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

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.

Civil Action No. 1:14-cv-335

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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Plaintiffs Sue Evenwel and Edward Pfenninger ("Plaintiffs") respectfully ask this Court to deny the Motion to Dismiss ("Mot.") filed by Defendants ("Texas").

I. INTRODUCTION

Resolution of Texas's Rule 12(b)(6) motion turns on two legal issues: (1) whether the Fourteenth Amendment's one-person, one-vote principle entitles the Plaintiff voters to state legislative districts that ensure that their votes are weighted equally with all others in the State and thus suffer constitutional injury when Census population-based districting leads to gross inter-district voting power discrepancies; and (2) if the one-person, one-vote principle in fact protects voting equality, whether the well-established framework for determining whether inter-district discrepancies exceed constitutional limits applies to Plaintiffs' claim. Because these legal issues must be decided in Plaintiffs' favor, Texas's motion must be denied. Plaintiffs have clearly alleged facts, necessarily deemed true for Rule 12(b)(6) purposes, that demonstrate a right to constitutional relief.

First, the Supreme Court determined over fifty years ago in *Baker v. Carr* that a voter states a justiciable claim for relief when she alleges that a State has implemented an apportionment system under which the weight of her vote is impaired relative to the weight of others' votes. The Supreme Court then reaffirmed in *Reynolds v. Sims* that the Fourteenth Amendment requires judicial relief against unequal treatment if the weight of voters' votes depends on where they live, thus requiring each district in a reapportionment plan to be established so as to ensure that equal numbers of voters in all districts can vote for proportionally equal numbers of elected officials. Accordingly, Texas's claim that it is entitled to redistrict based on total population when the result of that process is the debasement of the votes of electors in certain parts of the State cannot be sustained.

Second, because Plaintiffs seek to vindicate their equal protection rights under the established one-person, one-vote principle of *Reynolds*, the settled framework for evaluating permissible deviations from precise equality applies perforce here. Under that framework, the alleged gross voter-population deviations in Plan S172 are *per se* unconstitutional. Even if they are not, Texas has the burden of justifying them under strict scrutiny, which cannot be accomplished by a Rule 12(b)(6) challenge to a plainly sufficient complaint. Accordingly, Plaintiffs have adequately alleged facts sufficient to state a claim for relief, and Texas's motion must be denied.

II. BACKGROUND

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. Complaint, ECF No. 1 ("Compl.") ¶ 19. The Texas Constitution formerly included provisions requiring that "[t]he State shall be divided into Senatorial Districts … according to the number of qualified electors, as nearly as may be …." Compl. ¶ 20. In 1981, Texas Attorney General Mark White opined that those aspects of the Texas Constitution were "unconstitutional on [their] face as inconsistent with the federal constitutional standard." Tex. Att'y Gen. Op. No. MW-350 (1981). Those provisions of the Texas Constitution were repealed in 2001. Compl. ¶ 20. Consistent with Opinion No. MW-350, and in the absence of any state law requiring division of senatorial districts by the number of qualified electors, the Texas legislature redrew the Texas senatorial districts to equalize their total populations but did not consider equalizing the number of electors or potential electors by district. Compl. ¶ 21.

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. Compl. ¶ 17. In response to the 2010 Census, the Texas Legislature undertook a Texas Senate redistricting process. Compl. ¶ 18. The Texas Legislature initially created Plan S148 as a redistricting plan for the Texas Senate. H.B. 150, a bill containing Texas's congressional, state senate, and state house redistricting plans, including Plan S148, was signed into law by Defendant Governor Rick Perry on June 17, 2011. Compl. ¶ 23. All three redistricting 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 found that there was a "not insubstantial claim that" Plan S148 violated Section 5 of the Voting Rights Act, *see Davis v. Perry*, No. 5:11-cv-00788-OLG-JES-XR, ECF No. 147 (W.D. Tex. Mar. 9, 2012), and the court remedially created Census population-based Plan S172 as an interim plan for the 2012 elections. Compl. ¶ 24. The Texas Senate and Texas House thereafter 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. Compl. ¶ 25.

Texas has created tables of official State data that serve as appropriate benchmarks for determining the number of actual or potential electors in any postulated district. Those data include the Citizen Voting Age Population ("CVAP") from the three American Community Surveys ("ACS") conducted by the Census Bureau closest to the creation of Plan S172 in 2012, the total voter registration numbers released by Texas in 2008 and 2010, and the non-suspense voter registration numbers released by Texas in 2008 and 2010. Compl. Exs. B-E. Using any of those data, many of the districts created by Plan S172 are severely over- or under-populated with

voters relative to other districts in Texas. Compl. ¶¶ 26-27. Set out below are the variations from the ideal district using those data. Compl. ¶ 27.[1]

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%

Plaintiffs live in Senate districts among the most overpopulated with electors under Plan S172. Compl. ¶¶ 29-30. Plaintiff Evenwel resides in Senate District 1, and Plaintiff Pfenninger resides in Senate District 4. Compl. ¶¶ 6, 7. Both are registered voters who regularly vote in Texas Senate elections and plan to do so in the future. Compl. ¶¶ 6, 7. The tables below compare the number of electors (or potential electors) in Senate District 1 and 4, respectively, to the Senate District with the lowest number of electors (or potential electors), expressed as a percentage deviation from the ideal district and as a ratio of relative voting strength:

SENATE DISTRICT 1

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)	573,895	372,420	201,475	40.08%	1:1.54

[1] For each data set, the "ideal" district is the total relevant population statewide, divided by 31 (the number of Senate districts). For example, the statewide CVAP from the 2007-2011 ACS was 15,070,385, meaning that the "ideal" senate district would contain 502,632 citizens of voting age (potential electors). *See* Compl. Ex. D. The percentage deviation from that ideal is then determined by summing the maximum upward and downward percentage deviations, each based on difference from the "ideal" district. *See Brown v. Thomson*, 462 U.S. 835, 842-46 (1983) (utilizing this formula).

(Exhibit D)					
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

SENATE DISTRICT 4

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

In sum, there are electors in the State of Texas whose votes weigh approximately one and one-half times Plaintiffs' votes, and Plaintiffs' votes weigh only two-thirds of the votes of other electors in the State of Texas. Compl. ¶¶ 29-31.

III. LEGAL STANDARD

To prevail under Rule 12(b)(6), Defendants must show either: (1) that the Plaintiffs' claim is without a basis in law—*i.e.*, that the right to an equally weighted vote has no legal merit

and/or is not subject to judicial protection; or (2) that the well-pleaded facts and reasonable inferences to be drawn therefrom are insufficient to make the claim plausible. *See* Mot. at 3 ("When considering a motion to dismiss under Rule 12(b)(6), the Court accepts all well-pleaded facts in the complaint as true and resolves all doubt in the plaintiff's favor."); *see also Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996) (noting that courts also may look to "the documents either attached to or incorporated in the complaint").

IV. ARGUMENT

A. Plaintiffs Have Properly Pleaded Denial Of A Well-Established And Justiciable Fourteenth Amendment Right To An Equally Weighted Vote.

1. The Supreme Court's decisions in *Baker*, *Reynolds*, and *Burns* make clear that voters have a right to an equally weighted vote and that a claim asserting the debasement of that right is justiciable.

The seminal case of *Baker v. Carr*, 369 U.S. 186 (1962), addressed both the meaning of the right of voters to equal protection under State law and the justiciability of a well-pleaded denial of that right. The *Baker* plaintiffs were eligible voters in Tennessee who claimed that geography-based districting had created gross inequalities in individual voting power, denying them "the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes." *Id.* at 187-88 (internal quotation omitted). The Supreme Court recognized that the plaintiffs were "voters of the State of Tennessee," *id.* at 204, that a "citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution," *id.* at 208, and that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," *id.* at 206. The Court then determined that the claimed violation of that right was justiciable in federal court because the question presented involved the "consistency of state

action with the Federal Constitution" and "judicially manageable standards" permitted evaluation of Equal Protection Clause claims. *Id.* at 226.

Decided two years later, *Reynolds v. Sims*, 377 U.S. 533 (1964), was the Supreme Court's first attempt to impose the kind of "judicially manageable standards" identified in *Baker*. There, the plaintiffs were again voters who claimed that their right to an equally weighted vote had been impaired by geography-based districting. *Id.* at 537, 541. The Court reaffirmed *Baker*'s holding that the plaintiffs' claim was justiciable,[2] *id.* at 554-56, and determined that the principal means of protecting voting rights is to balance the relevant populations of the various districts: "the 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 579 (emphasis added). The Court also made clear that traditional districting principles could not supersede voters' rights to an equally weighted vote. *Id.* at 579-81 (noting that a State might have a rational basis for desiring to maintain political boundaries in order to ensure some municipal representation, but that, "[c]arried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body").

As *Reynolds* explained:

> [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

[2] *See Reynolds*, 377 U.S. at 563 ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simpleminded modes of discrimination.") (citation and quotations omitted); *id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status[.]") (internal citations omitted).

> 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. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor.

Id. at 562-63 (footnote omitted). While *Reynolds* made clear that states must attempt to balance the populations of legislative districts "so that" voters in all parts of the State have an equally weighted vote, *id.* at 579, it did not specify the precise population metrics the State was required to balance.

Two years after *Reynolds*, the Court was faced with a claim that Census population equality was a paramount state interest. In *Burns v. Richardson*, 384 U.S. 73, 90-91 (1966), the Island of Oahu, Hawaii contained a large population of military personnel and other transients who were counted in the Census but were not registered to vote in Hawaii. Hawaii decided to redistrict based on voter registration statistics rather than total population, and the resulting redistricting plan assigned 37 of 51 state house seats to Oahu based on voter registration. Had redistricting been based on total (Census) population, Oahu would have been entitled to three additional seats. *See id.* at 90. While the plan created deviations between districts of over 100% with respect to total population (*e.g.*, certain districts contained twice as many residents as others), the districts had only minor deviations in their numbers of registered voters. *See id.* at 90-91 & n.18.

The Supreme Court upheld Hawaii's decision to rely on voter population to apportion districts against a *Baker/Reynolds* Equal Protection challenge. *See id.* at 93. The Court acknowledged that it had "carefully left open the question" of whether a State is *required* to use voter population statistics in redistricting,[3] *id.* at 91, but nevertheless noted that the use of total population to create a districting plan under the circumstances presented in *Burns* would have been "grossly absurd and disastrous," *id.* at 94 (quotation omitted). In upholding Hawaii's plan in spite of its significant variations in Census population, the Court made 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.[4]

2. The courts of appeals have struggled to apply *Baker*, *Reynolds*, and *Burns* where total population does not necessarily track voter population.

Despite the clear mandate that voters are entitled to an equally weighted vote, three circuit courts of appeals have struggled to apply the Court's teachings in *Baker*, *Reynolds*, and *Burns*, at least in part because the Supreme Court has never clearly stated that a state must use a particular population base when reapportioning its legislative districts. Application of these precedents has proven particularly difficult where it is alleged that the use of a Census population metric resulted in the debasement of voters' rights to vote on equal terms with other voters in the state.

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[3] Texas argues that "the Supreme Court has never held … that the Equal Protection Clause 'requires' the States to use any particular set of population data in order to satisfy the 'equal population' principle," Mot. at 5, and has never mandated what groups must comprise the "population" that must be equalized. Mot. at 3-4 (quoting *Reynolds*, 377 U.S. at 568). That is of course true. But that is not a basis for dismissal, as it simply begs the question that Plaintiffs would have this Court answer.

[4] The Supreme Court has recently upheld other Hawaii redistricting plans that have relied on voter statistics as opposed to Census population. *See, e.g.*, *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013), *aff'd*, 134 S. Ct. 1001 (2014).

In *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1991), the Ninth Circuit held that Los Angeles County was required to use total population rather than CVAP to reapportion its County Board of Supervisors districts. In the majority's view, there was no precedent "requir[ing]" state and local governments to consider the distribution of eligible voter population for purposes of compliance with the one-person, one-vote principle. *Id.* at 774. Rather, the Ninth Circuit concluded that because "the government should represent *all* the people," *Reynolds* and its progeny "recognized that the people, including those who are ineligible to vote, form the basis for representative government." *Id.* Using voter population, the court found, would cause "serious population inequalities across districts," which, in turn, would result in "[r]esidents of the more populous districts [having] less access to their elected representative" in violation of the Equal Protection Clause. *Id.* at 774.

In a thoughtful dissent, Judge Kozinski examined the relevant Supreme Court decisions and concluded that the *Garza* majority's rationale turned *Reynolds* on its head by adopting an unsustainable conception of the Fourteenth Amendment under which the purported right of "access" to elected officials by non-voters trumps the equal-protection rights of eligible voters. *Id.* at 780-85 (Kozinski, J., concurring in part and dissenting in part). His own reading of the decisions confirmed that the Fourteenth Amendment protected the rights of voters. *Id.* at 782 (explaining that "the 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 or ten[,] or one-half") (citation omitted). "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." *Id.* Although he recognized that a State might have a serious interest in

preserving proportional representation, he determined that "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." *Id.* at 783.

A similar issue was presented to the Fourth Circuit in *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). In that case, the plaintiffs challenged the method of dividing Mecklenburg County, North Carolina into districts for the election of County Commissioners and School Board members. The plaintiffs claimed that dividing the county into districts based on total population unconstitutionally debased the votes of citizens in districts that have fewer eligible voters, and alleged that the use of Voting Age Population data rather than total population data was constitutionally required under the circumstances. The Fourth Circuit found no basis in the Supreme Court's decisions for elevating the principle of "electoral equality" (equally weighted votes) over "representational equality" (equal numbers of constituents for equal numbers of representatives). *Id.* at 1223. The court nevertheless declined to adopt the *Garza* majority's view, and instead found that "the decision to use an apportionment base other than total population is up to the state," *id.* at 1225, because "[e]ven if electoral equality were the paramount concern of the one person, one vote principle," resolving the issue "would lead federal courts too far into the 'political thicket,'" *id.* at 1227 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring)). The Fourth Circuit declined to overturn the county's use of a total population metric. *Id.* at 1227.

The Fifth Circuit reached the same basic conclusion in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). In that case, the plaintiffs argued that the use of total population to redistrict the Houston City Council resulted in gross disparities in the number of voters in the various districts, and that the City was instead required to utilize CVAP. Reviewing that claim, the Fifth

Circuit chided the Supreme Court for being "somewhat evasive in regard to which population must be equalized," but nevertheless concluded that the pertinent decisions "indicated with some clarity that the choice has political overtones that caution against judicial intrusion." *Id.* at 524. The court agreed with Judge Kozinski that Supreme Court precedent (particularly *Burns*) refuted the *Garza* majority's conclusion that use of total population was constitutionally required. *Id.* at 528. But the Fifth Circuit found "no justification to depart from the position of *Daly*." *Id.* It declined to interpret "the Equal Protection Clause to require the adoption of a particular theory of political equality." *Id.* at 527. Like the Fourth Circuit, the Fifth Circuit held that "the choice of population figures is a choice left to the political process." *Id.* at 523.

In sum, three circuit courts have been presented with the question of whether the rights of voters to an equally weighted vote should give way to representational equality; one found that a right of "representational equality" predominated over voters' rights, and two found that the choice of whether to use total population or voter population is committed to the discretion of the state or political subdivision at issue. In each of these cases, plaintiffs sought to have the court choose between the competing metrics.

3. Texas's motion should be denied because it is based on the distinguishable and incorrect reasoning of *Chen*, *Daly*, and *Garza*.

Although Texas never overtly disputes that the Fourteenth Amendment entitles voters to an equally weighted vote, it nevertheless argues that this case should be dismissed because, consistent with *Chen* and *Daly*, its decision to use total population as its base for redistricting was a decision committed to the political process. Texas has buttressed that argument with a position sympathetic to the *Garza* majority opinion that essentially provides that, so long as a state chooses to use total population in redistricting and keeps the total plan deviation within

10%, it cannot be liable for a one-person, one-vote violation. These arguments are incompatible with controlling Supreme Court precedent.

As an initial matter, *Chen*, *Daly*, and *Garza* are easily distinguished from the present case.[5] Those cases did not address Plaintiffs' contention, which is that Texas unnecessarily deprived them of an equally weighted vote because Texas could have protected Plaintiffs' rights *and* pursued other legitimate redistricting goals, such as creating districts of roughly equal total population. Plaintiffs have pleaded facts that fully support their position. *See* Compl. Ex. A (Declaration of Peter A. Morrison, Ph.D.). The question squarely presented here is whether a constitutional right to an equally weighted vote—which no court has disavowed—can be ignored so long as representational equality is achieved. *Chen* and *Daly* could not have addressed that question because the plaintiffs in those cases did not bring forth any facts showing that voters' rights could be reconciled with the goal of representational equality. *See Chen*, 206 F.3d at 523 (plaintiffs argued that the Fourteenth Amendment required Houston "to use CVAP *rather than* total population" in designing city council districts) (emphasis added); *Daly*, 93 F.3d at 1228 ("Finally, Plaintiffs suggest that perhaps a districting plan could be created for Mecklenburg County which would produce de minimis variations in both total population and voting-age population, thereby achieving both electoral equality and representational equality. We will not address this argument because such a proposed plan is not part of the record on appeal."). Those

[5] Notably, Texas has not argued that *Chen* is binding on this panel. That is likely because Texas has taken the position in an analogous context that circuit precedent does not bind three-judge district court panels specially constituted under 28 U.S.C. § 2284(a) because only the Supreme Court has the authority to review a three-judge court's decisions. *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)).

cases therefore cannot provide guidance to this Court, which confronts a Fourteenth Amendment action with a different factual premise.

In any event, *Chen*, *Daly*, and *Garza*—each of which form the basis for Texas's arguments favoring dismissal—cannot be reconciled with Supreme Court precedent for several reasons. First, the ultimate conclusion reached in *Chen* and *Daly*—that the determination of the appropriate population basis for redistricting is left to the political process—is flatly inconsistent with *Baker*, *Reynolds*, and their progeny. The Supreme Court settled the political-question issue in favor of justiciability more than 50 years ago. *See Davis v. Bandemer*, 478 U.S. 109, 118 (1986) (plurality opinion) ("Since *Baker v. Carr*, we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. In the course of these cases, we have developed and enforced the 'one person, one vote' principle.") (citation omitted). *Reynolds* squarely rejected the very reasoning *Chen* and *Daly* employed:

> 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.

The many Supreme Court decisions examining whether an apportionment plan utilized the appropriate population base for one-person, one-vote purposes were wrongly decided if, as *Chen* and *Daly* found, that issue is committed to the political process and is therefore unreviewable. *See, e.g.*, *Burns*, 384 U.S. 73; *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Gaffney v. Cummings*, 412 U.S. 735

(1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Chapman v. Meier*, 420 U.S. 1 (1975); *Brown*, 462 U.S. 835; *Connor v. Finch*, 431 U.S. 407 (1977); *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989). Moreover, the Court's statement in *Burns* that the state possesses discretion to choose the relevant "apportionment base"—on which Texas relies—contains an important qualifier: "[u]nless [the] choice is one the Constitution forbids." 384 U.S. at 92.[6] *Reynolds* made clear that the Constitution forbids the use of any metric that debases a voter's right to an equally weighted vote. *See supra* 7-8.

Indeed, the concept of a judicially enforceable right to an equal voice in choosing representatives under the Fourteenth Amendment is the constitutional foundation from which the concept of racial-bloc vote dilution emerged. *See Shaw v. Reno*, 509 U.S. 630, 640-41 (1993). Absent judicial recognition that voting rights can "be denied by a debasement or dilution of the weight of a citizen's vote," *Reynolds*, 377 U.S. at 555, there would have been no basis to strike down "practices such as multimember or at-large electoral systems" that "can reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice … when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength," *Shaw*, 509 U.S. at 641 (citation and quotations omitted). Nor would Congress have been authorized to prophylactically enforce that right by prohibiting, under Section 2 of the Voting

[6] Consistent with *Burns*, Plaintiffs do not dispute that Texas retains discretion to choose any voting population base that would adequately protect voters' right to an equally weighted vote. Texas is therefore incorrect in its assertion that Plaintiffs seek an order requiring the Texas legislature to utilize CVAP. *See* Mot. at 1, 2, 7, 10. It is for the Texas Legislature to decide which voter-population metric or metrics to use. The Complaint clearly alleges that the voter-population deviations under Plan S172 exceed constitutional limits under any available voter-based metric. *See infra* 18-19. Texas's criticism of CVAP is thus beyond the scope of this dispute. In a similar vein, Texas has objected to Plaintiffs' assertion that the Texas Legislature can harmonize total population and voter population on the ground that it "ignores numerous other, valid considerations that must be made when Texas redraws legislative districts," Mot. at 8 n.5. But how voter equality is balanced against other valid considerations is an issue for the Texas Legislature to resolve as it has not yet considered the issue.

Rights Act, "[state] legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent." *Id.*; *see also City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 77-78 (1980).

Similarly, if *Chen* and *Daly* were correct that a State's choice of a population base is not subject to judicial review, the Texas Legislature could, for example, limit the relevant population to property owners without running afoul of the one-person, one-vote principle. Such a rule would effectively overrule *Reynolds*. *See Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from the denial of certiorari) ("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."). Thus, were Texas now to dispute Plaintiffs' ability to pursue a judicial challenge to protect their right to an equally weighted vote, it would call these legal regimes into constitutional doubt. Texas therefore cannot obtain dismissal on the ground that it is up to the State to decide the extent to which it protects voters' rights to an equally weighted vote.

Second, *Chen*, *Daly*, and *Garza* are misguided to the extent that they rely on the supposed constitutional stature of "representational equality." No constitutional text and no decision from the Supreme Court has ever recognized "representational equality" as a constitutional principle. *Baker*, *Reynolds*, and every other one-person, one-vote claims have been brought by *voters* alleging a violation of a right to an equally weighted vote. *See supra* 6-9, 14-15. Moreover, *Burns* upheld, applying *Reynolds*, a redistricting plan that equalized voter population but contained deviations of 100% with respect to total population. 384 U.S. at 90-91 & n.18. That would have been intolerable if "representational equality" were a legitimate constitutional doctrine. If representational equality were a constitutional norm, even a non-voter would have standing to challenge a State's failure to accord it as a denial of "voting" rights—an inevitable

consequence of transforming a political principle into a constitutional command. Such an argument therefore provides no basis for dismissal here.

Third, even if *Chen* and *Daly* are premised on the principle that representational equality is an important—or even compelling—state interest, that interest must be subordinate to the constitutional right of voters to an equally weighted vote. *Reynolds* made that much clear when it determined that a State's interest in traditional geography-based districting principles must yield to voters' rights. 377 U.S. at 579-81. Subsequent cases reinforced that principle by finding that while traditional districting principles could justify deviations up to 10%, a compelling, narrowly tailored government interest would be required to justify deviations between 10% and approximately 16.4%. *See infra* 19. Texas therefore cannot obtain dismissal on the ground that it is entitled to allow an interest in representational equality or another governmental interest to supersede Plaintiffs' right to an equally weighted vote.

Finally, *Chen*, *Daly*, and *Garza*—echoed by Texas here—read too much into the fact that the Supreme Court has traditionally looked to total population to determine whether a plaintiff has adequately alleged a one-person, one-vote violation. As Judge Kozinski cogently explained, population equalization frequently may be an available means of ensuring equally weighted voting. *Garza*, 918 F.2d at 781. But the means should not be confused with the end. Rather, the use of total population in redistricting has always been understood as one *means* of effectively protecting electors from having their votes diluted in the districting process. *Reynolds*, 377 U.S. at 579 ("[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.") (emphasis added); *Connor*, 421 U.S. at 416 ("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). *Gaffney*, on which Texas relies, is not to the contrary. There was no challenge in *Gaffney* to Connecticut's plan based on voter inequality; as such, there was no reason to reach the issue. The Court nevertheless highlighted that "total 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." *Gaffney*, 412 U.S. at 746. If anything, *Gaffney* supports *Plaintiffs'* position. Texas therefore cannot insulate Plan S172 from further review simply because it decided to use total population as its apportionment base.

In sum, none of Texas's arguments provides a sufficient basis for finding that Texas was entitled to redistrict the Texas Senate based only on total population figures when the result would defeat Plaintiffs' right to an equally weighted vote.

B. Plaintiffs Have Alleged Facts Sufficient To Establish That Plan S172 Violates Their Right To An Equally Weighted Vote.

Texas's own data disclose that the votes of certain Texas voters are worth approximately one and one-half times the weight of Plaintiffs' votes. Compl. ¶¶ 29-31. The deviation between the voter population of District 1 to the lowest-populated district, as compared to the ideal district, is anywhere from 40.08% to 49.23% under the various available metrics for calculating voter population. Compl. ¶ 29. The deviation between the voter population of District 4 to the lowest-populated district, as compared to the ideal district is anywhere from 30.81% to 42.22% based on those same figures. Compl. ¶ 30. Texas's data further disclose that the total plan deviation of Plan S172 is anywhere from 45.95% to 55.06% under the various metrics for calculating voter population. Compl. ¶ 27. These facts must be taken as established for purposes of deciding the present motion.

Under the Supreme Court's settled framework for adjudicating one-person, one-vote challenges, the "State must make an honest and good-faith effort to construct its districts as nearly of equal population as is practicable." *Gaffney*, 412 U.S. at 743. Nevertheless, the Court has recognized "that absolute equality [is] a 'practical impossibility,'" *id.* (citation omitted), and that the States can deviate from the ideal of absolute equality to achieve certain permissible redistricting goals. Therefore, the Court has developed "guidelines … for determining compliance with the basic goal of one person, one vote." *Chapman*, 420 U.S. at 22. Those guidelines provide that a plan with a maximum population deviation under 10% generally qualifies as a "minor deviation[ ]."[7] *Brown*, 462 U.S. at 842. Relevant here, a total plan deviation of 10% or more is *prima facie* evidence of a one-person, one-vote violation that triggers strict scrutiny under which the government must establish: (1) a compelling interest justifying the population deviation; and (2) that the apportionment plan is narrowly tailored to pursue that interest. *See Brown*, 462 U.S. at 852; *Mahan*, 410 U.S. at 329; *Gaffney*, 412 U.S. at 750-51. A large enough population deviation—approximately 16.4% or greater—can be *per se* unconstitutional. *See Mahan*, 410 U.S. at 329. This framework has applied in cases analyzing plans created using voter population, *see, e.g.*, *Burns*, 384 U.S. at 90-92, as well as plans created using total population. Deviations of the magnitude pleaded here are clearly outside the outer boundary of discretion permitted to further any State interests, no matter how compelling. *See Mahan*, 410 U.S. at 329.

Even if—contrary to precedent and constitutional principle—the State were permitted an unlimited departure from precise equality to further some compelling interest, the State bears the

[7] Nevertheless, the State must have a legitimate basis for *any* departure from mathematical equality. *See, e.g., Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004).

burden of establishing that interest. The State cannot satisfy that burden at the motion to dismiss stage. *See Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009) ("Rule 12(b)(6), besides some minor exceptions, does not permit courts to consider evidence extrinsic to the pleadings.") (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *see, e.g., Khatib v. County of Orange*, 639 F.3d 898, 905-06 (9th Cir. 2011). That is particularly true here, as the Complaint alleges that the Texas Legislature labored under the mistaken legal impression that the Fourteenth Amendment required it to ignore voter population and focus exclusively on total population, Compl. ¶¶ 20-21, and therefore did not "make a good-faith effort" to apportion Senate districts with roughly equal numbers of voters. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). Moreover, even if Texas considered "representational equality" to be a State interest of the highest order, the Complaint pleads facts making plausible that the State could have satisfied that interest *and* protected the right of Texas voters to an equally weighted vote. *See* Compl. Ex. A (Declaration of Peter A. Morrison, Ph.D. ¶¶ 9, 11).

Accordingly, because the right to an equally weighted vote is a right that is cognizable and subject to judicial protection, and because the Supreme Court's existing framework for resolving one-person, one-vote claims applies in full here, the facts set forth in Plaintiffs' complaint adequately allege at least a *prima facie*, if not conclusive, violation of Plaintiffs' Fourteenth Amendment rights.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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