics are less likely than non-Hispanic whites to be eligible voters because of offender disenfranchisement laws. See Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level*

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[8] Population data are available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003&prodType=table (last visited Sept. 24, 2015); http://factfinder.census.gov/faces/tableservi-ces/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003B&prodType=table (last visited Sept. 24, 2015) (African-American); http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003D&prodType=table (last visited Sept. 24, 2015) (Asian); http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003H&prodType=table (last visited Sept. 24, 2015) (white, non-Hispanic); http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003I&prodType=table (last visited Sept. 24, 2015) (Hispanic).

Estimates of Felon Disenfrachisement in the United States, 2010, at 17 (Table 4) (July 2012), http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf. The consequence of these demographic and socioeconomic differences is that the ratio of voters-to-inhabitants is likely to be lower in heavily minority communities than in heavily white communities.

This may have consequences for a State's choice of population base. For example, a State may desire (as appellants suggest (Br. 46)) to create districts that are equal in both total population and eligible voters. But given demographics in many parts of the country, equalizing both total population and eligible voters would require districts that yoke together pieces of low voter-density minority neighborhoods with pieces of high voter-density white neighborhoods. The districts produced under this version of appellants' proposed rule would "crack" geographically compact and cohesive minority communities.

Likewise, if a State were to seek to equalize only the number of eligible voters across districts without regard to total population, "packing" (rather than "cracking") minorities might be the concern. That is, there are no doubt jurisdictions, including Texas, where the number of eligible minority voters is large enough to create districts under such a system with a majority non-white electorate. But if those districts are to be contiguous, Tex. Const. Art. III, § 25, they would have to contain significant numbers of those voters' neighbors and non-voting family members as well. The result would be that those districts would provide the opportunity to elect candidates of the minority community's choice at an unacceptable cost,

by overpopulating the majority-minority districts with significantly more inhabitants than majority-white districts contain. In practice, this packing would likely reduce the total number of opportunity districts that could be drawn and lead to vote dilution because minority voters would not have the same opportunity as other members of the electorate to elect representatives of their choice. 52 U.S.C. 10301; *Johnson* v. *De Grandy*, 512 U.S. 997, 1017-1021 (1994).

The Voting Rights Act, in short, provides an important limitation on the States' ability to choose among permissible apportionment bases, even if Texas is right that the Equal Protection Clause does not.

C. The District Court Correctly Dismissed Appellants' Complaint

Under this Court's precedents, appellants failed to state a *prima facie* claim of malapportionment under the Equal Protection Clause. In Plan S172, Texas equalized the number of people across its state senatorial districts within a *de minimis* deviation of 8.04%. See *Brown*, 462 U.S. at 842. Appellants did not allege that the deviation was the result of an arbitrary or discriminatory state policy. J.S. App. 8a. The plan therefore complies with the Equal Protection Clause.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
VANITA GUPTA
Principal Deputy Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
MARK L. GROSS
ERIN ASLAN
Attorneys

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