No. 14-940

In The

Supreme Court of the United States

SUE EVENWEL, *et al*.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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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 ("Plan S172") 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.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Appellants.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every state. Since its creation in 1977, MSLF attorneys have defended individual liberties and sought to ensure "equal protection of the laws." *E.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Concrete Works of Colorado, Inc. v. City &*

[1] Pursuant to Supreme Court Rule 37.3, the undersigned certifies that all parties consent to the filing of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

County of Denver, 321 F.3d 950 (10th Cir. 2003). Accordingly, MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding this case.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the district court because the right to vote is a fundamental right and this Court has repeatedly held that diluting a citizen's vote based on where he or she lives diminishes that right. It is a court's responsibility to protect the right to vote by scrutinizing any districting scheme that may diminish the voting power of a citizen. The three-judge panel of the district court, however, failed to conduct any review of either Plan S172 or the redistricting scheme at issue, and instead simply deferred to the State's judgment on the issue.

Although Plan S172 proportions Texas State Senate districts relatively equally by total population, the number of citizens of voting age in each district is extremely disproportionate. For example, Senate District 1, where Appellant Sue Evenwel lives, has 573,895 citizens of voting age, which is over 200,000 more than the senate district with the fewest number of citizens of voting age. Senate District 4, where Appellant Edward Pfenninger lives, has 533,010 citizens of voting age, over 160,000 more than the senate district with the fewest number of adult citizens. Therefore, voters in Senate Districts 1 and 4 need significantly more votes to guarantee that the

candidate of their choice is elected than voters from the district with the fewest number of citizens. This results in the citizens of Appellants' districts having less electoral power than citizens in districts where fewer votes are required to elect a senator. This Court, however, has repeatedly stated that a citizen's voting power cannot be determined solely based on where an individual lives. Accordingly, this Court should reverse the judgment of the district court which upheld Plan S172.

Although this Court has never expressly stated that the Fourteenth Amendment requires governments to apportion districts based on the number of citizens of voting age in each district, the principle of electoral equality of citizens is at the core of nearly all of this Court's "one person, one vote" cases. The principle of electoral equality recognizes that persons eligible to vote hold the ultimate political power in our democracy, and is served by apportionment by proportion of citizens of voting age, not total population. Therefore, a diminishment of electoral equality cannot be justified by other purported legislative principles, such as a desire for equal access to representatives. Furthermore, these other principles are not significantly affected when a state apportions districts to achieve electoral equality. Accordingly, this Court should reverse the judgment of the district court and expressly hold that the Fourteenth Amendment requires states to apportion districts to achieve a relatively equal number of citizens of voting age.

ARGUMENT

I. THE RIGHT TO VOTE IS ONE OF THE MOST FUNDAMENTAL RIGHTS AND A COURT MUST STRICTLY SCRUTINIZE A DISTRICTING SCHEME THAT DIMINISHES THAT RIGHT.

The right to vote is a fundamental right that this Court has an obligation to protect. *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). "The Equal Protection Clause guarantees citizens that their State will govern them impartially. In the context of redistricting, that guarantee is of critical importance because the franchise provides most citizens their only voice in the legislative process." *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J., concurring in part and dissenting in part) (internal citations omitted). A citizen thus "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); *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.").

This Court has made clear that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v.*

Virginia Bd. of Elections, 383 U.S. 663, 665 (1966). In order to be consistent with the Equal Protection Clause, "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*, 397 U.S. 50, 56 (1970). Specifically, states must apportion districts in a manner that provides proportionate voting strength for the electors in each district. *Chapman v. Meier*, 420 U.S. 1, 24 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group."); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight.").

This Court has made clear that:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another

> district half the size also elect one representative.

Bd. of Estimate of City of New York v. Morris, 489 U.S. 688, 698 (1989). Therefore, a redistricting scheme that dilutes the voting power of citizens in certain districts violates an individual's fundamental right to vote and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, because the right to vote is a fundamental right, government action that diminishes the right to vote must be strictly scrutinized. *Harper*, 383 U.S. at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *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)). "Strict scrutiny is a searching examination, and it is the government that bears the burden to prove" that any infringement on a fundamental right is justified. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013). Importantly, a court cannot simply defer to the government and presume it "had acted in good faith. . . ." *See id.* at 2414.

The district court, however, failed to strictly scrutinize Plan S172. *See* Jurisdictional Statement App. at 13a-14a. Instead, the district court dismissed

Appellants' complaint without examining the effects of Plan S172 on individual voters' voting strength. *Id.* The district court's approach is inconsistent with this Court's precedent and the requirements of the Fourteenth Amendment. *Harper*, 383 U.S. at 670. Accordingly, this Court should reverse the judgment of the district court and hold that an infringement on the right to vote is subject to strict scrutiny.[2]

II. A DISTRICTING SCHEME THAT DILUTES A CITIZEN'S VOTE BASED SOLELY ON WHERE HE OR SHE LIVES DIMINISHES THAT CITIZEN'S RIGHT TO VOTE.

This Court should also reverse the judgment of the district court because it failed to apply the cardinal principle that one's voting power cannot be diminished solely because of where he or she lives. In *Gray*, this Court held that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." 372 U.S. at 381. This Court reasoned that "[h]ow then can one person be given twice or 10 times the voting power of

[2] Plan S172 creates a large enough deviation in number of citizens of voting age across districts that it is likely *per se* unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973); Br. for Appellants at 47 n.8; Part II, *infra*. Accordingly, Texas is probably unable to justify Plan S172 under any standard of review, much less under strict scrutiny.

another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" *Id.* at 379. In order to prevent this vote dilution and ensure equal participation in the electoral process, the Equal Protection Clause guarantees that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.*

One year later, this Court made it clear that the "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In *Reynolds*, residents of Jefferson County, Alabama, challenged the apportionment of seats in the Alabama Legislature. *Id.* at 540. Specifically, the plaintiffs alleged that, due to uneven growth in population in certain districts, the failure to reapportion representatives in nearly sixty years diluted the voting power of some voters. *Id.* Relying on the reasoning in *Gray*, this Court reaffirmed the principle that "voters cannot be classified, constitutionally, on the basis of where they live." *Id.* at 565. As a result, the Court held that the Constitution required Alabama to reapportion its districts because "[t]he fact that an individual lives here or there is not a legitimate

reason for overweighting or diluting the efficacy of his vote." *Id.* at 567.

Like *Gray* and *Reynolds*, Plan S172 dilutes the value of votes based solely on where a voter lives. Before the district court, Appellants demonstrated that the redistricting scheme dilutes the votes of those living in Appellants' districts because there are substantially more citizens and registered voters in those districts than in other districts. *See* Jurisdictional Statement App. 27a-30a. For example, Senate District 1, where Plaintiff Sue Evenwel lives, has 573,895 citizens of voting age, which is over 200,000 more than the senate district with the fewest number of adult citizens. Jurisdictional Statement App. 28a. Therefore, in order to guarantee an election of a candidate of their choice, voters in Senate District 1 would need to cast 286,947 votes in favor of that candidate. Voters in the district with the fewest number of citizens, however, only need to cast 186,211 votes to elect the candidate of their choice, which is less than the difference in number of voting age citizens between the two districts. *See Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 780 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) ("Since it takes a majority in each district to elect a supervisor, this means that the supervisor from District 1 can be elected on the basis of 353,826 votes (less than the *difference* between the two districts). . . ." (emphasis in original)).

Senate District 4, where Plaintiff Edward Pfenninger lives, has 533,010 citizens of voting age,

over 160,000 more than the senate district with the fewest number of adult citizens. Jurisdictional Statement App. 30a. Although not as egregious as Senate District 1, Senate District 4 still requires more votes to guarantee a candidate's election than in the lowest district.[3] But as this Court said in *Reynolds*, "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." 377 U.S. at 563; *Wesberry*, 376 U.S. at 8 ("To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'"). Instead, the Fourteenth Amendment requires that "all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565. "[T]hose qualified to vote have the right to an equally effective voice in the election process" and if "the votes of some residents have greater weight than those of others . . . the equal protection of the laws has been denied." *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 480-81 (1968). "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired

[3] At the very least, this deviation is prima facie evidence that the redistricting scheme is diluting the effectiveness of Appellants' votes. *See Brown v. Thomson*, 462 U.S. 835, 852 (1983) ("We have come to establish a rough threshold of 10% maximum deviation from equality . . . below that level, deviations will ordinarily be considered de minimis.").

when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State." *Reynolds*, 377 U.S. at 568.

Plan S172 impairs the right to vote of the voters living in Senate Districts 1 and 4 by diluting the effectiveness of their votes. As this Court has made clear, such an apportioning scheme violates the Equal Protection Clause of the Fourteenth Amendment. "[T]he basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds*, 377 U.S. at 567. Accordingly, this Court should reverse the judgment of the district court in order to ensure that all Texas voters have an equal voice in their government.

III. NO OTHER LEGISLATIVE CONSIDERATIONS CAN JUSTIFY A DIMINISHMENT OF A CITIZEN'S FUNDAMENTAL RIGHT TO VOTE.

A final reason this Court should reverse the judgment of the district court is because the judgment allows a legislature, when redistricting, to elevate other considerations above a citizen's fundamental right to vote. Although this Court has repeatedly held that the right to vote is diminished when a citizen's voting power is diluted solely based on where he or she lives, *Reynolds*, 377 U.S. at 567, it has never expressly articulated that voting districts must be apportioned based on the Citizen Voting Age Population

("CVAP")[4] of each district. In fact, it appears that this Court has left open the question of what population base a state must use when apportioning districts. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (Stating that the Court "carefully left open the question what population" base should be used when apportioning districts.); *Hadley*, 397 U.S. at 58 n.9 (Stating that there was "no need to decide" the question of what population should be used when apportioning districts "at this time. . . ."). This Court's previous precedents, however, have made clear that the right to vote is a right that belongs to citizens and that the "one person, one vote" principle requires the electoral equality of citizens to be elevated over considerations of those not eligible to vote. Accordingly, the logical conclusion is that the Fourteenth Amendment requires states to apportion districts based on the number of citizens of voting age.

This Court's opinions set out a long-standing principle that the "one person, one vote" principle of the Fourteenth Amendment protects the electoral equality of citizens. "Citizens, not history or economic interests, cast votes." *Reynolds*, 377 U.S. at 580. As Judge Kozinski said in his opinion in *Garza*, "[i]t is very difficult . . . to read the Supreme Court's

[4] The U.S. Census Bureau estimates CVAP through its ongoing American Community Survey. *See* U.S. Census Bureau, *American Community Survey*, *available at* http://www.census.gov/acs/www/about_the_survey/american_community_survey/ (last visited August 6, 2015).

pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part). The principle of electoral equality recognizes that persons eligible to vote "hold the ultimate political power in our democracy," and is served by apportionment by proportion of eligible voters. *Id.* at 781.

As demonstrated above, this Court's decisions recognize that the right to vote is a fundamental right held by citizens, and the right to vote is diminished when "the votes of *citizens*" are weighed "differently, by any method or means." *Reynolds*, 377 U.S. at 563 (emphasis added). The justification for this Court's holding in *Reynolds* was that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567. The principle of electoral equality was also reflected in nearly all of this Court's "one person, one vote" cases. *See Gray*, 372 U.S. at 381 ("[O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which *equality of voting power* may be evaded." (emphasis added)); *Morris*, 489 U.S. at 698 ("a *citizen* is . . . shortchanged if he may vote for only one representative when *citizens* in a neighboring district, of equal population, vote for two. . . ." (all emphasis added)); *Harper*, 383 U.S. at 668 ("The principle that denies the State the right to dilute a *citizen's vote* on account of his economic status or other such factors by analogy bars a system which excludes those

unable to pay a fee to vote or who fail to pay." (emphasis added)); *Chapman*, 420 U.S. at 24 ("All *citizens* are affected when an apportionment plan provides disproportionate voting strength. . . ." (emphasis added)); *Lockport*, 430 U.S. at 265 ("[A]ll *citizens* have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that *their votes* be given equal weight." (all emphasis added)); *Hadley*, 397 U.S. at 52 ("[A] *qualified voter* has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." (emphasis added)). Accordingly, as this Court has recognized, "total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan." *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973).

Even *Burns*, wherein this Court stated that the question of relevant population base was left open, reaffirms the principle of electoral equality. 384 U.S. at 91. In that case, this Court upheld a Hawaii State House redistricting plan that apportioned representatives by voter registration statistics rather than total population. *Id.* at 90. Hawaii adopted this plan because the large population of military personnel and tourists resulted in a large number of non-voters on Oahu. *Id.* at 94. The Court upheld Hawaii's decision to rely on voter population to apportion districts because "[t]otal population figures may thus constitute a substantially distorted reflection of the

distribution of state citizenry." *Id.* As stated by Judge Kozinski "[w]hile *Burns* does not, by its terms, purport to require that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so." *Garza*, 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part). When this Court's Equal Protection Clause cases are read together, it is clear that the Constitution prevents redistricting plans that result in disproportionate electoral power.

The principle of electoral equality is also reflected in this Court's cases involving Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973. In *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986), this Court suggested that vote dilution under Section 2 of the VRA should be examined by looking at the number of eligible voters in an area. This Court emphasized that courts must look to voting power of racial groups in order to determine whether a government has unlawfully diluted their right to vote. *Id.* at 49-51. Thus, *Gingles* suggested that voters are the relevant demographic for courts to look at when determining whether vote dilution has occurred.[5]

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[5] Although the VRA enforces the Fifteenth Amendment, there is no fundamental difference between the right to vote protected by the Fifteenth Amendment and the right to vote protected by the Equal Protection Clause of the Fourteenth Amendment. *Reynolds*, 377 U.S. at 557-58 ("[A]ll who participate in the election are to have an equal vote – whatever their race. . . ."); U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the

(Continued on following page)

As a result of *Gingles*, most circuits recognize the principle of electoral equality when analyzing vote dilution under Section 2 of the VRA. *See Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *Campos v. City of Houston,*, 113 F.3d 544, 548 (5th Cir. 1997); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1418-28 (9th Cir. 1989), *abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990). For example, in *Negron*, the Eleventh Circuit reasoned that:

> In order to elect a representative or have a meaningful potential to do so, a minority group must be composed of a sufficient number of voters or of those who can readily become voters through the simple step of registering to vote. In order to vote or to register to vote, one must be a citizen.

113 F.3d at 1569. Because voting power can only come from those eligible to vote, the Eleventh Circuit held that CVAP was the relevant statistic for a court to

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United States or by any State on account of race, color, or previous condition of servitude."). Both amendments ensure that citizens have relatively equal voting power when electing representatives. *See Gray*, 372 U.S. at 381 (comparing the "conception of political equality" in the Fourteenth and Fifteenth Amendments).

determine whether a minority group's right to vote had been unlawfully diluted. *Id.* at 1569.[6]

The Seventh Circuit, in *Barnett*, expanded the reasoning of *Negron* and stated that:

> Neither the census nor any other policy or practice suggests that Congress wants noncitizens to participate in the electoral system as fully as the concept of virtual representation would allow, although permanent resident aliens are permitted to make federal campaign contributions, 2 U.S.C. § 441e, as are certain other nonvoters.

141 F.3d at 704. Because "[t]he right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens." *Id.* As a result, the Seventh Circuit agreed that "citizen voting-age population is the basis for determining equality of voting power." *Id.*

In 2009, this Court once again examined the issue of what metric to use to determine vote dilution in VRA Section 2 cases. *Bartlett v. Strickland*, 556 U.S. 1 (2009). In *Bartlett*, a plurality of this Court

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[6] The Eleventh Circuit clarified that the use of CVAP is necessary "only where there is reliable information indicating a significant difference in citizenship rates between the majority and minority populations." *Id.*

stated that courts examining Section 2 claims must determine if "minorities make up more than 50 percent of the voting-age population in the relevant geographic area[.]" *Id.* at 18 (plurality opinion). Although this wording implies that courts should look at voting age population ("VAP"), rather than CVAP, to determine if there is vote dilution, the opinion also made reference to CVAP and, more importantly, reaffirmed the principle of electoral equality.[7] *Id.* at 19 ("The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.").

Only two circuits have examined the issue after *Bartlett*. *See Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009); *Pope v. County of Albany*, 687 F.3d 565 (2d Cir. 2012).[8] In *Reyes*, the Fifth Circuit held that *Bartlett* did not require courts to abandon CVAP as the proper metric for determining

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[7] Furthermore, it appears that there was not a significant difference between the voting age population and the citizen voting age population in *Bartlett*. *Id.* at 9.

[8] The Eleventh Circuit also recently decided an appeal in a VRA Section 2 case. *Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1339 (11th Cir. 2015). The court, however, did not "address any issues related to the merits" and instead held that the district court's granting of a motion for summary judgment was improper and remanded the case to the district court for trial. *Id.* at 1348-49.

minority vote dilution. 586 F.3d at 1023-24. In *Pope*, the Second Circuit used VAP to determine whether a VRA Section 2 violation had occurred, but the court noted that both parties relied on VAP and, as a result, the court did not have to examine the issue of CVAP. 687 F.3d at 573 n.6. Therefore, for the most part, the circuit courts have consistently held that CVAP is the proper metric to use to determine whether vote dilution has occurred in VRA Section 2 cases. In these cases, the circuit courts recognize that the principle of electoral equality is a necessary aspect of the fundamental right to vote.

The circuit courts, however, have taken a different view when it comes to vote dilution under the "one person, one vote" principle. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). Although the Fifth Circuit did not hold that the Fourteenth Amendment requires voting districts to be divided by total population, it did reject plaintiffs' argument that "[s]ince [a 'one person, one vote'] inquiry focuses on the dilution of *votes*, it would be improper to allow the votes of two adult citizens to be weighed equally with the vote of a single adult citizen merely because the latter happened to live in proximity to a noncitizen ineligible to vote." *Id.* at 523 (emphasis in original). Instead, the court ruled that "the choice of population figures is a choice left to the political process." *Id*. The court ruled this way despite stating, three years earlier, that CVAP must be used for VRA Section 2 claims because "only voting-age persons who are

United States citizens can vote." *Campos*, 113 F.3d at 548.[9]

The Ninth Circuit has also inconsistently applied the concept of electoral equality. The Ninth Circuit has held that the "one person, one vote" principle requires voting districts to be divided by total population. *Garza*, 918 F.2d at 773-76. Astonishingly, the court expressly rejected the principle of electoral equality and stated that using CVAP would "dilute the access of voting age citizens in that district to their representative." *Id.* at 775. The Ninth Circuit elevated representational equality over electoral equality despite acknowledging the importance of electoral equality in its VRA Section 2 cases. *See Romero*, 883 F.2d 1418, 1426 (citing *Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), for the proposition that "for purposes of determining minority vote dilution, 'effective voting majority' [is the] appropriate standard").[10]

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[9] The Fourth Circuit has also held that the "one person, one vote" principle does not require voting districts to be divided in a certain way. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996). Although the Fourth Circuit did not contradict itself regarding the principle of electoral equality in VRA Section 2 cases, its decision still adds to the uncertainty of how to properly protect the right to vote from vote dilution.

[10] The Second Circuit has been more consistent, although it has never explicitly held that the "one person, one vote" principle requires electoral equality. *See Roxbury Taxpayers Alliance v. Delaware Cnty. Bd. of Sup'rs*, 80 F.3d 42, 47 (2d Cir. 1996) ("When representatives are elected from districts of equal populations,

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The Ninth Circuit's analysis in *Garza* is unpersuasive because this Court has stated that other concerns, such as access to a representative, are secondary to ensuring electoral equality. *Reynolds*, 377 U.S. at 580. In *Reynolds*, this Court rejected Alabama's argument that concerns over access to representatives required unequal districts:

> Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

Id. Fifty years later, concerns about access are even more unconvincing. Technology has made it easier to communicate with one's representatives and their staff. Furthermore, legislative staff provide many valuable services to constituents, allowing a representative to meet the needs of the constituents without having to meet with the constituent in person. *See* Ron Lieber, *When to Call Your Elected Representatives*

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each citizen enjoys the right to his or her fair share of representation on the body comprising those representatives. . . .").

for Help, N.Y. Times, October 20, 2012, at B1, *available at* http://www.nytimes.com/2012/10/20/your-money/how-senators-and-representatives-can-help-constituents.html?module=ArrowsNav&contentCollection=Your%20Money&action=keypress&region=FixedLeft&pgtype=article.

Likewise, one's right to petition the government is not infringed by dividing districts by number of citizens of voting age. Scot A. Reader, *One Person, One Vote Revisited: Choosing A Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521, 543 (1994) ("Because equally-weighted voting does not target expression in the forum of petitioning representatives, these rationales are inapposite"); Br. for Appellants at 37-41. Therefore, one's access to a representative is not significantly diminished if one district has a greater total population than another. On the other hand, districts with unequal amounts of voters infringe on a citizen's fundamental right to vote. *See* Scot Reader, 17 Harv. J.L. & Pub. Pol'y at 543 ("Unlike access, voting is a zero-sum game."). Accordingly, this Court must protect the right to vote and ensure electoral equality among citizens of different districts.[11]

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[11] Even when this Court has suggested that representational equality is important, it has always reaffirmed the paramount importance of electoral equality. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *see also* Timothy Mark Mitrovich, Comment, *Political Apportioning is not a Zero-Sum Game*: *The Constitutional Necessity of*

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Courts have consistently used CVAP when analyzing vote dilution under the VRA, but no circuit has held that CVAP is the proper metric to use to determine whether a government has diluted a citizen's vote under the "one person, one vote" principle. Like the district court below, these courts only recognize the principle of electoral equality in some cases. This Court's cases, however, have consistently reflected the principle of electoral equality. In order to reaffirm that principle, this Court must reverse the judgment of the district court and hold that a redistricting scheme must ensure electoral equality of citizens.

Apportioning Districts to be Equal in Terms of Both Total Population and Citizen Voter-Age Population, 77 Wash. L. Rev. 1261, 1293 (2002) (arguing that the Fourteenth Amendment requires both electoral equality and representational equality). Therefore, even if Texas wishes to seek representational equality through redistricting, it must also seek to achieve electoral equality. Texas, however, failed to provide a justification for why it did not seek to apportion districts in a way that would achieve equality in total population and CVAP. *See* Br. for Appellants at 46 ("As a mathematical matter, 'it is possible to devise a number of feasible alternative 31-district plans with different combinations of total population and CVAP deviations,' including at least one plan 'that eliminate[s] the gross deviations in CVAP without significantly exceeding the 8.04% total population deviation from the ideal in Plan S172.'" (quoting Jurisdictional Statement Supp. App. at 2-3)).

CONCLUSION

This Court has repeatedly protected the fundamental right to vote of all citizens by ensuring that each citizen has the same electoral power as other citizens, regardless of where he or she lives. The district court failed to adequately protect the right to vote of all Texas voters and its decision diminishes the voting power of citizens in Appellants' districts. In order to ensure that no individual's right to vote is diminished, this Court should reverse the judgment of the district court and hold that states must apportion legislative districts equally based upon citizens of voting age.

Dated this 7th day of August 2015.

Respectfully submitted,

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