No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIALCAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF AMICUS CURIAE OF TENNESSEE STATE LEGISLATORS AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF APPELLANTS

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STATEMENT OF AMICI CURIAE

This amicus brief is submitted by legislators from the State of Tennessee and by the Judicial Education Project in support of the Evenwel Appellants.[1] Amici write separately to explain why exclusive reliance on population for reapportionment can unfairly, unreasonably, and unconstitutionally dilute rural votes.

Amici Tennessee Senators and Representatives represent districts as follows:

Lieutenant Governor Ronald Ramsey represents the 4th District, covering Johnson County, which contains the town of Johnson City; Sullivan County, which contains the towns of Bristol and Kingsport; and part of the lightly-populated county of Carter.

Senator Mark Norris, the Senate Majority Leader, represents the 32nd District, which includes Tipton County, a rural county, and a more lightly-populated, suburban area of Shelby County.

Senator Paul Bailey represents the 15th District, which covers the rural counties of

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Communications reflecting such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to the brief's preparation or submission.

Cumberland, Jackson, Overton, Bledsoe, Putnam, and White.

Senator Mae Beavers represents the 17th District, which covers the lightly-populated counties of Cannon, Clay, DeKalb, Macon, and Smith; and Wilson County, which contains the town of Lebanon.

Senator Janice Bowling represents the 16th District, which covers the rural counties of Coffee, Franklin, Grundy, Marion, Sequatchie, Van Buren and Warren.

Senator Mark Green represents the 22nd District, which covers the lightly-populated counties of Houston and Stewart; and Montgomery County, which contains the small city of Clarksville.

Senator Delores Gresham represents the 26th District, which covers the lightly-populated counties of Chester, Decatur, Fayette, Hardeman, Hardin, Haywood, Henderson, and McNairy.

Senator Ferrell Haile represents the 18th District, which covers the lightly-populated county of Trousdale; Sumner County, a rapidly growing county, containing the towns of Gallatin and Hendersonville; and a more-lightly populated, suburban area of Davidson County (Metropolitan Nashville).

Senator Ed Jackson represents the 30th District, which includes the rural counties of Crockett, Lake, Dyer, and Lauderdale; and Madison County, which includes the small city of Jackson.

Senator Bill Ketron represents the 13th District, which covers part of Rutherford County, a county that is rapidly increasing in population.

Senator Jim Tracy represents the 14th District, which covers the lightly-populated counties of Bedford, Lincoln, Marshall, and Moore; and a suburban portion of Rutherford County, which contains the small city of Murfreesboro.

Representative Glen Casada, the House Republican Caucus Chairperson, represents the 63rd District, which includes part of Williamson County.

Representative William Lamberth represents the 44th District, which includes part of Sumner County, a rapidly growing suburban and rural county containing the towns of Gallatin and Hendersonville.

Representative Ron Lollar represents the 99th District, which consists of the northeast portion, lightly populated, of Shelby County.

Representative Terri Lynn Weaver represents the 40th District, which includes the rural counties of Smith, Trousdale and part of DeKalb;, and Sumner County, a rapidly growing suburban and rural county.

Representative Ryan Williams represents the 42nd District, consisting of part of Putnam County, a less populated county that includes the town of Cookeville.

Maclin P. Davis, Jr., Esq. is a retired attorney from Nashville, Tennessee. As a young member of

the Tennessee House of Representatives in the early 1950s, he pressed the House Leadership, which was controlled by rural Democrats, to reapportion and redistrict the General Assembly, as required by the State Constitution. This had not been done since the turn of the 20th Century, resulting in rural districts' being substantially overrepresented. When Leadership refused, Mr. Davis played a substantial role in the Tennessee case of *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (Tenn. 1956), in which he was one of the counsel of record. When the Tennessee Supreme Court concluded that this was a political question and declined to grant relief, he was active in pursuing the federal court case that culminated in this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the seminal case standing for the principle of "one person, one vote," cited numerous times in *Reynolds v. Sims*, 377 U.S. 533 (1964), and in countless other cases. Mr. Davis, as a scholar on this subject, fervently believes that the principles of *Baker* and *Reynolds* must be upheld in this case.

The Judicial Education Project (JEP) is a national, non-profit educational institution dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited powers, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are

conducted through various outlets, including print, broadcast, and internet media. JEP has filed amicus briefs in numerous cases in this Court and in the federal courts of appeals, including this Court's 2013 case *Shelby County v. Holder*.

SUMMARY OF ARGUMENT

Fifty years ago, in a case arising out of Tennessee, this Court laid down the foundational principle of one-person, one-vote. Representative democracy required as much. State legislatures, this Court wrote, serve as the "fountainhead of representative government in this Country." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). For "[l]egislators represent people, not trees or acres." They "are elected by voters, not farms or cities or economic interests." *Id.*

This Court's earliest one-person, one-vote cases addressed the urban-rural imbalance created by urban migration and decades of inaction that served the status quo. Despite large population shifts from the rural to urban areas, legislatures ordinarily did nothing to reapportion voting districts. As a result, the votes of urban citizens were diluted. A series of cases from this Court changed all of that: Under one-person, one-vote, States were required to apportion districts based on population data. But as this case shows, relying exclusively on population data may give rise to its own gerrymandering concerns.

The urban-rural imbalance has now come full circle. Because many states, like Texas, rely exclusively on population data, rather than looking

to the number of eligible voters, in drawing district lines, it is now rural voters whose votes are particularly susceptible to dilution. The temptation for state legislators to maintain the status quo has hardly diminished in the last half century.

The district court's determination that the method of population apportionment is wholly unreviewable leaves officials with unfettered discretion to dilute the votes of some citizens based solely on geography. But this Court has been clear that where one lives is not a permissible basis for vote debasement. Indeed, apportioning in a manner that substantially overweights the votes of some and underweights the votes of others is as unconstitutional as not reapportioning at all.

ARGUMENT

Exclusive Reliance on Total Population to Apportion Districts May Unconstitutionally Dilute the Votes of Rural Citizens.

This Court's cases make clear that the one-person, one-vote rule protects eligible voters from vote dilution. The fundamental right to vote does not vary based on geography. Rather, the Equal Protection Clause ensures that "the vote of any citizen is approximately equal in weight to that of any other citizen in the State" regardless of where that citizen resides. *Reynolds*, 377 U.S. at 579. Thus, this Court has time and again held that a citizen's right to vote "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.

This principle is long-standing. In *Baker v. Carr*, this Court started from the premise that "[a] citizen's right to a vote free from arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution…." 369 U.S. at 208. In *Gray v. Sanders*, the Court explained that: "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." 372 U.S. 368, 379-80 (1963).

Indeed, the very foundation of our democracy is at stake. As the *Reynolds* Court put it: "Full and effective participation by all citizens in state government requires … that each citizen have an equally effective voice in the election of members of his state legislature." 377 U.S. at 565.

A. Early one-person, one-vote cases involved regional battles pitting underrepresented urban interests against rural interests.

It is nothing new for this Court's one-person, one-vote cases to address political power imbalances between regions of States. Historically, these power imbalances have seen rural state legislators concentrate political power by failing to reapportion and thereby diluting the votes of urban citizens.

In early cases, this Court held unconstitutional the voter dilution resulting from the prolonged failures to redraw districts. The States' refusal to redraw districts—for decades—gave power to rural interests that were quite happy to preserve the status quo. For years, the courts stayed out of the fight too. *See, e.g.*, *Colegrove v.*

Green, 328 U.S. 549 (1946). The results were unacceptable. As this Court observed, "Legislative inaction, coupled with the unavailability of any political or judicial remedy, had resulted in … a minority strangle hold on the State Legislature." *Reynolds*, 377 U.S. at 570.

In Tennessee, for example, by the 1950s, the Tennessee General Assembly had not reapportioned its districts since doing so after the 1900 census. That left Representatives and Senators from rural districts with undue power in the wake of the massive migrations to more urban districts during those 50 years. Rural legislators were determined to hold on to that power, and refused pleas from urban legislators to reapportion. Appeals pointing to the Tennessee Constitution, which requires decennial reapportionment and provides that the houses shall be apportioned based on qualified voters, fell on deaf ears.[2] A lawsuit was filed in state court, but the Tennessee Supreme Court's refused to grant relief in *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (Tenn. 1956).

Underrepresented voters then turned to the federal courts, initiating *Baker v. Carr*. The Plaintiffs in that case were from Davidson (Nashville), Hamilton (Chattanooga), Knox (Knoxville), Montgomery (Clarksville), and Shelby (Memphis) Counties.[3] They complained that the

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[2] TENN. CONST. Art. II, §§ 5 and 6 (1870).

[3] In 1950, Davidson, Hamilton, Knox, and Shelby Counties were the most populated in the State, and Montgomery County had more population than many others. *See*

continued application of the 1901 Apportionment Act, notwithstanding the growth of Tennessee's population and its changing distribution, violated the Equal Protection Clause of the Fourteenth Amendment. This Court held that the *Baker* Plaintiffs, with the support of the U.S. Department of Justice, had stated a justiciable claim and that they had standing to make it. 369 U.S. at 197-98.

More to the point, the *Baker* Plaintiffs lived in metropolitan areas and complained that the 1901 Apportionment Act favored the interests of smaller, rural counties. "[A] single vote in Moore County, Tennessee, [wa]s worth 19 votes in Hamilton County, that one vote in Stewart or Chester County [wa]s worth nearly eight times a single vote in Shelby or Knox County." 369 U.S. at 245 (Douglas, J., concurring); s*ee also* 369 U.S. at 253 (Clark, J., concurring)("[I]t appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House.").

Gray v. Sanders also involved a complaint of urban vote dilution. Fulton County (Atlanta) voters argued that rural interests were overrepresented in the vote-counting system used in primary elections for statewide offices. In response, Georgia claimed that its apportionment system was designed "to achieve a reasonable balance as between urban and rural electoral power." 372 U.S. at 370. In effect, however, it had the opposite result, diluting the votes cast in Atlanta and other urban areas. Faced

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http://www.census.gov/population/cencounts/tn190090.txt (last viewed August 3, 2015).

with this scenario, the Court asked, "How … can one person be given twice or ten times the voting power of 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. Its answer: "Once 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 … wherever their home may be in that geographical unit." *Id.* Because the stem operated on a statewide basis, voting power had to be equalized across the board.

In *Wesberry v. Sanders*, this Court addressed a vote dilution challenge to Georgia's congressional redistricting plan, which was then more than 30 years old. Underrepresented voters from the Fifth District, which included Atlanta and Fulton County, complained that, while the Fifth had a total population of 823,680, the average for the ten districts was 394,312, and the Ninth had only 272,154 people. 376 U.S. at 2. This Court found that "the 1931 Georgia apportionment grossly discriminates against voters in the Fifth Congressional District." *Id.* at 7.

Reynolds v. Sims was this Court's fourth urban vote dilution case in three years, and it signaled this Court's growing impatience with unequal apportionment and the importance it placed on one-person, one-vote. Plaintiffs from three of the largest Alabama counties and the fifth largest complained that the county-based system of allocating seats in the Alabama Legislature violated their constitutional rights by diluting the voting

rights of urban voters.[4] 377 U.S. at 541. This Court agreed: "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as invidious discriminations based on factors such as race." *Id.* at 566; *see also id.* at 563 ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."). Indeed, "[t]o say that a vote is worth more in one district than in another . . . run[s] counter to our fundamental ideas of democratic government." *Id.* at 563-64 (quotation omitted).

Fifty years later, the legacy of one-person, one-vote continues: It is still true that citizens' votes must not be diluted "merely because of where they happen to reside." *Reynolds*, 377 U.S. at 563. The early one-person, one-vote cases involved claims by urban voters that their votes were diluted by the weight given to rural interests. Today, because of apportionment plans like the Texas Senate Plan, it is rural voters whose fundamental rights are most in jeopardy.

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[4] In 1960, Jefferson County was the most populated county in Alabama, Mobile the second-most, and Etowah the sixth-most. *See* http://www.census.gov/population/cencounts/al190090.txt (last viewed August 3, 2015).

B. Exclusive reliance on total population to the exclusion of actual or potential voters can create the same problems that this Court confronted some 50 years ago.

1. The exclusive use of total population apportionment mandated by the Texas Senate Plan results in vote dilution.

Under Plan 172, the plan challenged here, the history of one-person, one-vote districting has come full circle: The votes of rural citizens are underweighted based solely on their place of residence. This the Constitution does not permit.

The Evenwel Appellants have shown that using total population as the basis for drawing Senate districts in Texas overpopulates some districts with voters and packs other districts with people ineligible to vote. They live in Senate districts in which the citizen voting age population, the total voter registration, and the non-suspense voter registration figures range from 173,161 to 215,567 people more than the least populated Senate district for SD 1 and between 148,030 and 175,836 people more than the least populated Senate district for SD 4. Br. of Appellants at 11-12. The effect is to dilute the votes of the Evenwel Appellants making one vote from the underpopulated districts worth between 1.54 and 1.84 votes in SD 1 and between 1.41 and 1.61 votes in SD 4. Br. of Appellants at 11-12.

These deviations—ranging from 30% to 50%, Br. of Appellants at 18—are well in excess of those

this Court has found acceptable. While "[m]athematical exactness or precision" is not required to satisfy one-person, one-vote standards for state legislative districts, *Reynolds*, 377 U.S. at 577, deviations approaching 20% are per se unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973).

This appeal, moreover, shows that the underpopulated districts are urban and the overpopulated districts are rural. Appellant Evenwel lives in Titus County in rural northeast Texas, and Appellant Pfenninger lives in Montgomery County north of Houston. *See* J. S. App. D, at 19a-20a, ¶¶ 6, 7. They allege that their districts are overpopulated in terms of citizen voting-age population, total voter registration, and non-suspense voter registration. *Id.* at 27a-30a. In contrast, the districts that are underpopulated with voters are largely urban or suburban, and three of the five most underpopulated are in Houston.

2. The exclusive use of total population apportionment has resulted in vote dilution in other places and for plans other than the Texas Senate Plan.

Vote dilution claims like those of the Evenwel Appellants can arise anywhere that eligible voters and non-eligible persons are not evenly distributed. One might reasonably assume that there are more non-eligible persons in urban areas than there are in rural areas simply because there are more people in urban areas. But the problem can be a local one involving county commissions or municipal districts, and legislators may be tempted to use more

sophisticated methods to underweight some votes intentionally, while intentionally overweighting others.

In *Chen v. City of Houston*, 206 F. 3d 502 (5th Cir. 2000), for example, the Fifth Circuit found that Houston districts overweighted some voters while underweighting others. "[U]sing CVAP figures," the Court wrote, "it is clear that several Houston districts fall outside the ten percent threshold established as a safe-harbor for population variance in municipal election districts." *Id.* at 522.

Similar claims were directed at the City of Irving, Texas. There, the difference between total population and voting age population in the city council districts was not uniform. *See* Pet. For Cert. at 9, *Lepak v. City of Irving*, No. 12-777. Instead, while the total population for District 1 was 31,642, its voting-age population was 20,930, and its citizen voting-age population was only 11,231. *Id.* In contrast, the most populated District, District 5, had a total population of 33,126, a voting-age population of 26,000, and a citizen voting age population of 19,673. *Id.* As a result, District 5 had a total population that was greater than that of District 1 by 1,484, but its voting-age population was 5,070 greater, and its citizen voting-age population was 8,442 larger.

In *Garza v. County of Los Angeles*, a low overall deviation of 0.68 nonetheless did not yield balanced county commission districts. *See* 918 F. 2d 763, 773 (9th Cir. 1990). As Judge Kozinski noted, in a separate opinion, "[T]he supervisor from District 1 can be elected on the basis of 353,826 votes …, while

the supervisor from District 3 requires at least 549,332 votes." *Id.* at 780 (Kozinski, J., concurring in part and dissenting in part). In other words, "a vote cast in District 1 counts for almost twice as much as a vote cast in District 3." *Id.*

In *Gray v. Sanders*, Georgia defended its use of a system that favored rural counties and voters in statewide primaries for state office, claiming that the system was designed "to achieve a reasonable balance as between urban and rural electoral power." 372 U.S. at 370. This Court quashed that notion, but Georgia returned to the well in its 2001 and 2002 legislative redistricting plans. A three-judge federal district court found that, even though the overall deviation in the House and Senate plans was less than 10%, the plans were an unconstitutional exercise of political gerrymandering. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd sub nom. Cox v. Larios*, 542 U.S. 947 (2004). The district court concluded that the plans implemented "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta." 300 F. Supp. 2d at 1327.

In short, the exclusive use of total population to apportion can result and has resulted in vote dilution in state, municipal, and county commission districts around the country. The district court's failure to look behind the veil of total population apportionment leaves entirely unchecked official attempts to gerrymander elections. Of course, the urge to protect regional districts in redistricting has not disappeared in the last fifty years. As a result,

"[o]ne must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'" *Reynolds*, 377 U.S. at 563 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

3. The exclusive use of total population apportionment may result in vote dilution in Tennessee.

Tennessee took *Baker's* mandate and the principle of one-person, one-vote to heart. The General Assembly and the state courts have conscientiously applied these rules. *See*, *e.g.*, *State v. Crowell*, 631 S.W.2d 702 (Tenn. 1982). Tennessee amici believe that legislatures should be apportioned in a way that complies with this Court's precedents. If the district court's ruling in this case, and others like it, are allowed to stand, Tennessee's rural voters could find themselves just as underrepresented as the State's urban voters were before *Baker*. All that would take would be for drafters inclined toward regional gerrymandering to pack favored districts with non-eligible persons.

In a State like Tennessee, amici believe that the use of total population has thus far produced a legislature that accommodates both rural and urban interests. However, they fear that, if the use of total population is not subject to some constraint, future legislative plans can be tilted toward urban areas through the artful use of non-eligible persons. The effect would be to favor urban interests or rural. *Cf.* Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. of Pol. Sci. 388 (1988) (identifying "one of the biggest policy stories of the

past two decades" as "the continuing reallocation of federal policy benefits from rural to nonrural Americans" and finding it attributable "in part" to court-ordered congressional redistricting). Neither the Tennessee Legislature nor any other representative body should be permitted to restrict itself to using only total population figures in apportioning districts, particularly when the deviations are as large as those in the Texas Senate Plan.

* * *

This case offers this Court the opportunity to refine its one-person, one-vote jurisprudence to clarify that rural vote dilution is no more acceptable than urban vote dilution. *Reynolds v. Sims* explained that "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm." 377 U.S. at 568. It is time for the Court to provide reasonable population parameters to ensure that this is so.

CONCLUSION

This Court should reverse the judgment of the U.S. District Court for the Western District of Texas and remand the case for further proceedings on the merits.

Respectfully submitted,

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