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IN THE SUPREME COURT OF THE UNITED STATES

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SUE EVENWEL, ET AL., :

Appellants : No. 14-940

v. :

GREG ABBOTT, GOVERNOR OF :

TEXAS, ET AL. :

- - - - - x

Washington, D.C.

Tuesday, December 8, 2015

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:08 a.m.

APPEARANCES:

WILLIAM S. CONSOVOY, ESQ., Arlington, Va.; on behalf
of Appellants.

SCOTT A. KELLER, ESQ., Solicitor General, Austin, Tex.;

on behalf of Appellees.

IAN H. GERSHENGORN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for United
States, as amicus curiae, supporting Appellees.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 14-940, Evenwel v. Abbott.

Mr. Consovoy.

ORAL ARGUMENT OF WILLIAM S. CONSOVOY

ON BEHALF OF THE APPELLANTS

MR. CONSOVOY: Mr. Chief Justice, and may it please the Court:

This appeal presents a fundamental question. That question is whether the one-person, one-vote rule affords eligible voters any reasonable protection. We submit that the answer must be yes under this Court's decisions, and as a consequence, Appellants have stated a claim under the the Equal Protection Clause.

The districts at issue here, District 1 and District 4, have deviations as measured by eligible voters approaching 50 percent under any metric available to voters elected. No decision of this Court has ever sustained vote dilution of that magnitude under a one-person, one-vote case. Beginning with Gray, continuing to Wesberry, through Reynolds, and the Court's many decisions since then, the issue has always been vote dilution.

JUSTICE GINSBURG: What about the many times

1 the Court has said that the -- the principle is equal
2 representation of the population? And we have had now,
3 for half a century, population -- that the population is
4 the -- the legitimate standard. We have never held to
5 the contrary.

6 So we have the States overwhelmingly for
7 half a century using population as shown in the census,
8 and now you're saying they can't do that anymore.

9 MR. CONSOVOY: I can answer the question
10 in -- in three different ways.

11 First, with respect to the phrase "equal
12 representation for equal numbers of people." That
13 sentence originated in Wesberry. But that's only half
14 the sentence. There's a dash, and it continues:
15 "Therefore, for us to hold that within the States
16 legislatures may draw the lines of congressional
17 districts in such a way as to give some voters a greater
18 voice in choosing a congressman than others would be
19 unconstitutional."

20 And in fact, in every time the Court uses
21 that phrase, which is the only one, I believe, my
22 friends rely on, it is either within the same sentence
23 or bracketed on one side or the other by protection of
24 voters.

25 Now, as to tradition, to -- actually, to the

1 word "population," we don't -- we -- we see that as
2 asking the question, not answering it. Burns explains
3 that Reynolds used population without distinguishing.
4 Burns itself reserved on the question. Hadley confirms
5 that Burns reserved on it. And here we are today.

6 JUSTICE GINSBURG: I thought -- I thought
7 Burns said it approved a deviation from population but
8 it took great pains to say, we're not saying you could
9 do that in every case. Burns seems to be the only --
10 the only case that you have, and Burns involved this
11 really peculiar situation of Hawaii with a tremendous
12 military temporary population.

13 MR. CONSOVOY: I -- I read Burns as
14 reserving on it completely, to not choose one way or the
15 other. It certainly did say that you do not have to use
16 the -- the census to draw districts. That supports our
17 position. It certainly says that you can protect
18 eligible voters. That supports our position.

19 And -- and further back to Your Honor's
20 question about tradition, if tradition were the rule,
21 Baker would have come out the other way. Before Baker,
22 for centuries, geography was the basis. And the Court
23 said in Baker, as a matter of jurisdiction, and then in
24 Reynolds as a matter of -- of equal protection law, that
25 tradition doesn't trump the individual rights of a voter

1 to be protected.

2 And we don't have to guess about that
3 because we know from standing. In all of those cases,
4 standing was predicated on the right of the voter.

5 It would be unusual if someone who couldn't
6 vote came to this Court and says -- said my one -- a
7 child, for instance -- my one-person, one-vote rights
8 have been violated.

9 JUSTICE SOTOMAYOR: The problem is that --
10 what you're forgetting is the dual interest. There is a
11 voting interest, but there is also a representation
12 interest, and it's that which has led us to -- to accept
13 the total population base because States have to have
14 some discretion to figure out who should be having the
15 representational voice.

16 Burns made it very clear that we were
17 deferring to the State because it had a legitimate
18 reason for its need.

19 And -- but Burns was in the 1960s, when we
20 picked total population as a perfectly legitimate way
21 because there's a representational need at issue as
22 well. Not just voting. A State has to be able to
23 say -- I think just as the Federal government did --
24 we're -- the legislature is protecting not just voters;
25 it's protecting its citizens -- or noncitizens. The

1 people who live there.

2 MR. CONSOVOY: So if I can just clarify:
3 It's not really a representational interest that's being
4 claimed on the other side. They -- a non-voter will
5 be -- there's 31 senate districts in Texas. A non-voter
6 will have one representative under our rule, and they
7 will have their one representative under theirs. It's
8 an access claim that's being made. That's what the
9 Garza opinion from the Ninth Circuit said.

10 And it's not even really an access claim.
11 It's a diminishing access claim. That's how far from
12 voting the interest on the other side goes. It is that,
13 if we have districts that are overpopulated with
14 non-voters, we will have diminishing access to our
15 representative.

16 We don't deny that access is an interest,
17 along with county lines, along with other interests that
18 the State can take into consideration, and the
19 10 percent framework allows for that. This is not a
20 situation where we are here complaining about a
21 deviation of 15 percent or 10.1 percent. We're
22 complaining about a deviation of nearly 50 percent. No
23 interest such as diminishing access could ever overcome
24 the individual right of a voter to an equal vote.

25 And if you --

1 JUSTICE KAGAN: Mr. Consovoy, of course it's
2 true that when we apportion House members, we use total
3 population as the metric. And the question that's
4 raised by your position is why it would be the case that
5 the Constitution requires something with respect to one
6 apportionment that it prohibits with respect to another.

7 MR. CONSOVOY: Apportionment and intrastate
8 districting are fundamentally different concerns.
9 Apportionment at the time of Article I's framing was
10 focused on taxation issues, on giving States autonomy
11 with respect to voter qualifications. And there was a
12 real concern. That's why it was a -- the great
13 compromise.

14 What the Court held in Reynolds, as a matter
15 of equal protection, is that that compromise does not
16 justify this kind of injury.

17 And we don't have to guess about this
18 either. In -- in Reynolds Alabama came to the Court and
19 said, "semi" we surrender. How about a plan that
20 mirrors the House precisely? Every county gets one
21 representative, and the rest is done on a population
22 basis. Not only on a population basis. The precise
23 formula used for the House of Representatives. Reynolds
24 said no.

25 JUSTICE SOTOMAYOR: What's interesting is in

1 Reynolds is the reason they caved was because,
2 constitutionally, the Arizona Constitution required
3 total population. It's that fact that they deviated
4 from their own Constitution that led them to court. So
5 it wasn't a caving compelled by Federal law. It was
6 mostly a casing compelled by State law.

7 MR. CONSOVOY: Well, the -- not that this
8 Court found the case, because it wouldn't -- couldn't be
9 before this Court on a State law ground. It could only
10 be before this Court --

11 JUSTICE SOTOMAYOR: No. But what I'm saying
12 is that we -- we acceded on the ground that using total
13 populations was permissible.

14 MR. CONSOVOY: There's no doubt that
15 Reynolds thought, in that case, total population. The
16 Court in Reynolds thought it was permissible.

17 Of course, Baker, the Tennessee constitution
18 apportioned unqualified voters, and there was no
19 suggestion in Baker that that was an additional problem
20 with the Tennessee constitution.

21 But the fundamental issue has always been
22 the individual right. And I think Gray is the best case
23 to show that.

24 Gray is about election for statewide
25 offices, so it can't be a representational issue.

1 There's going to be one governor. That governor is --
2 everyone is going to have the same access to that
3 governor or not. There are no districts.

4 And yet Gray is the case that establishes
5 this rule. Gray is the case that says, voters are
6 entitled to an equal vote. You can't marry up the
7 representational interest that's asserted on the other
8 side with Gray. It doesn't -- it doesn't make any
9 sense.

10 We also know from -- with respect to
11 congressional districting, as late as 1969, in
12 Kirkpatrick, the Court assumed, for purposes in that
13 case, that Missouri could district at the congressional
14 level on the basis of eligible voters. So I don't think
15 it would be fair to say that this issue has somehow been
16 clouded or decided by uses of the words "population" or
17 using the census in prior cases.

18 JUSTICE KAGAN: I'm -- I'm sorry. Did I
19 just understand you to say that you think that the --
20 the House apportionment rule is not clear?

21 MR. CONSOVOY: No. The -- that
22 congressional districting intrastate at the State level
23 as opposed to the State level.

24 So if -- if 1969 Kirkpatrick v. Chrysler
25 says -- because the United States has argued that not

1 only is apportionment required at the Federal level but
2 intrastate congressional districting. And my point --
3 they -- and they rely solely on Westbrooke for that --
4 excuse me -- Wesberry for that proposition.

5 My point is in 1969 the Court flatly
6 rejected Wesberry as having decided that issue. There
7 is no decision of the Court that resolves this question.
8 It is -- it is completely open.

9 And the only way to make sense of the
10 one-person, one-vote rule is to make it about eligible
11 voters. They are the ones who have standing. They are
12 the ones who can bring a claim. They are the ones who
13 are injured. And not only is that our view and the case
14 law's view, that was -- that was Congress's view.

15 JUSTICE GINSBURG: Is it your view that what
16 the Fourteenth Amendment means is that in all the years
17 between -- what was it? -- 1868 and 1920, it was wrong
18 for the States to include, for these purposes, women?
19 They were not eligible voters.

20 MR. CONSOVOY: Any -- there is no question
21 that was a problem. It was an -- it was an issue in the
22 '60s with minorities as well who were -- who were
23 disenfranchised. The -- the Court in Reynolds at the
24 time was doing more than one thing at once.

25 JUSTICE GINSBURG: But you're saying that

1 that was wrong. I mean, in your interpretation of the
2 Fourteenth Amendment from 1869 till 1920, the State
3 should not have been counting women for -- for purposes
4 of determining representation in the State legislature.

5 MR. CONSOVOY: For purposes of the -- of the
6 Equal Protection Clause, the one-person, one-vote rule
7 protects voters. If disenfranchisement of women or
8 minorities is an issue, those cases could have been
9 brought. Eventually, that issue was resolved by this
10 country, as was minority representation.

11 But the Warren court in Reynolds was
12 accomplishing several things. And equal weight for
13 voters has to matter. A noncitizen or any other
14 disenfranchised person would not have the ability to
15 bring a one-person, one-vote claim.

16 JUSTICE BREYER: Yes, but here we have -- I
17 want to go back to Justice Kagan's question. And this
18 is something that -- it seems everyone is arguing this
19 is as if this is an equal protection problem. And
20 certainly, the -- Reynolds v. Sims does deal with equal
21 protection. And it did deal with instances in which
22 voters and everything else were malapportioned. So I
23 don't think the court really considered this.

24 But if you step back from the Equal
25 Protection Clause and say there are other parts of the

1 Constitution that, in fact, are relevant here -- maybe
2 it's the Republican Form of Government Clause. But the
3 words that Justice Kagan read are words about what kind
4 of democracy people wanted. And those words say if you
5 look to other parts of the Constitution, such as those,
6 or Republican Form of Government, that what we actually
7 want is the kind of democracy where people, whether they
8 choose to vote or whether they don't choose to vote, are
9 going to receive a proportionate representation in
10 Congress.

11 And if you take that as a constitutional
12 principle, that shows an objective of some of the
13 clauses of the Constitution. Then you have to retreat
14 from the idea that the Equal Protection Clause, as
15 interpreted in Reynolds v. Sims, solves this case. And
16 indeed, it argues against you.

17 MR. CONSOVOY: So two answers.

18 One is to argue that this is justiciable on
19 the other side as a Guarantee Clause claim, I think
20 shows just how far the logic has to go to come up with
21 something on the other side of the ledger here. This
22 Court has never -- in fact, in Baker, the Court rejected
23 the Guarantee Clause as a basis for hearing these cases.
24 To turn around now, and turn 180 degrees, so that a -- a
25 somewhat abstract Guarantee Clause claim, that --

1 JUSTICE KAGAN: Well, Mr. Consovoy --

2 JUSTICE BREYER: I'm not making it. I'm
3 making -- I'm pointing at her -- she didn't quote the
4 Guarantee Clause. Maybe I shouldn't have thrown that
5 in. But it's the same point.

6 MR. CONSOVOY: If I could -- but Reynolds, I
7 think, does speak to this, because that exact theory
8 would be the one that would have sustained the model
9 that Alabama brought to the Court, that -- that followed
10 the House of Representatives, which does take account of
11 these issues.

12 And even if, Justice Breyer, even if you're
13 correct, that theory is correct, that doesn't solve this
14 case. We have alleged in our complaint that Texas could
15 have done much more to -- to manage both
16 representational equality, as it's called, and voting
17 equality to get both within 20 percent. To say that we
18 have not --

19 JUSTICE SOTOMAYOR: You had an expert say
20 it, but you didn't have an expert prove it. He did not
21 come in with a map that did that.

22 MR. CONSOVOY: We did not come in with a
23 map.

24 One, we're still at the motion-to-dismiss
25 stage in this case, so our allegation, which is at

1 paragraph 22 of the complaint, has to be taken as true.

2 But second, the reason we didn't come to a
3 map is fundamental here as well. We don't want the
4 Court or ourselves to write this map for Texas. We want
5 the Texas legislature to do its job.

6 Texas, by State law, was precluded from
7 taking voter equality --

8 JUSTICE SOTOMAYOR: How is -- does practical
9 possibility play into this discussion at all? I mean,
10 the ACS, which you posit is the way that you can find
11 who the eligible voters are, has been -- has been -- I
12 think almost decisively been proven as being inadequate.
13 It only measures cities with populations or places with
14 populations over 65,000. Just on that ground alone,
15 there are going to be districts that can't rely on it.

16 MR. CONSOVOY: I -- I think -- sorry.

17 JUSTICE SOTOMAYOR: It's flawed on many
18 levels. We could -- take my assumption. It's flawed.

19 Does that practicality have any play in our
20 decision?

21 MR. CONSOVOY: I will take the assumption
22 and then I will try to argue again against it, if you --
23 you'll allow me.

24 But practicality, if the Court were to hold
25 that -- two different questions. As the Court explained

1 in Tennant just recently, it's our burden to bring in
2 evidence showing that total population census didn't
3 protect individual rights.

4 We believe -- at this stage, we have alleged
5 it, so it has to be taken as true. If we can't prove
6 it, then we have failed to meet our burden.

7 It would be a different question if the
8 Court held yes, the evidence you brought in is
9 sufficient to show that your rights have been violated
10 through the ACS data, but not sufficient to draw a new
11 map. Then I think the Court is in a very unusual place,
12 where I think the answer is we're back to Baker, which
13 would then become -- that would be the argument of the
14 dissent in Baker, which is you have a violation but no
15 judicially manageable way to solve it, so now we're back
16 to political question.

17 But if I could get back to the fundamental
18 premise, which is the ACS data, the ACS data -- I think
19 Your Honor was talking about the 1-year ACS data, but
20 States for redistricting used the 5-year ACS data. That
21 matters -- measures populations going down less than
22 3,000 people. The only group it doesn't have is
23 individual block group data, and that data is rarely
24 used for districting that we're talking about here.

25 Moreover, we know the ACS data is good

1 because it's used in Section 2 every day, and not just
2 for a vague and general purpose. Under Strickland,
3 under Bartlett against Strickland, to bring a successful
4 Section 2 claim, you have to show that you have a
5 majority of the citizen voting-age population in your
6 district to -- to get through the first factor for
7 Section 2.

8 That means if there's 50.1 percent minority
9 eligible voters in your district, you can proceed; if
10 it's 49.9 percent, you cannot. This data is used to
11 determine that question.

12 If it can do that in every circuit court in
13 the country -- and in this Court's opinions in LULAC and
14 Strickland supported using this data for that purpose --
15 if it can do that, it can bring a deviation of
16 47 percent to somewhere between 10 and 20.

17 And I don't want to leave this abstract. If
18 you look at the Supplemental Appendix, the data is
19 actually in there. If you turn to page 5 of the
20 Supplemental Appendix, there is a column called "CVAP"
21 and it lists all of the CVAP numbers for every Texas
22 Senate district. I would point out that Texas asked for
23 these numbers to draw this map. They used CVAP to draw
24 this map.

25 If you pull those numbers and look at

1 District 1, it has 557,000 people. Right next to that
2 is the plus or minus with numbers. It says 6,784.
3 That's the margin of error. That's the margin of error
4 for CVAP data.

5 So if you took all of those margins of error
6 and used them against our position at every turn -- so
7 for under-populated district, assume up; for
8 overpopulated district, assume down -- assume it at
9 every turn against us, and you ran the numbers, it would
10 move the deviation from 47 percent to 45 percent.

11 This is not an issue about margin of error,
12 about data. This is not an issue about the availability
13 of data. This data is used if -- by every demographer
14 to draw statewide districts at every turn.

15 JUSTICE KAGAN: Mr. Consovoy, could I go
16 back to the question that Justice Breyer raised and
17 can -- stripped, if he'll permit me, of the Guarantee
18 Clause, because the Fourteenth Amendment is actually
19 quite -- you know, the framers of the Fourteenth
20 Amendment explicitly considered this issue, and, you
21 know, made a decision.

22 So Senator Howard, who introduces the
23 Amendment on behalf of the joint committee that drafts
24 it, talks about these deliberations. And he says the
25 committee adopted numbers as the most just and

1 satisfactory basis, and that's the principle upon which
2 the Constitution itself was originally framed, referring
3 back to the original drafting. And then he says
4 numbers, not voters; numbers, not property; this is the
5 theory of the Constitution.

6 Now, this is the theory of the Constitution
7 as to one thing, which is not the thing that you are
8 talking about. This is the theory of the Constitution
9 as to House apportionment.

10 But again, I'll go back to this question.
11 This is just a clear, explicit choice that was made
12 about what it meant to -- to have equal representation
13 with respect to that area. And how you go from that
14 being mandated to it being prohibited in the State
15 context is something that I still can't quite work
16 myself around.

17 MR. CONSOVOY: Justice Harlan agreed with
18 you. He did.

19 JUSTICE KAGAN: That's a good person to be
20 on the side of.

21 MR. CONSOVOY: Yes.

22 (Laughter.)

23 MR. CONSOVOY: But his -- his position was
24 rejected 8-1 in Reynolds. Because that exact argument
25 was brought forth by Alabama. They presented a plan

1 that was not only somewhat generally modeled on an
2 apportionment standard, it mirrored it exactly. So I
3 think there are reasons why that's not correct as a --
4 just a legal matter, because apportionment was concerned
5 with many other things. They wanted the States to have
6 taxation basis. They wanted -- there was an issue with
7 suffrage, for sure. There was an issue with voter
8 qualifications. It was a complex, Federalism-based,
9 sovereignty comprise that does not apply within a State.

10 I can't do any better, I apologize, than say
11 Reynolds --

12 JUSTICE KAGAN: I hear you as to that it
13 does not apply. I mean, I guess I can -- I can
14 understand. I might not agree with, but I can
15 understand the position that says that the requirement
16 might not apply. But you are suggesting that we go
17 beyond that, and to say, not only does the requirement
18 not apply, but that States have to do it the exact
19 opposite way.

20 MR. CONSOVOY: So, two answers.

21 We take our cue on that from the right that
22 is supposed to be protected. It all follows from the
23 right, and it starts with voting. We start with the
24 proposition that one person can't be given two votes
25 while their neighbor be given one vote, and from there

1 the Court moved in Gray to say, well, you can't do it by
2 calling it weighting under some sort of electoral
3 college model. That's the same thing.

4 Then the third step was you can't accomplish
5 that same invidious voter discrimination by drawing
6 lines. Now if you accept all of that as true, that I
7 can't be given five votes and my neighbor be given one,
8 then even if it follows from the apportionment model and
9 you -- and you defend it on that basis, if it causes
10 that injury, I have a claim. And to say that I don't
11 have a claim because a different constitutional
12 provision protects a different right in a different way,
13 I -- we find, you know, not a satisfactory response
14 beyond which Reynolds itself rejects -- rejects the
15 argument.

16 And turning back to Section 2 for a moment,
17 Congress agreed with our position. Congress relied on
18 Reynolds being a vote-dilution case to enact Section 5,
19 not only in the Senate report that's been so widely used
20 in those cases, but in this Court's opinions as well, in
21 Perkins and in later cases. The Court has held that --
22 and -- and in Bolden, both the plurality and
23 Justice Marshall's dissent, said Reynolds is about vote
24 dilution.

25 And Section 2 -- the same argument could be

1 made, Justice Kagan, about Section 2. Section 2 only
2 counts eligible voters. No one argues that we're
3 discriminating against non-voters by not taking them
4 into consideration. If the Court were to proceed with
5 that kind of representational model, we would have one
6 rule that minorities get the -- excuse me -- the benefit
7 of under Section 2, and no protection for people who are
8 not minority status under one-person, one-vote. There
9 is a -- there is a real fundamental disconnect there.

10 JUSTICE GINSBURG: In -- in your view, the
11 States would have a choice between the citizen
12 voting-age population or they could use the registered
13 voters? Either one would be okay?

14 MR. CONSOVOY: Well, we start with the
15 proposition that Burns said. It's not the method by
16 which you distribute legislators that count. It's the
17 distribution of legislators that count.

18 Therefore, as Burns explains, the State can
19 truly use any metric that adequately and fairly
20 distributes legislators. We think registered voters is
21 not ordinarily going to be the right one for two
22 reasons:

23 Gray says those who hold the one-person,
24 one-vote right are those who meet the basic
25 qualifications of voting. So there, registered voters

1 run into trouble.

2 And then Burns essentially doubles down on
3 that argument by saying it depends upon political
4 activity.

5 And where we're drawing lines at essentially
6 the beginning of the game, we shouldn't make the right
7 depend upon who ends up deciding to enter the fray and
8 choose to vote.

9 So we think the data that we principally
10 rely on, the -- the ACS measure of citizen voting-age
11 population is ordinarily going to be the fairest and
12 most accurate measure. But that's for the legislature
13 to decide when it -- when it reviews all this
14 information.

15 And the Texas legislature -- I think it's
16 important to keep in mind when they drew this map, they
17 did everything that we're asking to be done here. They
18 took all of this data -- the total census data, the
19 citizenship data, the registered voter data, the -- the
20 precinct data -- and they put it all into a computer.
21 And they drew their districts.

22 And they used our data to draw districts in
23 this map. They just used it to comply with Section 2
24 and when -- and then closed their eyes and didn't want
25 to look at -- to see what kind of deviations it caused

1 for one-person, one-vote.

2 All we're asking the legislature to do is
3 open its eyes.

4 JUSTICE SOTOMAYOR: Do you think they did
5 that invidiously? Did they do it purposely?

6 MR. CONSOVOY: Well, under one-person,
7 one-vote, a deviation over 10 percent, as the Court just
8 recently heard --

9 JUSTICE SOTOMAYOR: They knew that, and they
10 intentionally decided to have deviations greater than
11 10 percent? That's what you're saying?

12 MR. CONSOVOY: I don't think we can know --
13 we'll ever know because they were handcuffed by State
14 law. There was an attorney general interpretation from
15 1981 that precluded Texas from considering voter
16 eligibility. It -- so it's really arbitrary --

17 JUSTICE SOTOMAYOR: That goes both back to
18 my point that they decided that they wanted to make this
19 a representational matter. But do -- so they were
20 precluded -- intentionally decide to exclude it?

21 MR. CONSOVOY: No. Under the one-person,
22 one-vote rule, a deviation exceeding 10 percent, we
23 establish, as we -- we argue as a matter of eligible
24 voters, itself is prima facie evidence of invidious --

25 JUSTICE SOTOMAYOR: Well, we have -- we have

1 plenty of case law that says you can have deviations
2 greater than 10 percent -- Hawaii did -- if you have a
3 legitimate reason. And so why would -- the great
4 representational need that Justice Kagan was talking
5 about not be an adequate reason?

6 MR. CONSOVOY: We think it is a -- a reason
7 to go over 10 percent. That's -- we do not want the
8 perfect to be the enemy of the good on this issue. We
9 understand that things need latitude. We are asking for
10 nothing more than to bring them within the 10 to
11 20 percent range that the Court has always held.

12 JUSTICE SOTOMAYOR: You're -- you're now --
13 you're now saying 10 to 20 percent is okay instead of
14 10 percent when we use total population.

15 MR. CONSOVOY: The -- the Court has up --
16 held up the 16.5 percent, and -- and Mahan 20 percent as
17 the outer limit. We take our cues from those.

18 JUSTICE BREYER: Suppose Texas said here, we
19 want children to be represented? That's all. Children.
20 See, they're not voters. So suppose -- if we take
21 children out of it, what's the deviation?

22 MR. CONSOVOY: We haven't examined it. We
23 only examine on the basis of eligible voters. But
24 children are represented at the polls. They're
25 represented at the polls by their parents. If there are

1 parents here who have been disenfranchised, they were
2 disenfranchised by the State. States like California
3 and Texas and New York have --

4 JUSTICE SOTOMAYOR: Well, how about --

5 MR. CONSOVOY: -- have --

6 JUSTICE SOTOMAYOR: How about children who
7 are citizens when their parents are not, which is fairly
8 common in many areas?

9 MR. CONSOVOY: And -- and when -- when they
10 become eligible voters, they will move into this base.
11 They are not counted for Section 2, and don't -- haven't
12 heard any argument that Section 2 discriminates against
13 children.

14 If I might, Mr. Chairman, reserve the
15 balance.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 General Keller.

18 ORAL ARGUMENT OF SCOTT A. KELLER

19 ON BEHALF OF THE APPELLEES

20 MR. KELLER: Thank you, Mr. Chief Justice,
21 and may it please the Court:

22 The only question the Court has to resolve
23 here is whether the Equal Protection Clause requires
24 every State to change its current practice and use voter
25 population to reapportion. The answer is no.

1 Texas validly used Federal census data to
2 equalize total populations States have done for decades.
3 And the framers of the Equal Protection Clause accepted
4 total population as a permissible apportionment base in
5 Section 2 of the Fourteenth Amendment, as Justice Kagan
6 said earlier.

7 CHIEF JUSTICE ROBERTS: Well, why don't they
8 use that under Section 2, then?

9 MR. KELLER: In Section 2 of --

10 CHIEF JUSTICE ROBERTS: The Voting Rights.

11 MR. KELLER: The Voting Rights Act?

12 CHIEF JUSTICE ROBERTS: Yes.

13 MR. KELLER: Section 2 of the Voting Rights
14 Act for tax voters -- and our position, unlike the
15 United States's position, is that only voters are
16 protected under the Voting Rights Act. So in
17 considering whether there is an opportunity to elect a
18 candidate of one's choice, only voters would count for
19 that inquiry. Indeed I --

20 CHIEF JUSTICE ROBERTS: Well, it is -- it is
21 called the one-person, one-vote. That seems to be
22 designed to protect voters.

23 MR. KELLER: It does protect voters, but
24 there are multiple legitimate bases here on which a
25 State can redistrict. Electoral equality is one of

1 them. Representational equality is another.

2 And if I can back out, what we're dealing
3 with here is the general Equal Protection Clause's test
4 which -- it guards against invidious discrimination.
5 The Court has noted before a mere disparate impact does
6 not violate the Constitution. And so really the claim
7 that's being alleged here is one of invidious vote
8 dilution.

9 But Texas, by using total population, as
10 States have done for decades, and no State today uses
11 voter population, does not invidiously target groups to
12 cancel out their voting power or reduce their ability to
13 elect representatives of their choice.

14 Rather, what Texas was doing was making the
15 legitimate choice to use representational equality,
16 which, as this Court's cases have noted, is a legitimate
17 interest that the State can count for in redistricting.

18 What the State cannot do is submerge the
19 population principle. In other words, as Reynolds held,
20 we cannot base apportionment on geography. We have to
21 take account of population. And we have done that.

22 There is no allegation here that our
23 8.04 percent deviation of total population would not
24 satisfy the Court's one-person, one-vote doctrine unless
25 we are required to use voter population.

1 JUSTICE ALITO: There are at least two
2 arguments that could support your position. One is that
3 it's one-person, one-vote, and what counts is giving
4 each person an equal chance of affecting the outcome of
5 the election. But total population figures are a good
6 enough proxy for eligible voters. That's one possible
7 argument.

8 And that's -- that's what the census
9 measures, and that's close enough.

10 Another argument is that representational
11 equality is the real basis, and therefore that's why you
12 use population.

13 So which argument are you making?

14 MR. KELLER: I don't believe we're making
15 either of those arguments, Justice Alito.

16 Total population is not permissible because
17 it tracks voter population. At the same time, while the
18 Court doesn't have to reach this question,
19 representational equality is not the only basis on which
20 a State can redistrict.

21 It's our position that we could choose a
22 reliable measure of voting-eligible population without
23 running afoul of the Equal Protection Clause's
24 guaranteed against invidious discrimination.

25 JUSTICE ALITO: It seems to me that the two

1 interests are not always consistent. They can be in
2 great conflict.

3 You can have a situation if you -- if you
4 want to equalize population, you may have a situation
5 where you cause great inequality in the -- the chances
6 of any -- of voters affecting the outcome of the
7 election. On the other hand, if you choose eligible
8 voters only, then you may have a situation where every
9 person within two districts does not have an equal
10 representation defined in some way in the legislature.

11 I don't think you can just say, well,
12 it's -- you know, we serve both. What do you do when
13 they come into conflict?

14 MR. KELLER: I believe what this Court said
15 in Burns is you allow the States to choose the theory of
16 representation. And indeed, the decision to include or
17 exclude non-voters, Burns said, was left to the States,
18 because part of what this Court's doctrine has
19 recognized is States need leeway, and that this is a
20 core sovereign function. It is part of the dignity of
21 State sovereignty to be able to structure elections.

22 And when a -- when a State is choosing
23 either representation or equality, when the two are
24 intentioned, that's not an illegitimate basis upon which
25 to reapportion.

1 JUSTICE KENNEDY: Well, if the voter
2 population is a permissible basis under the
3 Constitution, I assume that's because there is -- is an
4 ethical, a good government, a liberty interest in
5 protecting these voters. That's a valid interest,
6 correct?

7 MR. KELLER: Correct.

8 JUSTICE KENNEDY: Well, if in a case like
9 this where there is a 45 percent deviation, something of
10 that order, then why isn't Texas required at that point
11 to recognize that these interests that are legitimate
12 under the Constitution, which are voter based, should
13 not be accommodated, and so that you should at least
14 give some consideration to this disparity that you have
15 among voters?

16 MR. KELLER: Well, first off, the court in
17 Gaffney upheld the use of total population while
18 recognizing that there could -- there was, in New York
19 at least, a different State, a 29 percent deviation in
20 voter population. Yet the court there said it was quite
21 sure that a prima facie case in invidious discrimination
22 had not been made out.

23 And so while a State can, and legitimately
24 does consider both representational equality and
25 electoral equality, the Equal Protection Clause's

1 general language doesn't mandate that either must take
2 precedence over the other.

3 So of course it would be legitimate for the
4 State to look at that data. At the same time, when we
5 have Federal census data, which is the most robust data
6 set available, it is not invidious for Texas to use that
7 enumeration rather than a different data set when it
8 reapportions. And all we have under the census data is
9 total population data.

10 JUSTICE BREYER: What we have -- and that's
11 why I think Justice Alito's question is important -- is
12 a table on page 9 of the Blue Brief.

13 Now, just looking at that table, by
14 inspection, I don't know whether the true -- whether
15 this is true or false. So I thought the major
16 difference between the two here is probably that some
17 areas of -- of the State -- there are a lot of people
18 who are working and they have children. I mean, it
19 can't all be explained on the basis of illegal
20 immigration or something. It just can't be, given those
21 numbers. I don't think so.

22 And if we accept the principle that it's
23 voter equality, we are saying that the family of two of
24 certain age that has eight children or whatever is
25 getting no representation for those other people or

1 human beings. And if we accept the opposite, we have to
2 put up with inequality of -- of power of voters. You
3 have to -- you have to say the one or the other. And
4 you could take your position it's up to the State.

5 But I mean, that seems to me to be what's
6 actually behind the numbers that he's -- that -- that
7 are being quoted, but I'm not sure. So I'd like your
8 reaction.

9 MR. KELLER: Sure. Justice Breyer, I
10 believe there's a difference between diminishing access
11 to representatives and actually having representation.
12 The United States has said that if Texas or another
13 State reapportioned on the basis of voter population,
14 that non-voters would be invisible to the system.
15 That's not right. They would still be represented.

16 The issue is does State -- does a State have
17 to have the same amount of constituents per
18 representative? And a State can do so. It's a
19 legitimate --

20 JUSTICE BREYER: That sounds an awful lot
21 what they had in 1750 or something, where the British
22 Parliament said, well, don't worry, America, you're
23 represented by the people in England because after all,
24 they represent everybody in the British Empire.

25 MR. KELLER: Which is --

1 JUSTICE BREYER: I mean, that people are
2 being represented through somebody else is a little --
3 possible, but tough.

4 MR. KELLER: Well, for instance, a child in
5 my congressional district would still be represented by
6 that member of Congress. So the issue is -- really is
7 diminishing access to the representative. And while
8 that's a legitimate basis for a State to reapportion
9 under, there is no Equal Protection principle that would
10 elevate that as a rule of constitutional law that would
11 say that the State of Texas invidiously discriminated.

12 JUSTICE KENNEDY: But why is one option
13 exclusive of the other? Why can't you have both? You
14 have population equality and voter equality, both,
15 especially when you have indicated that a voter-based
16 apportionment is -- is valid and serves important
17 purposes. And here it's being completely -- it's being
18 very substantially disregarded with this huge deviation.

19 Why can't you use both?

20 MR. KELLER: Well, first of all, there's
21 been no demonstrative plan that was submitted to the
22 Texas legislature, which has a notice-and-comment
23 procedure on this, or to the district court, that both
24 of these could have been equalized within 10 percent.
25 Indeed, their demographer didn't specify the extent of

1 the deviations. Their demographer simply said, well,
2 the deviations can be reduced.

3 If the Court were to try to go down the road
4 of requiring States to equalize within 10 percent of a
5 deviation, both total and voter population, States would
6 inevitably have to disregard many other traditional
7 redistricting factors, like compactness, continuity,
8 keeping communities together. And that would be the
9 opposite of what the Court has said that States have in
10 this context, which is the leeway to structure their
11 elections as part of the core function of their
12 sovereignty.

13 JUSTICE KENNEDY: That sounds highly
14 probable to me.

15 Has anything been written on this, or any
16 studies on this --

17 MR. KELLER: I -- I -- I don't --

18 JUSTICE KENNEDY: -- in -- in the context of
19 Texas.

20 MR. KELLER: I -- I -- I don't believe so.
21 We're not aware of any. And we're also not aware that
22 this would be practically feasible. Indeed, if they had
23 a plausible allegation that this was possible, we would
24 have expected to see a demonstrative map at this phase
25 in the litigation.

1 CHIEF JUSTICE ROBERTS: Do you have any idea
2 how often this is a problem? I mean, it is a case that,
3 of course, around the country, people use total
4 population. But it seems to me that there will be a lot
5 of areas where, in terms of the actual numbers, it's not
6 going to make a difference.

7 Do you have any idea?

8 MR. KELLER: I believe New York's amicus
9 brief suggests that in places such as California,
10 Alaska, possibly New York, certainly New York City, the
11 issue will absolutely come up. However, even --

12 CHIEF JUSTICE ROBERTS: But only in -- only
13 in those particular handful of --

14 MR. KELLER: A few more examples --

15 CHIEF JUSTICE ROBERTS: And I'm not
16 suggesting --

17 MR. KELLER: -- Delaware, Maryland.

18 By no means would this necessarily be a
19 problem anywhere. However, if there were a rule that a
20 State had to consider voter population, that would
21 change the nature of redistricting.

22 CHIEF JUSTICE ROBERTS: Well, what if it
23 were you had the same minor or de minimis deviation
24 allowed there? In other words, if you're within -- the
25 deviation between total population and voter population

1 was within -- under 10 percent, does that take care of
2 many of the areas where it's a problem?

3 MR. KELLER: Well, Mr. Chief Justice, for
4 the reasons I just suggested to Justice Kennedy, I
5 believe that would be quite an onerous burden and change
6 the nature of redistricting. Could there possibly be a
7 situation out there in which a plan might be able to get
8 within a 10 percent deviation of total population and a
9 10 percent deviation of the five-year rolling average
10 sampling in the American Community Survey? Maybe. I'm
11 not aware of any such scenario.

12 And to back out to first principles, I don't
13 believe that would be a test of invidious
14 discrimination. That would be moving much further in
15 the direction of a disparate, impact-like test that the
16 Court has never fashioned to determine whether someone's
17 voting power is being canceled out, or is fenced out of
18 the political process.

19 JUSTICE SOTOMAYOR: Could you explain why
20 the ACS -- your adversary says ACS is fine; it's used in
21 Section 2 and Section 5. Why would it be inappropriate
22 to use it in -- in deciding the impact on an equal
23 voting analysis?

24 MR. KELLER: Well, our position is that if
25 the ACS data is reliable enough to hold the State liable

1 under Section 2 of the Voting Rights Act, it would also
2 be reliable enough to use in apportionment.

3 Now there could be issues about the
4 granularity of the data. For instance, the five-year
5 averages. We do get at census-block level, which is
6 about five to 600 to 3,000 people.

7 The smaller you would get for district
8 levels, depending on if you were at a city plan as
9 opposed to our State Senate plan. There may be issues
10 where you couldn't use the data to get within the
11 10 percent-deviation.

12 But certainly in larger districts, like the
13 Texas State Senate plan, you could use the five-year
14 CVAP data, and you could do that to get within the
15 10 percent deviation. Of course, we're not
16 constitutionally compelled to, because as the Court
17 recognized in Burns, that is up to the States in
18 choosing a legitimate population basis.

19 If I could briefly address the
20 United States's argument on Section 2 of the Voting
21 Rights Act. We disagree on this point.

22 Section 2 of the Voting Rights Act does not
23 protect non-voters. And earlier when we discussed
24 Section 2, I'd like to return to that to cite to the
25 Court the Persily amicus brief of page 26, because I

1 think this cuts against the United States's theory on
2 Section 2.

3 Persily brief says, "If the minority group
4 has very low rates of citizenship, then the
5 redistricting plan is not to blame for their lack of
6 representation. Rather, their lack of sufficient voters
7 is."

8 So the United State's suggestion that there
9 could be packing or cracking claims of communities that
10 have nothing to do with packing or cracking voting
11 blocks, that is an incorrect interpretation of
12 Section 2. It is not consonant with the tax, and it
13 would render Section 2 unconstitutional, as not
14 congruent and proportional with the right to vote that
15 is being protected.

16 If the Court has no further questions, thank
17 you, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Thank you, General.
19 Mr. Gershengorn.

20 ORAL ARGUMENT OF IAN H. GERSHENGORN
21 FOR UNITED STATES, AS AMICUS CURIAE, SUPPORTING
22 APPELLEES

23 MR. GERSHENGORN: Mr. Chief Justice, and may
24 it please the Court:

25 Redistricting on the basis of total

1 population, as Texas did here, vindicates the principle
2 of equal representation for equal numbers of people that
3 is at the heart of Reynolds and Wesberry. We thus agree
4 that Texas was not required to redistrict on the basis
5 of some as-yet-undefined measure of voter population.

6 However, we disagree that the Court should
7 go on to decide that Texas is free in the future to
8 redistrict on the basis of some measure of population --
9 voter population if it so chooses.

10 There are, in our view, at least four
11 reasons why voter population cannot be required.

12 First is the one mentioned by Justice Kagan.
13 We think it would be a very odd interpretation to say
14 that the Constitution forbids for State legislative
15 redistricting what it requires for congressional
16 redistricting.

17 Second is the very long history of States --
18 of States redistricting on a basis other than -- other
19 than voter population. At the time of the framing of
20 the Fourteenth Amendment, there were the vast majority
21 of states redistricted on other-than-voter population.
22 In the wake of the Fourteenth Amendment, Congress in the
23 apportionment acts required districting on the basis of
24 inhabitants. And, of course, over the last 50 years,
25 States have unanimously redistricted on the basis of

1 total population, not voter population.

2 Third is the -- is -- are the data problems,
3 and they are real. The ACS data has a number of
4 limitations. First of all, it is not constitutionally
5 required, unlike the census. It would be very odd, we
6 think, for the Court to demand, as a constitutional
7 standard, data that does not even have to be collected.

8 Second, it does not measure what the -- what
9 the plaintiffs suggest is required. It is not a measure
10 of voter eligibility. CVAP does not include --
11 citizen-voting-age population data, for example, does
12 not include felons. It does not include overseas
13 voters. It does not include the mentally ill. That
14 kind of data just does not exist.

15 And third with respect to the data, picking
16 up on Justice Sotomayor's point, the data in the ACS
17 does not exist at the level of granularity, accuracy,
18 and timeliness needed to redistrict. To be clear, the
19 data level does not exist at the census block level,
20 which is where districting happens. It is not issued on
21 a timely basis. The census data comes out, for example,
22 in April 2021. The ACS data, the five-year average
23 comes out in December, and it has data from 2016 going
24 forward.

25 CHIEF JUSTICE ROBERTS: That's often used

1 for Section 2.

2 MR. GERSHENGORN: Your Honor, it's used for
3 a very different purpose with respect to Section 2. In
4 Section 2 it is used as one factor among many to
5 determine whether electoral opportunity has been -- has
6 been given. So it's used along with -- with population
7 data, voting data, turnout data, a whole variety of
8 socioeconomic factors.

9 That's very different than this Court saying
10 every State and thousands of local jurisdictions
11 throughout the country have to use that data as the sole
12 measure for redistricting.

13 I'd like to then pick up on Justice
14 Kennedy's question.

15 JUSTICE ALITO: Well, can I ask you this?
16 Who has standing to bring a Reynolds v. Sims claim? Is
17 it anybody who is counted in the census?

18 MR. GERSHENGORN: So Your Honor, that's a
19 question this Court noted and reserved in Baker v. Carr
20 in footnote 23. And it's a question that this Court has
21 never had to resolve in the context of Wesberry, which
22 of course has the exact same rule.

23 We think that nothing -- not much turns on
24 it because, as a practical measure, you can get a voter.
25 You can always find a voter in the district. But let me

1 explain why we don't think it, sort of, is dispositive
2 here, and this goes to a number of those issues --

3 JUSTICE ALITO: Are you going to tell me who
4 has --

5 MR. GERSHENGORN: -- we've heard this
6 morning.

7 JUSTICE ALITO: Are you going to tell me who
8 has standing or not?

9 MR. GERSHENGORN: Yes, Your Honor. We think
10 that it is -- we think that the -- the better
11 understanding is that a non-voter would have standing.
12 But I -- here's why I don't think it matters: Because
13 you can view our position as through either lens,
14 through a representational lens in which what's
15 happening is that the Reynolds v. Sims right is a way to
16 ensure that all persons covered by the Equal Protection
17 Clause who can't -- even those who cannot cast a ballot
18 still have a voice in representational --

19 JUSTICE ALITO: That includes everybody who
20 is counted in the census.

21 MR. GERSHENGORN: Yes, Your Honor.

22 JUSTICE ALITO: It includes --

23 MR. GERSHENGORN: But let me say --

24 JUSTICE ALITO: It includes aliens. It
25 includes prisoners.

1 MR. GERSHENGORN: And let me --

2 JUSTICE ALITO: It includes undocumented
3 aliens.

4 MR. GERSHENGORN: But let me explain why I
5 don't think it's necessary.

6 JUSTICE ALITO: But does it include all
7 those groups?

8 MR. GERSHENGORN: I'm sorry, Your Honor?

9 JUSTICE ALITO: Does it include members of
10 all of those groups?

11 MR. GERSHENGORN: So we think it might, but
12 we don't think that you have to agree with that to rule
13 in our way. Because we do think that the right at
14 Reynolds is also viewed, as we said on page 14 of our
15 brief -- and we think this is important -- as a voter
16 right. The way to think about this, as Reynolds did,
17 was to view this as a right -- consistent with the way
18 Reynolds thought about it, was to say that, when you
19 have twice the representatives in -- twice the -- the
20 inhabitants in a district, you get half the vote.

21 What Reynolds said, picking up on
22 Plaintiff's counsel's position, was that of course it
23 would violate the Constitution to count somebody's vote
24 as two or five or ten times. But then what it said in
25 the next sentence: "Of course, the effect of State

1 legislative districting schemes which give the same
2 number of representatives to unequal number of
3 constituents is identical." That is exactly the point
4 we're making here.

5 And if I could pick up, then, on
6 Justice Kennedy's and the Chief Justice's point about
7 why can't you do both.

8 The reason is very much -- and we agree with
9 General Keller that the problem with doing both is that
10 it -- it largely eliminates a State's flexibility to
11 deal with the traditional redistricting factors. What
12 you are forced to do is take a large, for example, Anglo
13 population in one part of the State that has high
14 citizen rates and pair it with the situation where it
15 has -- with -- with populations that have low
16 citizenship rates in another part of the State.

17 Or to take an example from the amicus
18 briefs, Manhattan has 9 percent children. Brooklyn has
19 30 percent. If you have to do both, what you're doing
20 is pairing people from the -- from part of Manhattan
21 and -- and pairing them with part of -- of voters in
22 Brooklyn. What ends up happening is to do both at the
23 level of 10 percent is to eliminate a State's ability to
24 take into account things like political subdivisions, to
25 take into account compactness, and all of the other

1 things that this Court has said is critical in
2 redistricting.

3 As to the Chief Justice's question about
4 whether this is a big deal or not, or whether it's --
5 "big deal" isn't the right word -- whether it would have
6 a large practical effect -- I would assume it's a big
7 deal. That's why we're here.

8 (Laughter.)

9 MR. GERSHENGORN: -- as to whether it would
10 have a large practical effect. I think the answer to
11 that is yes.

12 What we're talking about is not just 50
13 States but thousands of jurisdictions around the
14 country, local jurisdictions, none of whom use voter
15 population as a measure for redistricting.

16 What the amicus briefs show is this is not
17 just a situation in which things are affected -- States
18 are affected where there are citizenship differences
19 between citizens and noncitizens, but that children
20 actually are a critical part of it. It's not just that
21 Manhattan is 9 percent and Brooklyn is 30 percent
22 children. In Texas, the counties range, the amicus
23 briefs suggest, from 9 percent in some counties to 35
24 percent in other counties. In Alaska the difference
25 between rural and urban is 20 percent children in some

1 and 30 -- 37 percent in another.

2 This is an issue that is going to affect
3 States and local jurisdictions throughout the country.
4 And local jurisdictions, to be clear, don't have the
5 data at the level and -- at the level in which this
6 Court would now be requiring as a constitutional matter.

7 Now, I'd like to pick up on one other point
8 that Plaintiff's counsel raised, which is that, in his
9 view, it's quite unclear as to what Wesberry actually
10 holds. We think that that is really a fundamental
11 misreading of Wesberry.

12 What Wesberry said was -- the whole point of
13 Wesberry was that the -- the method of apportioning or
14 allocating representatives to the States had to be the
15 same as the method for allocating within districts in a
16 State. That was the reason that -- when what Wesberry
17 said was that the great compromise had to be reflected
18 into -- into redistricting.

19 That principle in Wesberry was exactly the
20 principle that then the Court adopted in Reynolds,
21 what -- what the Court said in Reynolds. It was
22 Wesberry that clearly established the fundamental
23 principle of representative government in this country
24 as one of equal representation for equal numbers of
25 people, without regard to race, sex, economic status, or

1 place of residence within the State.

2 So it is precisely that same principle from
3 Wesberry which looked at the -- looked at the -- looked
4 at the framing and looked at the discussion of -- of
5 calculation of representatives at the framing, which
6 looked at the drafting of the Fourteenth Amendment, and
7 took that history, and then translated that --

8 JUSTICE ALITO: Isn't your argument that
9 voters are -- are irrelevant?

10 MR. GERSHENGORN: So Your Honor, I don't
11 think our argument is that voters are irrelevant. And
12 first of all -- so a couple of points on that.

13 First, of course, the question here is, when
14 Texas has chosen to use total population, is that
15 permissible? And we think that clearly is.

16 Second, we don't think voters are irrelevant
17 for the reasons that I've said. The -- what Reynolds
18 did was -- and the Reynolds line of cases was to use
19 total population to vindicate the voters' right. It is
20 a voters' right -- because Reynolds understood that,
21 when you have twice the inhabitants in the district, you
22 have half the -- half the voice before your
23 representative.

24 JUSTICE ALITO: What would you say about the
25 extreme case -- I mean, your time is going to going to

1 expire -- an extreme case. And maybe this would never
2 come up, but what if it did?

3 Suppose you have a district -- you have a
4 rural district, and suppose it's a State where the --
5 the total number of -- the total population per district
6 is -- is fairly small. You have a rural district with a
7 huge prison and very few other inhabitants. So you --
8 and you have a neighboring district that has no prison.

9 So in one district, you have that 10 percent
10 of the population are eligible voters; and the other
11 district, 90 percent of the -- the population are
12 eligible voters. That would be okay?

13 MR. GERSHENGORN: So Your Honor, two points
14 in response.

15 First, this Court has recognized -- and we
16 don't dispute -- that census data isn't the sole data.
17 A State can -- and this Court approved it in Mahan --
18 make adjustments to census data to more accurately
19 capture actual residents in the State. We think that's
20 what has been happening in Hawaii, and that's what Mahan
21 said.

22 Remember in Mahan, what the State had
23 done -- what Virginia had done was count all of the Navy
24 personnel as home ported, which is what the census had
25 done. And the Court said you have to make an adjustment

1 to that.

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Consovoy, you have four minutes
5 remaining.

6 REBUTTAL ARGUMENT OF WILLIAM S. CONSOVOY

7 ON BEHALF OF THE APPELLANTS

8 MR. CONSOVOY: Thank you.

9 Justice Breyer, to your question about
10 representation of children. If that were the principle
11 of Reynolds against Sims, in a statewide election, a
12 State could give five votes to a family of five and one
13 vote to an individual.

14 That would --

15 JUSTICE BREYER: I'm just thinking that I'd
16 like to know, before knowing whether this is mandatory
17 or not, your position. I'd like to know an awful lot
18 more than I know about who these people are who are
19 being represented on the representational theory, and
20 who are not being represented on the voter theory.

21 MR. CONSOVOY: In each --

22 JUSTICE BREYER: Now I don't know who they
23 are from the briefs; and therefore, it's pretty tough
24 for me to -- to tell.

25 MR. CONSOVOY: The data shows that it's a

1 mix of noncitizens, children, all the categories;
2 disenfranchised felons. It's a -- it's a mix. There
3 are children involved, of course.

4 But -- but our point is more fundamental.
5 If --

6 JUSTICE BREYER: Illegal immigrants.

7 MR. CONSOVOY: Some. But who have not --
8 who the State has chosen not to allow to vote. The
9 State can solve this problem themselves. These States
10 can enfranchise these people and give them the vote.
11 The States come here to say we do not want them to vote,
12 but we want them to count for districting. That should
13 be rejected by this Court.

14 Second --

15 JUSTICE SOTOMAYOR: That's not quite
16 accurate. For -- for most States, too many, they
17 disenfranchise prisoners, except for those who come from
18 that locale, which is quite rational. Most States
19 disenfranchise the mentally ill. So how are they -- who
20 else are they going to disenfranchise?

21 MR. CONSOVOY: I'm not suggesting -- we're
22 not suggesting we should choose for the State who they
23 allow to vote. We are -- we are arguing that we should
24 not allow the States to come to this Court and argue
25 that they should get the benefit of them counting when

1 they make the choice, that is their right, to
2 disenfranchise them.

3 You cannot disconnect this rule from voting
4 and allow it to stand up. The whole thing collapses.
5 Wesberry has the famous sentence now that says all other
6 rights are illusory if the right to vote is taken away.

7 That's -- the authors of that sentence would
8 be surprised to learn that the one-person, one-vote rule
9 has literally nothing to do with voting; that you could
10 have a system that crowds, in 31 Senate districts, all
11 eligible voters but 30 -- 30 of them into one, and give
12 each other person their own district. That plan would
13 be sustainable, absent some evidence of racial or
14 political discrimination.

15 The State comes in to say we know we can't
16 do it, but we'll never try. That's not how one-person,
17 one-vote works. The State-by-State law forced
18 themselves not to try this by saying they weren't
19 allowed to. If they were told by this Court that they
20 could at least -- to your point, Justice Kennedy -- do
21 both, they would go back to the drawing board and try.
22 If they failed, they may win that case. We suspect, and
23 we have alleged, so it must be taken as true, that they
24 can do both.

25 And Justice Kennedy, it will not be

1 traditional interest like districting, or county lines,
2 or anything like that will be -- that will inhibit them.
3 It is political and racial gerrymandering that they want
4 to do, and that our rule, and especially a rule
5 balancing both, will stop them. And we don't know that
6 abstractly; we know that from the case the Court heard
7 just before us.

8 The actual deviations in Arizona -- the
9 hypothetical case -- they are claiming it's an 8 percent
10 deviation. On page 26 of their own jurisdictional
11 statement, they concede that the CVAP deviations are
12 54 percent. And in District 8, the district mostly at
13 issue, is underpopulated by 22 percent.

14 If Arizona had to go back to the drawing
15 board with the Districting Commission and accommodate at
16 least voter, but at least -- or maybe both, there would
17 be no opportunity to engage in the political and racial
18 gerrymandering that has come to dominate the
19 redistricting process. That would not involve the Court
20 in those issues anymore. It would be solved
21 legislatively, as they should.

22 Section 2 does not work without this
23 understanding. As Justice Scalia pointed out in his
24 dissent in *Chisom v. Roemer*, there is nothing to measure
25 against if one-person, one-vote doesn't protect voters.

1 It's the baseline.

2 How do you know if minority vote dilution
3 has occurred unless you have a baseline to measure
4 against? The baseline is equal voting power of voters
5 absent discrimination. It completely unravels.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:04 p.m., the case in the
9 above-entitled matter was submitted.)

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