No. 14-

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

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

PARTIES TO THE PROCEEDING

Appellants are Sue Evenwel and Edward Pfenninger.

Appellees are Greg Abbott, in his official capacity as Governor of Texas, and Nandita Berry, in her official capacity as Texas Secretary of State.

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JURISDICTIONAL STATEMENT

Appellants Sue Evenwel and Edward Pfenninger respectfully submit this jurisdictional statement regarding their appeal of a decision of the United States District Court for the Western District of Texas sitting as a district court of three judges. Appellants ask that the Court note probable jurisdiction and set the case for oral argument.

OPINION BELOW

The district court's decision dismissing the complaint, although not yet reported in the Federal Supplement, is reprinted in the Appendix ("App.") at App. 3a-14a.

JURISDICTION

This case was properly before a three-judge district court pursuant to 28 U.S.C. § 2284(a) because it involves a constitutional challenge to a statewide redistricting plan. The United States District Court for the Western District of Texas entered final judgment against Appellants on November 5, 2014, thereby denying their request for a permanent injunction. App. 15a-16a. Appellants filed their timely notice of appeal on December 4, 2014. App. 1a. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

This is a direct appeal from a three-judge district court decision dismissing Appellants' constitutional challenge to a Texas Senate apportionment plan. The plan in question created districts with roughly equal total population (*i.e.*, all persons counted in the decennial Census) but with gross disparities in voters or potential voters. Appellants, both of whom reside in districts significantly overpopulated with such voters as compared to other districts in the same plan, brought this action pursuant to 42 U.S.C. § 1983 alleging that the plan violated the one-person, one-vote principle of the Fourteenth Amendment under *Reynolds v. Sims*, 377 U.S. 533 (1964). In particular, Appellants claimed that the Texas Senate map violated this principle because "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970).

The district court dismissed Appellants' suit for failing to state a claim upon which relief can be granted. The district court held that the Texas Legislature's decision to create Senate districts using total population is judicially unreviewable. The district court reached that conclusion here despite the fact that doing so fails to ensure that the votes of citizens in one part of Texas are given approximately the same weight as the votes of citizens in another part of Texas.

The district court's ruling raises an issue warranting plenary review. This Court has repeatedly explained that the issue remains unsettled, and Justice Thomas has urged the Court to decide it on certiorari review. Further, the merits of the claim have been the subject of robust debate in the courts of appeals. Judge Kozinski issued an opinion concluding that the claim Appellants bring here is not only serious but should prevail. The Fourth and Fifth Circuits later disagreed with Judge Kozinski on the merits of the claims, adopting the political question rationale the district court employed in this case. The district court likewise found the issue to be a close question. An issue attracting this much attention and debate certainly is not so insubstantial as to justify summary affirmance.

Indeed, Appellants clearly have a meritorious claim if the one-person, one-vote principle provides *any* protection to voters. Under the district court's reasoning, the Texas Legislature could have adopted a Senate map containing 31 districts of equal total population without violating the one-person, one-vote principle—even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State. That cannot be correct. The one-person, one-vote principle, by its terms, entitles voters to an equal vote. Unless the districting process no longer protects that right, the judgment below cannot stand.

Dismissal was particularly inappropriate given that the Complaint alleged that, based on Texas's own data, it could have created districts equalizing voter population *and* total population to a significant degree. Texas thus will be not deprived of flexibility to adopt a State Senate plan that best suits the needs of its residents if Appellants prevail. Deciding this substantial question in Appellants'

favor will merely ensure that voters are afforded the basic right to an equal vote the Fourteenth Amendment affords them. The Court should note probable jurisdiction and set the case for oral argument.

STATEMENT

I. The One-Person, One-Vote Principle

This Court has long held that the Equal Protection Clause includes a one-person, one-vote principle under which "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Reynolds*, 377 U.S. at 557-58 (citations and quotations omitted); *see also Hadley*, 397 U.S. at 56 (explaining that the Equal Protection Clause "requires that each qualified voter must be given an equal opportunity to participate in that election"). In short, the one-person, one-vote principle guarantees an equal vote to all voters. *See Reynolds*, 377 U.S. at 562.

Thus, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley*, 397 U.S. at 56; *Reynolds*, 377 U.S. at 568. Although the Equal Protection Clause does not require that the population of each district be absolutely equal, *Brown v. Thomson*, 462 U.S. 835, 842 (1983), it does forbid "substantial variation" from this constitutional norm, *Avery v. Midland County*, 390 U.S. 474, 485 (1968). A population deviation between the

largest and smallest districts of 10% or more is prima facie evidence of a one-person, one-vote violation triggering the government's duty to set forth a compelling justification for the deviation. *Brown*, 462 U.S. at 852; *White v. Regester*, 412 U.S. 755, 763 (1973); *Mahan v. Howell*, 410 U.S. 315, 329 (1973). A population deviation large enough can be *per se* unconstitutional. *Id.*

II. The Texas Senate Redistricting

The one-person, one-vote principle requires States to revise their apportionment schemes every ten years to account for population shifts and changes. *See Reynolds*, 377 U.S. at 583-84. To that end, Section 28, Article III of the Texas Constitution requires the Texas Legislature to reapportion the Texas Senate at its first regular session following the publication of each federal decennial Census. In response to the 2010 Census, the Texas Legislature undertook the task of reapportioning the Texas Senate.

Section 25, Article III of the Texas Constitution provides that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator." The Texas Constitution does not otherwise restrict districting by county, city, or other boundaries. The Texas Constitution previously required that "[t]he State shall be divided into Senatorial Districts of contiguous territory according to the number of qualified electors, as nearly as may be … and no single county shall be entitled to more than one Senator." In 1981, the Texas Attorney General opined that Section 25's requirement to divide the State into Senatorial Districts according to the number of qualified voters was "unconstitutional on its face as inconsistent with

the federal constitutional standard." Tex. Att'y Gen. Op. No. MW-350 (1981). In 2001, Section 25 was amended to eliminate the requirement to draw Senate districts "according to the number of qualified electors." In 2011, in accordance with the Attorney General's 1981 opinion and Section 25, as amended, the Texas Legislature redrew the State senatorial districts without taking into consideration the number of voters or potential voters in each district.

The Texas Legislature initially created Plan S148 as a redistricting plan for the Texas Senate. Former Governor Rick Perry signed H.B. 150 (a bill containing the congressional, State Senate, and State House redistricting plans, including Plan S148) into law on June 17, 2011. All three plans were challenged in federal court on various grounds. A three-judge panel of the United States District Court for the Western District of Texas determined there was a "not insubstantial claim" that Plan S148 violated Section 5 of the Voting Rights Act, and it created Plan S172 as an interim map for the 2012 State Senate elections. *See Davis v. Perry*, 991 F. Supp. 2d 809, 817-18 (W.D. Tex. 2014). On June 21, 2013, the Texas Legislature passed a bill making Plan S172 the permanent Senate map. Governor Perry signed Plan S172 into law on June 26, 2013.

As part of the districting process, Texas calculated the number of actual or potential voters in each Senate district in Plan S172 under various voting metrics. These data include: (1) the Citizen Voting Age Population ("CVAP") from the three American Community Surveys ("ACS") the Census Bureau conducted closest in time to the creation of Plan S172 in 2012; (2) the total voter registration numbers Texas released in 2008 and 2010; and (3) the non-suspense voter registration numbers Texas released in 2008 and

2010.[1] Set out below are tables showing the population variations from the "ideal" Senate district using Texas's data. App. 26a-30a; Supplemental Appendix ("SA") 2-12. The "ideal" Senate district is the total relevant population statewide, divided by 31 (the number of Senate districts).[2] As Table 1 demonstrates, Plan S172 deviates from the "ideal" district by roughly 46% to 55% depending on which voter-based metric is utilized.

1. Non-suspense voter registration is total voter registration minus the number of previously registered voters who fail to respond to a confirmation of residence notice sent by the county voter registrar.

2. For example, the statewide CVAP from the 2007-2011 ACS was 15,581,580. SA-9. That means that the "ideal" Senate district would contain 502,632 citizens of voting age, *i.e.*, the number of potential voters. The percentage deviation is then determined by summing its maximum upward and downward percentage deviations from the "ideal" district. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842, 846 (1983); *Connor v. Finch*, 431 U.S. 407, 416-18 (1977); *White v. Regester*, 412 U.S. 755, 761, 764 (1973).

TABLE 1

POPULATION VARIATIONS FROM THE IDEAL SENATE DISTRICT UNDER PLAN S172

Voter Metric	Deviation From Ideal District (%)
Citizen Voting Age Population (2005-2009)	47.87%
Citizen Voting Age Population (2006-2010)	46.77%
Citizen Voting Age Population (2007-2011)	45.95%
Total Voter Registration (2008)	51.14%
Total Voter Registration (2010)	55.06%
Non-Suspense Voter Registration (2008)	51.32%
Non-Suspense Voter Registration (2010)	53.66%

III. This Litigation

Appellant Sue Evenwel is a registered voter residing in Senate District 1 under Plan S172. Appellant Edward Pfenninger is a registered voter residing in Senate District 4 under Plan S172. Both vote regularly. App. 5a. Tables 2 and 3 compare the number of voters or potential voters in Senate District 1 and Senate District 4 under Plan S172, respectively, to the Senate district under Plan S172 with the lowest number of voters or potential voters, expressed as a percentage deviation from the Senate "ideal" district and as a ratio of relative voting strength.

TABLE 2

SENATE DISTRICT 1 DEVIATION AND VOTING POWER

Voter Metric	Senate District 1	Low Senate District	Absolute Difference	Deviation From Ideal District (%)	Voting Power
Citizen Voting Age Population (2005-2009)	557,525	358,205	199,320	41.49%	1:1.56
Citizen Voting Age Population (2006-2010)	568,780	367,345	201,435	40.88%	1:1.55
Citizen Voting Age Population (2007-2011)	573,895	372,420	201,475	40.08%	1:1.54
Total Voter Registration (2008)	513,259	297,692	215,567	49.23%	1:1.72
Total Voter Registration (2010)	489,990	290,230	199,760	46.69%	1:1.69
Non-Suspense Voter Registration (2008)	437,044	256,879	180,165	47.76%	1:1.84
Non-Suspense Voter Registration (2010)	425,248	252,087	173,161	47.23%	1:1.69

TABLE 3

SENATE DISTRICT 4 DEVIATION AND VOTING POWER

Voter Metric	Senate District 4	Low Senate District	Absolute Difference	Deviation From Ideal District (%)	Voting Power
Citizen Voting Age Population (2005-2009)	506,235	358,205	148,030	30.81%	1:1.41
Citizen Voting Age Population (2006-2010)	521,980	367,345	154,635	31.38%	1:1.42
Citizen Voting Age Population (2007-2011)	533,010	372,420	160,590	31.95%	1:1.43
Total Voter Registration (2008)	468,949	297,692	171,257	39.11%	1:1.58
Total Voter Registration (2010)	466,066	290,230	175,836	41.10%	1:1.61
Non-Suspense Voter Registration (2008)	409,923	256,879	153,044	40.57%	1:1.60
Non-Suspense Voter Registration (2010)	406,880	252,087	154,793	42.22%	1:1.61

As Tables 2 and 3 demonstrate, Appellants live in districts that substantially deviate (between 31% and 49%) from the "ideal" Senate districts in terms of number of voters or potential voters. There are voters or potential voters in Texas whose Senate votes are worth approximately one and one-half times that of Appellants.

Appellants filed suit in the United States District Court for the Western District of Texas pursuant to 42 U.S.C. § 1983 challenging Plan S172 as violating the one-person, one-vote principle of the Equal Protection Clause, and seeking a permanent injunction against its further enforcement. App. 34a. A district court of three judges was convened to hear the suit in accordance with 28 U.S.C. § 2284. Appellees filed a motion to dismiss; Appellants moved for summary judgment. The district court stayed briefing on the summary judgment motion pending the outcome of the motion to dismiss.

On November 5, 2014, the district court granted the motion to dismiss. App. 3a-14a. The court recognized that the "crux of the dispute is Plaintiffs' allegations that the districts vary widely in population when measured against various voter-population metrics." App. 5a. Relying primarily on *Burns v. Richardson*, 384 U.S. 73 (1966), the district court rejected the claim. Following the rationale that the Fourth Circuit and Fifth Circuit had previously adopted, the court held that the choice of which population base to use in apportioning districts is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." App. 13a (citing *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996)).

According to the district court, "the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" App. 11a (quoting *Burns*, 384 U.S. at 92). The court thus held that Appellants' claim that the Texas Legislature was required to ensure voter equality in the districting process was judicially unreviewable and dismissed the lawsuit for failing to state a claim. In the district court's judgment, Appellants had raised a "'close but ultimately unavailing legal theory.'" App. 14a (quoting *Neitzke v. Williams,* 490 U.S. 319, 327 (1989) (alterations omitted)). This timely appeal followed.

THE QUESTION PRESENTED IS SUBSTANTIAL

The only issue the Court must decide at this stage is whether to note probable jurisdiction and set the case for oral argument or instead to summarily affirm the district court's decision. The Court should grant plenary review because the question presented is substantial. In fact, the appeal raises an important and unsettled constitutional question that would meet the more stringent criteria for certiorari. The one-person, one-vote principle protects the rights of *voters* to an equal *vote*. A statewide districting plan that distributes voters or potential voters in a grossly uneven way therefore is patently unconstitutional under *Reynolds* and its progeny.

I. This Appeal Presents A Substantial Question.

The Court notes probable jurisdiction in direct appeals and sets the case for oral argument so long as

the question presented is "a substantial one." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). That standard is not demanding. Plenary review is warranted unless "after reading the condensed arguments presented by counsel in the jurisdictional statement and the opposing motion, as well as the opinion below, the Court can reasonably conclude that there is so little doubt as to how the case will be decided that oral argument and further briefing would be a waste of time." E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 304 (10th ed. 2013).

The question this appeal presents, "which asks what measure of population should be used for determining whether the population is equally distributed among the districts," is obviously substantial. *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from the denial of certiorari). The Court has "never determined the relevant 'population' that States and localities must equally distribute among their districts." *Id.* The sizable hole in the one-person, one-vote principle left by the failure to resolve this important issue alone justifies plenary review. *See id.* ("The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means.").

Judge Kozinski's separate opinion in *Garza v. County of Los Angeles*, 918 F.2d 763, 773-88 (9th Cir. 1991), confirms that the question presented by this appeal is substantial. In *Garza*, the Ninth Circuit panel majority ruled that Los Angeles County was constitutionally *required* to use total Census population in redistricting,

regardless of the effect that it would have on the number of voters in each district. In the Ninth Circuit's view, because "the people, including those who are ineligible to vote, form the basis for representative government," total population was the "appropriate basis for state legislative apportionment" given that the Census counts non-voters. *Id.* at 774.

The Ninth Circuit held that using voter population as the districting base would violate the Equal Protection Clause by producing "serious population inequalities across districts" that in turn would cause "[r]esidents of the more populous districts [to have] less access to their elected representative." *Id.* The Ninth Circuit further held that using voter population as the districting base would violate the Petition Clause of the First Amendment by denying non-voters fair access to elected officials. *See id.* at 775 ("Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government.").

Judge Kozinski disagreed. Not only did he find the argument for voter population as the apportionment base to be substantial, Judge Kozinski concluded that the claim should prevail. While acknowledging there are reasonable arguments on both sides of the issue, Judge Kozinski determined that the theory "at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id.* at 782 (Kozinski, J., concurring in part and dissenting in part). The one-person, one-vote principle "assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location." *Id.* That is, Judge Kozinski found that

the Equal Protection Clause "protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned." *Id.*

Judge Kozinski thus concluded that apportioning districts based only on total population violates the one-person, one-vote principle if it leads to malapportionment of voters or potential voters. *See id.* ("[T]he name by which the Court has consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five, ten, or one-half.") (citation omitted). It cannot seriously be argued that Judge Kozinski's opinion is not only wrong, but so clearly wrong that oral argument and full briefing would be a waste of time.

Finally, even the Fifth Circuit—while disagreeing with Judge Kozinski—acknowledged that this "is a close question." *Chen*, 206 F.3d at 523. Writing for the panel, Judge Garwood noted that the "Supreme Court has from the beginning of this line of cases been somewhat evasive in regard to which population must be equalized." *Id.* at 524; *see also Daly*, 93 F.3d at 1222. The Fifth Circuit further recognized that Judge Kozinski had made "a powerful case that the general tenor of the Court's opinions mandates protection of the individual potential voter." *Chen*, 206 F.3d at 525. That the Fifth Circuit, after lengthy analysis, reached a different answer than Judge Kozinski as to how this important issue should be decided, *see id.* at 525-28, does not undermine the substantiality of the question presented. This difference

of views confirms that this appeal meets the Court's well-established standard for plenary review. Indeed, even the district court agreed that this is a "close" question. App. 14a (citation and quotations omitted).

In short, this is not a petition for writ of certiorari in which the Court must decide whether to grant review based upon a multitude of factors beyond the case's merits. This is a direct appeal from a three-judge district court's decision resolving a constitutional challenge to a statewide redistricting plan. All the Court must decide at this stage, then, is whether Appellants' one-person, one-vote claim has enough substance to warrant full briefing and oral argument or whether the challenge is so frivolous as to justify summary affirmance. That is not a hard choice here. This appeal presents a substantial federal question.

II. The District Court Incorrectly Decided This Important And Yet Unsettled One-Person, One-Vote Question.

Even if this case were not an appeal, it would merit review. As noted above, the Court has not yet settled this constitutional issue. *See supra* at 13; *Burns*, 384 U.S. at 91 (noting that the Court has "carefully left open the question [of] what population" base is paramount for one-person, one-vote purposes); *Hadley*, 397 U.S. at 58 n.9 (same). By not deciding the issue, the Court has "left a critical variable in the requirement undefined." *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari); *see also Garza*, 918 F.3d at 785 (Kozinski, J., concurring in part and dissenting in part). It is vitally important the Court settle the issue now.

A. The Court's One-Person, One-Vote Decisions Make Clear That Voters Have A Right To An Equal Vote.

The Equal Protection Clause protects "the right of all qualified citizens to vote." *Reynolds*, 377 U.S. at 554. The right to vote is fundamental. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). A citizen therefore "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.").

Importantly, this equal-protection right secures more than ballot access. It also ensures that the vote of any one voter once cast is accorded equal weight relative to every other voter. As the Court has explained, "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565. The premise of the one-person, one-vote principle, accordingly, is that "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographic unit." *Id.* at 557-58. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living [in] other parts of the State." *Id.* at

568; *see id*. at 567 ("[T]he weight of a citizen's vote cannot be made to depend on where he lives.").

Reynolds could not have been clearer: the one-person, one-vote principle secures the right of *voters* to an equal *vote*. *See Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part) ("References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity."). To be sure, using total population as the exclusive apportionment base often will protect the Fourteenth Amendment rights of voters because "eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525; *see also Garza*, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part). But that will not always be true. Where, as in Texas, large numbers of non-voters swell the population of certain geographic locations, the exclusive use of total population as the apportionment base will fail to protect the individual constitutional right to cast an equally weighted vote.

Using total population to equalize districts therefore will not suffice to protect the constitutional rights of voters under all circumstances. For that reason, using total population in redistricting has always been understood as a means of protecting voters from having their votes diluted rather than an end to be achieved for its own sake. "[T]he overriding objective must be substantial equality of population among the various districts, *so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State*." *Reynolds*, 377 U.S. at 579 (emphasis added); *Connor v. Finch*, 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires

that legislative districts be of nearly equal population, *so that each person's vote may be given equal weight in the election of representatives*." (emphasis added)); *Garza*, 918 F.2d at 783 (Kozinski, J., concurring in part and dissenting in part) ("[A] careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality.").

At base, "the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Reynolds*, 377 U.S. at 561; *see, e.g.*, *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989). Thus, when there is a significant discrepancy between the total and voting populations, other data must be incorporated into the districting process to ensure that voters' equal-protection rights are not infringed. *See Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) ("[T]otal population … may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters.").

B. The District Court's Ruling Fails To Protect The Right Of Voters To An Equal Vote.

The district court's decision, which refused to protect the right of voters to an equal vote, is untenable under governing precedent. Adopting the rationale of *Chen* and *Daly*, the district court held that the choice of an apportionment base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected

groups of individuals." App. 13a. In the district court's view, making the choice between total and voter population judicially reviewable "would lead federal courts too far into the 'political thicket.'" *Daly*, 93 F.3d at 1227 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring)); *see also Chen*, 206 F.3d at 528 (finding "no justification to depart from the position of *Daly*"). Thus, the district court subscribed to the rationale that "the choice of population figures is a choice left to the political process." *Chen*, 206 F.3d at 523.

The conclusion that the choice between total and voter population as the apportionment base is an unreviewable political question cannot be squared with this Court's decisions. The Court settled the political-question issue in favor of justiciability more than 50 years ago. In *Baker v. Carr*, which was the first decision to find a vote dilution challenge to a legislative apportionment claim justiciable under the Fourteenth Amendment, the Court found the plaintiffs had standing as "*voters* of the State of Tennessee" and that "*voters* who allege facts showing disadvantage to themselves as individuals have standing to sue." 369 U.S. 186, 204, 206 (1962) (emphasis added). On that basis, the Tennessee voters' apportionment challenge was held to be "justiciable, and if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id.* at 209-10.

In other words, it was the plaintiffs' status as voters that afforded them Article III standing and it was their right to an undiluted vote under the Equal Protection Clause that made the constitutional claim justiciable. *See*

Gray, 372 U.S. at 375 & n.7. Absent those features, there is no reason to believe that the Court would have declared a judicially enforceable one-person, one-vote right in the first place.

Two years after *Baker*, *Reynolds* confirmed that the equal protection rights of voters cannot be relegated to the political process by firmly rejecting the very reasoning that the district court employed here:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566. Indeed, the many decisions examining whether an apportionment plan utilized the appropriate population base for one-person, one-vote purposes were wrongly decided if, as *Chen* and the district court found, that issue is committed to the political process and is therefore unreviewable. *See, e.g., Avery*, 390 U.S. 474; *Hadley*, 397 U.S. 50; *Dunn*, 405 U.S. 330; *Mahan*, 410 U.S. 315; *White*, 412 U.S. 755; *Chapman v. Meier*, 420 U.S. 1 (1975); *Brown*, 462 U.S. 835; *Connor*, 421 U.S. 407; *Morris*, 489 U.S. 688.

Accordingly, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" by this Court. *Reynolds*, 377 U.S. at 562; *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("[S]tate apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court.") (citation omitted)). Having "crossed the Rubicon," *Branch v. Smith*, 538 U.S. 254, 278 (2003), and found an enforceable one-person, one-vote principle in the Fourteenth Amendment, the Court cannot retreat to the political question doctrine when subsidiary issues must be resolved to determine whether voters' rights have been infringed, *see Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting in the denial of certiorari).

Despite the Court's determination that the one-person, one-vote right is judicially protectable, the district court held that *Burns* decisively resolved the issue in favor of unreviewablility. In particular, the district court read *Burns* as standing for the proposition that the choice of population base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals," App. 13a, because the legislature's "decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" App. 11a (quoting *Burns*, 384 U.S. at 92).

The district court's reliance on *Burns* was misplaced. At most, the case left unresolved the question presented here. *See Burns*, 384 U.S. at 91 ("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."). The Court has, in fact, explained that the question remains unsettled in decisions that post-date *Burns*. *See, e.g.*, *Hadley*, 397 U.S. at 58 n.9; *see also Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari); *Garza*, 918 F.3d at 785 (Kozinski, J., concurring in part and dissenting in part); *Daly*, 93 F.3d at 1222. *Burns* cannot fairly be read as resolving an issue that it went out of its way to note remains unresolved—and certainly not without expressly stating that the Court was resolving it.

If anything, the outcome in *Burns* indicates Appellants have the better argument. There, Hawaii had redistricted using registered voters as the population base in order to exclude military personnel and other transients who were counted in the Census but not registered to vote in that State. *See Burns*, 384 U.S. at 90-91. While the plan created deviations between districts of over 100% with respect to total population (*i.e.*, certain districts contained twice as many residents as others), the districts had only minor deviations in the numbers of registered voters. *See id.* at 90-91 & n.18. The Court upheld Hawaii's decision to rely on registered voters to apportion districts against an equal protection challenge arguing that Hawaii was obligated to use total population instead. *See id*. at 93. The Court concluded that using total population, given the high concentration of non-voters in Oahu, would have been "grossly absurd and disastrous." *Id*. at 94.

The district court's reading of *Burns* as holding that the choice of population base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals," App. 13a, also cannot be reconciled with *Burns* itself. If that were true, there would have been no reason to closely examine whether Hawaii's choice of

registered voters as a population base was permissible. *See Burns*, 384 U.S. at 93-97. After reiterating that the only question before it was whether Hawaii's plan fell "short of federal constitutional standards," *id.* at 86, the Court expressed concern that use of registered voters made one-person, one-vote rights depend "not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote," *id.* at 92. Upon studying the issue and the specific facts of the case, the Court held that despite the imperfections in using registered voters as a districting base, and "with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards." *Id.* at 97. If the district court's reading of *Burns* were correct, the Court would have been barred from examining Hawaii's choice of registered voters over state citizenship.

The district court's reliance on this Court's statement that the decision whether "to 'include or exclude' groups of individuals ineligible to vote from an apportionment base … 'involves choices about the nature of representation' with which the Court has 'been shown no constitutionally founded reason to interfere'" therefore was misplaced. App. 11a (quoting *Burns*, 384 U.S. at 92). That statement just begs the question this appeal presents. To this juncture, the Court has found no reason to interfere with a State's use of total population alone to redistrict because the use of total population has adequately protected the rights of voters. But *Burns* can in no way be read as a retreat from the proposition that, under *Reynolds*, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable that *equal numbers of voters can vote for proportionally equal numbers of officials*." *Hadley*, 397 U.S. at 56 (emphasis added).

Finally, the district court's judgment cannot be upheld on alternative grounds. The only other rationale that has ever been offered as a justification for denying voters an equal vote is the Ninth Circuit's "access" theory. *See supra* at 13-14. But the Ninth Circuit's conclusion that a non-voter's "access" right is superior to a voter's right to an equal vote is unsustainable as a matter of constitutional principle. The one-person, one-vote principle protects voters. *See Garza*, 918 F.2d at 773-88 (Kozinski, J., concurring in part and dissenting in part). Further, the contention that States *must* use total population cannot be reconciled with *Burns* given that Hawaii used registered voters. *See Chen*, 206 F.3d at 526. The prevailing rule in the Ninth Circuit is indefensible.

III. The Judgment Below Is Unsustainable If The One-Person, One-Vote Principle Is Meant To Ensure Voter Equality.

The district court's dismissal of Appellants' claim must be reversed if the one-person, one-vote principle requires Texas to protect voter equality to any reasonable degree. As noted, a difference in relevant population between the largest and smallest districts of 10% or more is *prima facie* evidence of a one-person, one-vote violation, requiring the State to have a compelling justification for the deviation; a large enough deviation can be *per se* unconstitutional. *See supra* at 4-5.

It is undisputed that the voter population deviations here exceed the 10% threshold needed for Appellants to state a claim under any metric that could possibly be used as a proxy for the number of voters in Plan S172. *See supra* at 8-10. No more is required to resolve this appeal in their

favor. But it is worth noting that the massive population deviations at issue make this a particularly appropriate case for resolving the important constitutional question presented.

First, that the population deviations are large enough to render Plan S172 *per se* unconstitutional makes this an easy case. The Court has found that a 16.4% population deviation "may well approach tolerable limits" regardless of the State's reasons for it. *Mahan,* 410 U.S. at 329. As Table 1 shows, the deviations at issue in this case are double or triple those examined in *Mahan*. As Tables 2 and 3 show, the deviations of Appellants' districts from the ideal districts are equally egregious. District 1 ranges from 40.08% to 49.23% under the various available metrics for calculating voter population. *See supra* at 9. For District 4, the deviation from the ideal district is anywhere from 30.81% to 42.22% based on those same figures. *See id*. at 10.

As the Court has explained, such massive disparities in voter population between Senate districts are patently unconstitutional:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could

> vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.

Reynolds, 377 U.S. at 562; *Morris*, 489 U.S. at 698 ("[A] citizen is … shortchanged if … he may vote for one representative and the voters of another district half the size also elect one representative."). If the one-person, one-vote principle has any force, the voting power differences present in this case are impermissible under *Reynolds*. Conversely, if voter population deviations this large are sustained, then the one-person, one-vote principle offers *no* protection for voters.

Second, the size of these voter population deviations shows that the Texas Legislature did not make an "honest and good faith effort" to apportion districts with roughly equal numbers of voters. *Mahan*, 410 U.S. at 324. Rather, the Texas Legislature labored under the misapprehension that the one-person, one-vote principle somehow *required* it to ignore voters altogether and to focus exclusively on total population instead. *See supra* at 5-6. The Court is appropriately cognizant of each State's sovereign authority to implement a variety of "legitimate objectives" beyond equalizing voting population through apportionment. *Brown*, 462 U.S. at 842; *see also Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Reynolds*, 377 U.S. at 578-79. But Texas could not have properly exercised

any discretion it holds to consider these other factors given that it has been operating pursuant to the Attorney General's 1981 opinion that it would be unconstitutional to base districting on voter population. Texas's failure to take voter equality into account therefore renders it unable to meet its burden even if it only is required to provide a satisfactory explanation that the "deviations … 'are based on legitimate considerations incident to the effectuation of a rational state policy.'" *Swann v. Adams*, 385 U.S. 440, 444 (1967) (quoting *Reynolds*, 377 U.S. at 533)).

Third, and last, even a conclusion here that Texas had a right or obligation under the Equal Protection Clause to equalize total population cannot save Plan S172. Based on Texas's own data, the legislature could have protected the interests of voters without foregoing consideration of total population as well. App. 24a, 33a. As Appellants have alleged, "[u]sing standard GIS software, one can readily adjust the boundaries of the districts in Plan S172 to create numerous alternatives to Plan S172." SA-2. Given the range of options available to the Texas Legislature, there were "many feasible ways to eliminate gross deviations" in voter population using this same 31-district map as a starting point "without causing significantly larger deviations in total population." SA-3. Unless Texas is prepared to dispute the accuracy of its own data at summary judgment (after Appellants prevail on appeal), then, there is no defensible claim that Texas will be deprived of substantial flexibility to adopt a Senate apportionment plan that best suits the needs of its residents.

In the end, the only conceivable basis for summarily affirming this decision would be the Court's conclusion that the one-person, one-vote principle so clearly affords voters *no* constitutional protection that briefing and oral argument would be a waste of time. That cannot be right. Under the district court's reasoning, the Texas Legislature could have adopted a Senate map containing 31 districts of equal total population without violating the one-person, one-vote principle—even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State. The idea that this hypothetical districting plan could survive one-person, one-vote review (let alone warrant summary affirmance) is facially absurd; that it would prevail under the district court's rationale is thus reason enough to grant plenary review.

Whatever other considerations may come within the Equal Protection Clause's ambit, the Court's decisions are clear that it protects the rights of voters to an equally weighted vote, and that the legislature's redistricting responsibility does not always terminate with equalization of total population. Even assuming that the Fourteenth Amendment protects both equal voting power and equal political access, Texas at a bare minimum must approach apportionment in a manner that reconciles both of these interests to the maximum extent feasible. Thus, whether Texas can, as it did here, advance total population equality in complete derogation of voter population equality raises a substantial question.

CONCLUSION

The Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

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February 2, 2015

APPENDIX

APPENDIX A — PLAINTIFFS' NOTICE OF APPEAL IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED DECEMBER 4, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. 1:14-cv-335

SUE EVENWEL; EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, in his official capacity as Governor of Texas; NANDITA BERRY, in her official capacity as Texas Secretary of State,

Defendants.

PLAINTIFFS' NOTICE OF APPEAL

Plaintiffs Sue Evenwel and Edward Pfenninger ("Plaintiffs") appeal to the Supreme Court of the United States under 28 U.S.C. § 1253 from the district court's November 5, 2014 Final Judgment denying a permanent injunction in this civil action, which was heard and determined by a district court of three judges under 28 U.S.C. § 2284(a).

DATED: December 4, 2014

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, FILED NOVEMBER 5, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-14-CV-335-LY-CH-MHS

SUE EVENWEL AND EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, AND NANDITA BERRY, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendants.

MEMORANDUM OPINION AND ORDER

After this case was filed raising allegations implicating a statewide redistricting scheme, Fifth Circuit Chief Judge Carl Stewart appointed this three-judge panel to preside over the case. 28 U.S.C. § 2284. This court has federal-question jurisdiction. 28 U.S.C. §§ 1331, 1343(a)(3)-(4); 42 U.S.C. § 1983. Before the court are the Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can

be granted (Clerk's Doc. No. 15). The court heard oral argument on the motion on June 25, 2014. Also pending are Plaintiffs' motion for summary judgment (Clerk's Doc. No. 12) and a motion to intervene filed by the Texas Senate Hispanic Caucus, and others (Clerk's Doc. No. 25). For the following reasons, we GRANT Defendants' Motion to Dismiss. Accordingly, we DISMISS Plaintiffs' motion for summary judgment and the motion to intervene.

I. Background

The Texas Legislature is required by the Texas Constitution to reapportion its senate districts during the first regular session after the federal decennial census. Tex. Const, art. III, § 28. It is undisputed that, after publication of the 2010 census, the Texas Legislature created redistricting PLANS148[1] and passed it as part of Senate Bill 31, which Texas Governor Rick Perry signed into law June 17, 2011. *See* Act of May 21, 2011, 82nd Leg., R.S.,ch.1315, 2011 Tex. Sess. Law Serv. 3748. A separate three-judge panel of the United States District Court for the Western District of Texas found that there was a not insubstantial claim that PLANS148 violated the federal Voting Rights Act, and issued an interim plan, PLANS172, for the 2012 primary elections. *See Davis v. Perry*, 991

1. The Legislature identifies the redistricting plans referred to in this opinion as the plans are identified "on the redistricting computer system operated by the Texas Legislative Council." This court will do the same. *See* Act of May 21, 2011, 82nd Leg., R.S., ch. 1315, 2011 Tex. Sess. Law Serv. 3748 ("PLANS148"); Act of June 21, 2013, 83rd Leg., 1st C.S. ch. l, 2013 Tex. Sess. Law Serv. 4677 ("PLANS172").

F. Supp. 2d 809, 2014 WL 106990, at *3 (W.D. Tex. 2014). Thereafter, the Texas Legislature adopted and Governor Perry signed into law PLANS172, as the official Texas Senate districting plan. *See* Act of June 21, 2013, 83rd Leg., 1st C.S. ch. 1, 2013 Tex. Sess. Law Serv. 4677.

On April 21, 2014, Plaintiffs Sue Evenwel and Edward Pfenninger filed this suit against Governor Perry and Texas Secretary of State Nandita Berry in their official capacities. Plaintiffs allege that they are registered voters who actively vote in Texas Senate elections. Evenwel lives in Titus County, part of Texas Senate District 1, and Pfenninger lives in Montgomery County, part of Texas Senate District 4.

Plaintiffs allege that, in enacting PLANS172, the Texas Legislature apportioned senatorial districts to achieve a relatively equal number of individuals based on total population alone. Plaintiffs concede that PLANS172's total deviation from ideal, using total population, is 8.04%. The crux of the dispute is Plaintiffs' allegation that the districts vary widely in population when measured using various voter-population metrics.[2] They further allege that it is possible to create districts that contain both relatively equal numbers of voter population and relatively equal numbers of total population. They conclude that PLANS 172 violates the one-person, one-vote principle of the Equal Protection Clause by not apportioning districts

2. Plaintiffs use the following metrics: citizen voting age population ("CVAP") from 2005-2009, 2006-2010, and 2007-2011; total voter registration from 2008 and 2010; and non-suspense voter registration from 2008 and 2010.

to equalize *both* total population and voter population. *See* 42 U.S.C. § 1983.

Defendants' motion to dismiss argues that there is no legal basis for Plaintiffs' claim that PLANS172 is unconstitutional for not apportioning districts pursuant to Plaintiffs' proffered scheme.

II. Standard of Review

Rule 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The inquiry under Rule 12(b)(6) is whether, accepting all facts alleged in the complaint as true, the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Importantly, legal conclusions need not be accepted as true. *Id.* Under Rule 12(b)(6), dismissal is proper if a claim is based on an ultimately unavailing legal theory. *See Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

III. Discussion

A state's congressional-apportionment plan may be challenged under the Equal Protection Clause in either of two ways: (1) that the plan does not achieve substantial equality of population among districts when measured using a permissible population base, *see Gaffney v. Cummings*, 412 U.S. 735, 744, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973); or (2) that the plan is created in a manner that is otherwise invidiously discriminatory against a

protected group, *see id.* at 751-52. Plaintiffs' challenge falls only in the first category, so we address that theory.[3]

Here Plaintiffs must prove that the districting plan violates the Equal Protection Clause by demonstrating that the plan fails to achieve "substantial equality of population"—what Plaintiffs refer to as the "one-person, one-vote" principle. *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."); *id.* at 577 ("[T]he 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."); *see also Brown v. Thomson*, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983); *Gaffney*, 412 U.S. at 744. Under this approach, absolute mathematical equality is not necessary, as some deviation is permissible in order to achieve other legitimate state interests. *See Brown*, 462 U.S. at 842; *Reynolds*, 377 U.S. at 577-79. Furthermore, 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 842-43.

In applying this framework, the Supreme Court has generally used total population as the metric of comparison. *E.g., Brown*, 462 U.S. at 837-40; *Gaffney*, 412

3. To the extent Plaintiffs intended to allege the second theory, they have failed to do so plausibly.

U.S. at 745-50; *Reynolds*, 377 U.S. at 568-69. However, the Court has never held that a certain metric (including total population) *must* be employed as the appropriate metric. *See Burns v. Richardson*, 384 U.S. 73, 91-92, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966) ("[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 this substantial population equivalency is to be measured."). Instead, the Court has explained that the limit on the metric employed is that it must not itself be the result of a discriminatory choice and that, so long as the legislature's choice is not constitutionally forbidden, the federal courts must respect the legislature's prerogative. *Id.* at 92 (citation omitted).

Plaintiffs do not allege that the apportionment base employed by Texas involves a choice the Constitution forbids. Accordingly, Texas's "compliance with the rule established in *Reynolds v. Sims* is to be measured thereby." *Id.* Measuring it in this manner, the Plaintiffs fail to allege facts that demonstrate a prima facie case against Texas under *Reynolds v. Sims*. The Plaintiffs do not allege that PLANS172 fails to achieve substantial population equality employing Texas's metric of total population; to the contrary, they 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%. Given that this falls below 10%, the Plaintiffs' own pleading shows that they cannot make out a prima facie case of a violation of the one-person, one-vote principle. *See Brown*, 462 U.S. at 842-43. Accordingly, they fail to state a claim upon which relief can be granted.

Plaintiffs attempt to avoid this result by 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. *See Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (rejecting argument that City of Houston violated Equal Protection Clause by "improperly craft[ing] its districts to equalize total population rather than [CVAP]"), *cert. denied*, 532 U.S. 1046, 121 S. Ct. 2020, 149 L. Ed. 2d 1017 (2001); *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 v. Cnty. of L.A.*, 918 F.2d 763, 773-74 (9th Cir. 1990) (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"), *cert. denied*, 498 U.S. 1028, 111 S. Ct. 681, 112 L. Ed. 2d 673 (1991); *see also Lepak v. City of Irving, Texas*, 453 F. App'x 522 (5th Cir. 2011) (unpublished) (relying on *Chen* to reject argument that Equal Protection Clause requires equalizing districts based on CVAP as opposed to total population), *cert. denied*, 133 S. Ct. 1725, 185 L. Ed. 2d 786 (2013).[4]

4. Plaintiffs argue that circuit precedent, such as *Chen*, is not binding on a three-judge panel such as this one because, Plaintiffs assert, appeal is direct from the panel to the United States Supreme Court. Because we reach the same result as *Chen* regardless of whether it is binding precedent, we need not decide this question.

Plaintiffs argue that their theory is consonant with *Burns*, in which the Supreme Court faced a related argument. 384 U.S. at 81, 90. *Burns* involved a challenge to Hawaii's apportionment on the basis of registered-voter data. *Id.* Although Hawaii achieved substantial equality using its chosen metric, there were large disparities between districts when measured using total population. *Id.* at 90. The Court began by explaining that Equal Protection Clause jurisprudence has "*carefully left open* the question what population" base was to be used in achieving substantial equality of population. *Id.* at 91 (emphasis added). The Court then 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.* at 92 ("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." (citation omitted)). The Court explained that this amount of flexibility is

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Plaintiffs also contend that the circuit court cases are distinguishable because, in this case, they do not ask the court to decide on behalf of the legislature which source of equality—electoral or representational—is supreme; rather they claim that substantial equality of population on both fronts is a constitutionally required choice where both can be achieved. This is a distinction without meaning. Regardless of whether both apportionment bases can be employed simultaneously, Plaintiffs ask us 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. This is the same request denied by the circuit courts that have reached the issue.

left to state legislatures because the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base "*involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.*" *Id.* (emphasis added). In other words, it is not the role of the federal courts to impose a "better" apportionment method on a state legislature if that state's chosen method does not itself violate the Constitution.[5] *See also Perry v. Perez*, 132 S. Ct. 934, 942, 181 L. Ed. 2d 900 (2012) (addressing requirement that federal courts respect legislative choices even when redrawing lines to address constitutional concerns: "In the absence of any legal flaw ... in the State's plan, the District Court had no basis to modify that plan.")

Working from this starting point, the Supreme Court highlighted the concerns raised by using registered voters as the apportionment base as opposed to state citizenship

5. In addition to the statements in *Burns*, the Supreme Court has repeatedly emphasized that apportionment of legislative districts is a decision primarily entrusted to state legislatures, with which a federal court is to interfere only when the Constitution demands it. *See Reynolds*, 377 U.S. at 586 (acknowledging that reapportionment is first and foremost a matter for the legislature and judicial interference is appropriate "only when a legislature fails to reapportion according to federal constitutional requisites"); *see also Miller v. Johnson*, 515 U.S. 900, 915, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Voinovich v. Quilter*, 507 U.S. 146, 156, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993); *Growe v. Emison*, 507 U.S. 25, 34, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993); *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975); *Gaffney*, 412 U.S. at 749-50.

or another permissible population base.[6] It then held that Hawaii's "apportionment satisfies the Equal Protection Clause *only because* on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." 384 U.S. at 93 (emphasis added). The permissible population base the Supreme Court considered in *Burns* was state citizenship. *Id*. 93-95. The Court was careful to note that its holding was limited to the specific facts before it and should not be seen as an endorsement of using registered voters

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6. The Court described the additional problems presented by using registered voters or actual voters as an apportionment base:

> Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions. Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years.

Burns, 384 U.S. at 92-93 (citations and internal quotation marks omitted).

as an apportionment base. *Id.* at 96 ("We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere.").

Plaintiffs characterize *Burns* as the Court "ma[king] clear that the right of voters to an equally weighted vote is the relevant constitutional principle and that any interest in proportional representation must be subordinated to that right." Quite the contrary, the Supreme Court 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." 384 U.S. at 92. Furthermore, the Supreme Court indicated problems in using one of the Plaintiffs' proposed metrics—registered voters—and ultimately measured the constitutionality of Hawaii's apportionment using the permissible population base of state citizenship. *See id.* at 92-93. We conclude 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. We decline the invitation to do so. *See, e.g., Chen*, 206 F.3d 502; *Daly*, 93 F.3d 1212.

IV. Conclusion

The Plaintiffs have failed to plead facts that state an Equal Protection Clause violation under the recognized means for showing unconstitutionality under that clause. Further, Plaintiffs' proposed theory for proving an Equal

Protection Clause violation is contrary to the reasoning in *Burns* and has never gained acceptance in the law. For these reasons, we conclude that Plaintiffs' complaint fails to state a claim upon which relief can be granted. *See Neitzke*, 490 U.S. at 327 (noting that court may dismiss claim that "is based on a close but ultimately unavailing [legal theory]").

Accordingly, it is **ORDERED** that Defendants' Motion to Dismiss (Clerk's Doc. No. 15) is **GRANTED** and Plaintiffs' claims against the Defendants are **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that Plaintiffs' motion for summary judgment (Clerk's Doc. No. 12) and the motion to intervene (Clerk's Doc. No. 25) are **DISMISSED**.

All other requests for relief are denied.
A final judgment will be rendered by separate order.

SIGNED this 5th day of November, 2014.

/s/_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

/s/_____
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

/s/_____
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED NOVEMBER 5, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-14-CV-335-LY-CH-MS

SUE EVENWEL AND EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, AND NANDITA BERRY, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendants.

FINAL JUDGMENT

Before the court is the above styled and numbered action. On this date by separate Order, the court dismissed Plaintiffs' claims with prejudice. As nothing remains in this action for the court to resolve, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that Plaintiffs' claims are dismissed with prejudice and the action is hereby CLOSED.

SIGNED this 5th day of November, 2014.

/s/_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

/s/_____
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

/s/_____
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

APPENDIX D — COMPLAINT, FILED APRIL 21, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Civil Action No. 1:14-cv-335

SUE EVENWEL; EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, in his official capacity as Governor of Texas; NANDITA BERRY, in her official capacity as Texas Secretary of State,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Sue Evenwel and Edward Pfenninger ("Plaintiffs") are qualified under Texas law to vote in the election of Texas State Senate members. Plaintiffs' votes in Texas State Senate elections will not be weighted equally with those of other qualified electors because of the malapportioned senatorial voting districts enacted by the Texas Legislature on June 23, 2013 and signed into law by Governor Rick Perry on June 26, 2013 ("Plan S172"). Plaintiffs bring this action for a declaration that Plan S172 is unconstitutional under the Fourteenth Amendment to the United States Constitution, and for an order enjoining

Texas from conducting further state Senate elections under Plan S172 and requiring the Texas Legislature to reapportion state senatorial voting districts in conformity with the Fourteenth Amendment.

BACKGROUND

2. The State of Texas recently adopted Plan S172 for the election of Members of the Texas Senate. Pursuant to Section 28, Article III of the Texas Constitution, the Texas Legislature initially re-apportioned the Texas Senate districts following the 2010 Federal Census. To "equally" apportion Texas's population in these Texas Senate districts, Texas sought to equalize total population with Senate districts and gave no consideration to the number of electors or potential electors within each district.

3. Members of the Texas Senate are elected to their posts by majority vote of registered voters actually casting ballots in a particular election. In districts where the number of electors is relatively low, the number of voters required to elect a Senate member is fewer than the number of voters required to elect a Senate member in districts where the number of electors is relatively high. Thus, the vote of an elector residing in a district where the number of electors is relatively high, like the districts in which Plaintiffs reside, is given significantly less weight than the votes of those in districts where the number of electors is relatively low.

4. Texas did not take into account the number of electors or potential electors in the proposed districts when crafting

Plan S172. There are, therefore, gross disparities in the number of electors between Texas Senate districts. For example, the votes of electors in Senate District 3, a district over-populated with electors, have only sixty-one percent (61%) of the weight of the votes of electors in Senate District 27, a district under-populated with electors. The gross disparities created by Plan S172 violate the fundamental requirement of voter equality under the Fourteenth Amendment.

5. By ignoring the discrepancies in the number of electors in each senatorial district, Plan S172 violates the "one person, one vote" principle of the Fourteenth Amendment to the United States Constitution. As the Supreme Court of the United States held in *Reynolds v. Sims*, the Fourteenth Amendment prohibits "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside." By enacting, implementing, and enforcing Plan S172, the Defendants have run directly afoul of what the Supreme Court in *Reynolds* refers to as "the basic principle of representative government," specifically, that "the weight of a citizen's vote cannot be made to depend upon where he lives." Defendants have done so despite the fact that equalization of elector populations can be achieved compatibly with equalization of total population in properly apportioned senatorial districts.

THE PARTIES

6. Plaintiff Sue Evenwel is a citizen of the United States and of Texas and resides in Titus County, Texas. She

is a registered voter residing within the geographic boundaries of Senate District 1 under Plan S172. She regularly votes in Texas Senate elections, and plans to do so in the future.

7. Plaintiff Edward Pfenninger is a citizen of the United States and of Texas and resides in Montgomery County, Texas. He is a registered voter residing within the geographic boundaries of Senate District 4 under Plan S172. He regularly votes in Texas Senate elections, and plans to do so in the future.

8. Defendant Rick Perry is the duly elected Governor of Texas, and is the Chief Executive Officer of the State of Texas under Article IV, Section 1, of the Constitution of the State of Texas. Governor Perry signed Plan S172 into law on June 26, 2013, and is sued here in his official capacity.

9. Defendant Nandita Berry is the Secretary of State of the State of Texas, is an Executive Officer of the State of Texas under Article IV, Section 1, is appointed by the Governor of Texas by and with the advice of the Texas Senate under Article IV, Section 21, of the Constitution of the State of Texas, and is the Chief Election Officer for the State of Texas. Ms. Berry is responsible for implementing and enforcing Plan S172. She is sued here in her official capacity.

Appendix D

JURISDICTION AND VENUE

10. Plaintiffs' claims arise under the United States Constitution and federal law, and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. Because Plaintiffs challenge the constitutionality of the apportionment of senatorial voting districts under Plan S172, this Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and (4).

11. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because all Defendants reside in Texas and each of the individual Defendants keeps his or her principal office in this district, and because a substantial part of the events or omissions giving rise to this complaint took place in this district.

REQUEST FOR THREE-JUDGE COURT

12. This action challenges the constitutionality of the apportionment of the Texas Senate, a statewide legislative body. Accordingly, "[a] district court of three judges shall be convened . . . ." 28 U.S.C. § 2284(a).

THE ONE-PERSON, ONE-VOTE PRINCIPLE

13. The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Relying on the Equal Protection Clause, the Supreme Court of the United States has held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a

substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). This principle is referred to as "one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

14. The one-person, one-vote principle requires equality of each qualified person's power to elect. The Supreme Court has held that, in accordance with this principle, it is permissible to apportion legislative districts based on the number of electors residing in those districts. *See Burns v. Richardson*, 384 U.S. 73 (1966). The Supreme Court has never held that the one-person, one-vote principle allows a state to apportion legislative districts on the basis of total population alone, while grossly underweighting certain electors' electoral power.

15. A panel of the United States Court of Appeals for the Fifth Circuit was previously faced with the question of whether the one-person, one-vote principle required the City of Houston to craft districts solely on the basis of citizen voting age population or another metric that would account for the number of electors, rather than the total population of the districts alone. *See Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). The court held that the decision to apportion on the basis of total population rather than voting population was a political question and that the courts should not interfere with the city's decision. The Fifth Circuit did not consider the question whether voting population could be ignored when it could be harmonized with total population.

Appendix D

REDISTRICTING THE TEXAS SENATE

16. The one-person, one-vote principle of the Equal Protection Clause requires that the States periodically revise their apportionment schemes in order to take into account population shifts and changes throughout the State. The Supreme Court has held that decennial reapportionment of state legislatures meets the minimal constitutional requirements for maintaining a reasonably current scheme of legislative representation. *See Reynolds*, 377 U.S. at 583-84.

17. Section 28, Article III of the Texas Constitution requires the Texas Legislature to reapportion the Texas Senate at its first regular session following the publication of the federal decennial Census.

18. In response to the 2010 Census, the Texas Legislature undertook a Texas Senate redistricting process beginning in June 2010.

19. Section 25, Article III of the Texas Constitution provides that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator." The Texas Constitution does not otherwise restrict districting by county, city, or other boundaries.

20. The Texas Constitution formerly included provisions requiring that "The State shall be divided into Senatorial Districts . . . according to the number of qualified electors, as nearly as may be . . . ." In 1981, however, Texas Attorney

General Mark White opined that these aspects of the Texas Constitution were "unconstitutional on [their] face as inconsistent with the federal constitutional standard." Att'y Gen. Op. No. MW-350 (1981). The opinion did not contain any analysis of the reason why those provisions were "inconsistent with" the federal Constitution. Those provisions of the Texas Constitution were repealed in 2001.

21. Consistent with Opinion No. MW-350, the Texas Legislature endeavored to re-draw the Texas Senate districts to equalize total population alone, and gave no consideration to also equalizing the number of electors in each Senate district.

22. It would have been possible for the Texas Legislature to adjust district boundaries so as to create 31 contiguous districts containing both relatively equal numbers of electors and relatively equal total population. *See* Exhibit A (Morrison Declaration). In other words, Texas could have safeguarded both the constitutional one-person, one-vote electoral principle and its interest in equally populated Senate districts but chose not to do so.

23. The Texas Legislature initially created Plan S148 as a redistricting plan for the Texas Senate. The Texas House passed H.B. 150, a bill containing Texas's congressional, state senate, and state house redistricting plans, including Plan S148, on April 28, 2011. The Texas Senate passed H.B. 150 on May 21, 2011, and Defendant Governor Rick Perry signed H.B. 150 into law on June 17, 2011.

24. All three redistricting plans included in H.B. 150, including Plan S148, were challenged in federal court. In particular, Plan S148 was challenged as violating Sections 2 and 5 of the Voting Rights Act. A three-judge court of the United States District Court for the Western District of Texas found that there was a "not insubstantial claim that" Senate District 10 in Plan S148 violated Section 5 of the VRA. *Davis v. Perry*, No. 5:11-cv-00788-OLG-JES-XR, ECF No. 147 (W.D. Tex. Mar. 9, 2012). That court created Plan S172 as an interim plan for the 2012 elections to remedy the perceived problem with Senate District 10 in Plan S148 and to adjust three contiguous districts. It otherwise sustained the enacted plan.

25. After the district court decreed Plan S172 as an interim plan for the 2012 elections, the Texas Senate and Texas House passed a bill making Plan S172 the State's legislatively enacted plan on June 14 and June 21, 2013, respectively. Governor Perry signed the bill on June 26, 2013. Plan S172 therefore superseded Plan S148.

PLAN S172 FAILS TO SECURE ONE-PERSON, ONE-VOTE RIGHTS TO PLAINTIFFS

26. Plan S172 creates Texas Senate districts that have large disparities in the number of electors amongst the districts. Tables created by the State setting forth the total population (from the 2010 Federal Census) and citizen voting age population ("CVAP") (from the three separate American Community Surveys ("ACS")) for each of the 31 districts of the Texas Senate are attached hereto as Exhibits B through D. A table created by the State

setting forth total voter registration and non-suspense voter registration for the 2008 and 2010 general elections is attached hereto as Exhibit E.

27. Many of the districts created by Plan S172 are severely over- or under-populated with electors relative to other districts in the State. The tables attached to this Complaint as Exhibits B through E reflect the fact that no consideration was given to the number of electors in the various districts: every conceivable measure of electors or potential electors demonstrates that Plan S172 distributes electors amongst the various districts in a remarkably unequal manner. Set out below are the variations from the ideal district using several different alternative metrics representing the number of electors or potential electors in Plan S172:

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Metric	% Deviation From Ideal*
CVAP (2005-2009 ACS) (Exhibit B)	47.87%
CVAP (2006-2010 ACS) (Exhibit C)	46.77%
CVAP (2007-2011 ACS) (Exhibit D)	45.95%
Total Voter Registration (2010) (Exhibit E)	55.06%
Total Voter Registration (2008) (Exhibit E)	51.14%
Non-Suspense Voter Registration (2010) (Exhibit E)	53.66%
Non-Suspense Voter Registration (2008) (Exhibit E)	51.32%

28. Plaintiffs live in Senate districts that are among the districts most overpopulated with electors under Plan S172.

29. Plaintiff Evenwel resides in Senate District 1. The table below compares the number of electors (or potential electors) in Senate District 1 to the Senate District with the lowest number of electors (or potential electors) for that metric, expressed as a percentage deviation from the ideal district and as a ratio of relative voting strength:

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* *Formula: number of electors in most-populated district minus number of electors in least-populated district, all divided by the average number of electors per district, expressed as a percentage of the average number of electors per district.*

Appendix D

Metric	Senate District 1	Low Senate District	Absolute Difference	% Deviation From Ideal	Voting Power
CVAP (2005-2009 ACS) (Exhibit B)	557,525	358,205	199,320	41.49%	1:1.56
CVAP (2006-2010 ACS) (Exhibit C)	568,780	367,345	201,435	40.88%	1:1.55
CVAP (2007-2011 ACS) (Exhibit D)	573,895	372,420	201,475	40.08%	1:1.54
Total Voter Registration (2010) (Exhibit E)	489,990	290,230	199,760	46.69%	1:1.69
Total Voter Registration (2008) (Exhibit E)	513,259	297,692	215,567	49.23%	1:1.72
Non-Suspense Voter Registration (2010) (Exhibit E)	425,248	252,087	173,161	47.23%	1:1.69
Non-Suspense Voter Registration (2008) (Exhibit E)	437,044	256,879	180,165	47.76%	1:1.84

Appendix D

30. Plaintiff Pfenninger resides in Senate District 4. The table below compares the number of electors (or potential electors) in Senate District 4 to the Senate District with the lowest number of electors (or potential electors) for that metric, expressed as a percentage deviation from the ideal district and as a ratio of relative voting power:

Appendix D

Metric	Senate District 4	Low Senate District	Absolute Difference	% Deviation From Ideal	Voting Power
CVAP (2005-2009 ACS) (Exhibit B)	506,235	358,205	148,030	30.81%	1:1.41
CVAP (2006-2010 ACS) (Exhibit C)	521,980	367,345	154,635	31.38%	1:1.42
CVAP (2007-2011 ACS) (Exhibit D)	533,010	372,420	160,590	31.95%	1:1.43
Total Voter Registration (2010) (Exhibit E)	466,066	290,230	175,836	41.10%	1:1.61
Total Voter Registration (2008) (Exhibit E)	468,949	297,692	171,257	39.11%	1:1.58
Non-Suspense Voter Registration (2010) (Exhibit E)	406,880	252,087	154,793	42.22%	1:1.61
Non-Suspense Voter Registration (2008) (Exhibit E)	409,923	256,879	153,044	40.57%	1:1.60

31. The effect of this severe overpopulation of electors is that the Plaintiffs' votes carry far less weight than the votes of other citizens in districts that are under-populated with electors.

32. The one-person, one-vote principle requires Texas to safeguard the right of electors like the Plaintiffs to an equally weighted vote in addition to equal representation based on total population.

33. The Supreme Court requires that States must "make a good-faith effort to achieve precise mathematical equality" in the apportionment of state voting districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). But the figures above confirm that Texas made no effort to ensure that the Plaintiffs' voting power was not substantially diluted when compared with votes of citizens living in other parts of the State.

34. Plaintiffs accept for purposes of decision that a jurisdiction might have a constitutional interest in creating legislative districts of roughly equal total population. But the Supreme Court's case law is clear that the Equal Protection Clause also protects the rights of *electors*, and that redistricting responsibility does not stop with total population equalization. States therefore must ensure that their apportionments protect the rights of electors, and they cannot apportion legislative districts based solely on total population where, as here, doing so would result in grossly unequal weighting of individual electoral power.

35. Plaintiffs recognize that the United States Court of Appeals for the Fifth Circuit held in *Chen v. City of Houston* that inequality of voting population among municipal legislative districts does not necessarily violate the one-person, one-vote principle because a jurisdiction can make a political decision to equalize total population rather than the number of electors. *Chen* did not consider whether electoral power could be ignored when it is possible to safeguard both interests. *Chen* also does not satisfy *Baker v. Carr* and *Reynolds v. Sims*, which not only protect electors' right to an equally weighted vote but also make justiciable legislative apportionment decisions that dilute the weight of votes. *Chen* is also distinguishable from the present case because the deviations amongst the districts in S172 with regard to the number of electors are greater than those that were presented in *Chen*. Finally, *Chen* is not binding on this Court because—as Texas recently recognized—only the Supreme Court has the authority to review the decisions of this three-judge court. *See* Plaintiff's Motion for Summary Judgment 38-40, ECF No. 347, *Texas v. Holder*, No. 12-cv-128 (D.D.C. Oct. 1, 2012) ("Texas contends that this three-judge district court is bound to follow only the precedent of the Supreme Court of the United States." (citing *United States v. Ramsey*, 353 F.2d 650, 658 (5th Cir. 1965))).

COUNT ONE – 42 U.S.C. § 1983

36. The allegations contained in paragraphs 1-37 above are re-alleged as if fully set forth herein.

37. The right to vote is fundamental, and is preservative of all other rights.

38. The Defendants are responsible for the passage, implementation, and enforcement of Plan S172.

39. Defendants violated the Equal Protection Clause of the Fourteenth Amendment by enacting, implementing, and enforcing Plan S172, which took no account of the rights of electors to an equally weighted vote and which weights the votes of Texas citizens differently based on where they live. As a result of Plan S172, the vote of electors living in certain areas of the State will be given significantly greater weight than the votes of Plaintiffs in state senatorial elections.

40. Plaintiffs' fundamental constitutional rights as electors to a vote of approximately equal weight to that of all other electors in the same state is impaired by Plan S172.

41. Texas could have apportioned its Senate districts to safeguard the principle of an equally weighted vote without departing from the goal of equalizing total population, but chose not to do so.

42. For these reasons, Plan S172 violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

43. Plaintiffs have no adequate remedy at law other than the judicial relief sought herein. Unless the Defendants are enjoined from enforcing Plan S172 and ordered to draw a new plan that complies with the Constitution, Plaintiffs will be irreparably harmed by the continued violation of their constitutional rights.

Appendix D

RELIEF SOUGHT

WHEREFORE, Plaintiffs hereby request that this Court award the following relief:

(a) Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, which declares (i) that Texas was required to account for electors' right to an equally weighted vote; and (ii) that Texas's failure to do so under the circumstances violated Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution;

(b) Permanently enjoin Defendants from calling, holding, supervising, or certifying any elections under Plan S172;

(c) Enter an order requiring Texas to establish constitutionally valid state senatorial districts prior to the next scheduled state senatorial election;

(d) Award Plaintiffs all reasonable fees and costs incurred herein under 42 U.S.C. §§ 1973*l*(e) and 1988(b) and (c); and

(e) Grant any and all further relief to which Plaintiffs shall be entitled.

Appendix D

DATED: April 21, 2014

Respectfully submitted,

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