No. 14-940

IN THE
Supreme Court of the United States

SUE EVENWEL, *et al.*,
Appellants,

v.

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

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

BRIEF OF NATHANIEL PERSILY, BERNARD GROFMAN, STEPHEN ANSOLABEHERE, CHARLES STEWART III, AND BRUCE E. CAIN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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September 25, 2015

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INTEREST OF *AMICI CURIAE*[1]

Amici are political scientists who are experts on redistricting, survey research, and the census. *Amici* submit this brief to highlight the data challenges involved in redistricting on any basis other than the official census enumeration. *Amici* agree with Appellees' substantive argument that the Constitution does not prevent the use of total population as the population basis for redistricting. States, at a minimum, have the constitutional latitude to redistrict on the basis of the only dataset that is sanctioned by the Constitution. To change the constitutional rules that have long determined one person, one vote would, moreover, be incredibly disruptive to the redistricting process and force courts to engage with a series of questions concerning the reliability of sample surveys and related datasets. In particular, *amici* submit this brief to bring to the Court's attention the absence of any dataset that would enable states to redistrict on the basis eligible voters.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have filed with the Court a blanket consent authorizing such a brief.

tial Commission on Election Administration. His CV is available at http://www.persily.com/. He has served as a special master or court-appointed expert in the following redistricting cases: *Favors v. Cuomo*, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *In re Reapportionment Commission*, 36 A.3d 661 (Conn. 2012); *Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004); *In re Legislative Redistricting of the State*, 805 A.2d 292 (Md. 2002); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002).

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SUMMARY OF ARGUMENT

The United States Constitution requires the creation of a single population dataset: the decennial Census's "actual enumeration" of persons. U.S. Const. art. I, § 2; amend. XIV. As such, states and localities, almost without exception, have used this dataset to build redistricting plans, and courts have repeatedly upheld plans that do so. Neither the federal government, nor any state, maintains an address list of eligible voters that would allow for redistricting on that basis. Surveys, funded by congressional whim, that provide partial estimates of eligibility based on citizenship are a poor substitute for the census redistricting dataset. An interpretation of

the Fourteenth Amendment that would prohibit the use of the most accurate and only constitutionally mandated population dataset and, in effect, mandate the creation of some new count of eligible voters would be both unprecedented and incredibly destabilizing to the U.S. Census and redistricting process.

The contested philosophical arguments occupying most of the briefing in this case can be avoided in favor of a simpler resolution based on the type of population data available and usable for redistricting. Appellants' interpretation of the constitutional requirement of one person, one vote is radical not only in its theoretical underpinnings, but also in its real, practical implications for the redistricting process. They argue that the dataset all states used for redistricting in 2010 is constitutionally deficient and impermissible. Instead, some other data – perhaps the American Community Survey, registered voter statistics, or some heretofore nonexistent dataset of eligible voters – should be used as the population basis for redistricting. None of these datasets, however, have the granularity, timeliness, detail, or accuracy comparable to the census enumeration.

Appellants' constitutional argument is predicated on the notion that it is possible to draw districts around equal numbers of eligible voters. If the Fourteenth Amendment requires that only people who can vote should be equally represented, then redistricting, under this view, should be based on equal numbers of eligible voters and no one else. For most states, that means the census enumeration of the total population, plus voting eligible military and overseas voters not counted at their voting address in the census, minus children, noncitizens, prisoners and disenfranchised felons, and those ineligible because

of mental disability. No state maintains a dataset of eligible voters, as such.

Appellants, therefore, urge this Court to mandate, as a constitutional rule, the use of currently available second-best alternatives that would not satisfy the rigid legal standard they proffer. Estimates of the citizen voting age population (CVAP) derived from the yearly American Community Survey (ACS) of 2.5 percent of households do not provide current, accurate data at the levels of geography (census block level or precinct) where most redistricting is conducted. At best, the ACS five-year averages give ballpark estimates of previous citizenship rates, several years before redistricting is conducted. The ACS could also be eliminated by the government at any time, as the House of Representatives has voted to do, or fully or partially defunded, as has happened twice since its inception.

Registered voter lists invite a different set of problems, and can only be used for redistricting if they match up well with more reliable population statistics. They are ripe for political manipulation and highly variable depending on the temporal proximity of the list to a given election. Moreover, at least one state does not keep a voter registration list, and another dozen allow for Election Day registration, which can lead to substantial changes in voter registration data in a short period of time.

The one-person, one-vote rule is not broken, and this Court should not try to fix it. The collateral damage caused by a rejection of the census as the basis for redistricting cannot be easily contained. In the end, Appellants not only invite the Court to read the Constitution to prohibit what is now the near-universal use of census population data for redistrict-

ing, but they also suggest that the Fourteenth Amendment requires government collection of data on voter eligibility that heretofore has not existed. The Court should reject that invitation.

ARGUMENT

I. NO DATABASE CURRENTLY EXISTS THAT WOULD ENABLE STATES TO REDISTRICT ON THE BASIS OF EQUAL NUMBERS OF ELIGIBLE VOTERS.

Appellants describe the key issue in this case as "whether the one-person, one-vote rule protects the right of eligible voters to an equal vote." App. Br. at 14. Yet, nowhere in the briefing before this Court or the litigation below has anyone identified a dataset that presents the eligible voting population of Texas communities in a way that would allow for redistricting on that basis. Texas is not unique in this regard: No state keeps track of its eligible voter population, let alone in a dataset usable for redistricting.

The absence of an eligible voter dataset should not surprise anyone familiar with the census and redistricting process in the United States. Virtually all states and localities draw districts based on the Census Redistricting Dataset – the P.L. 94-171 datafile distributed within one year of the decennial census to each state in time for its redistricting. *See* U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File: Technical Documentation* (2011), *available at* https://www.census.gov/prod/cen2010/doc/pl94-171.pdf. The Census Redistricting Datafile is derived from the "short form" of the cen-

sus, distributed to all U.S. households every ten years in fulfillment of the Constitution's requirement of an "actual enumeration." U.S. Const. art. I, § 2; amend. XIV. The short form includes ten questions concerning the respondent's name, phone number, age, gender, and race, as well as whether the residence is owned or rented. *See* U.S. Census Bureau, *Explore the Form: One of the Shortest Forms in History – 10 Questions in 10 Minutes*, *available at* http://www .census.gov/2010census/about/interactive-form.php. It contains no questions regarding citizenship or other criteria of voter eligibility except for age.

The Census Redistricting Datafile is both over and under-inclusive of the voting-eligible population. The datafile includes an enumeration of the voting age population, by providing population statistics for all those over the age of 18. But those counts, like those of the total population, include a myriad of groups ineligible to vote. Not only are non-citizens included in the redistricting data, but so are prisoners and disenfranchised felons, and those disenfranchised because of mental disability. Moreover, the redistricting dataset excludes a large group of voters (military and overseas voters) who are not at a residence on Census Day, but are nevertheless eligible to vote in elections.[2]

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[2] Because the census operates under the "usual residence rule," it counts every person at the location where they "live or sleep most of the time" as of Census Day. *See* U.S. Census Bureau, *How We Count America*, *available at* http://www.census.gov/2010census/about/how-we-count.php. Prisoners are therefore counted in prison.

These problems of over and under-inclusion are not unique to the Census Redistricting Dataset. The American Community Survey citizenship estimates, blessed by Appellants and described in greater detail below, also include prisoners, disenfranchised felons, and those ineligible because of mental disability, and exclude most eligible overseas and military voters. These are not nit-picky statistical arguments. The differences between the allegedly ideal, constitutionally mandatory statistic of eligible voters and the available datasets Appellants rely upon are considerable.

Data from Texas demonstrate the impossibility of satisfying Appellants' constitutional standard. Even if the estimates of the citizen voting age population (CVAP) were accurate, they would still erroneously include the 168,280 Texans in prison (which itself exceeds the population of a Texas legislative district), and the more than 350,000 others who are disenfranchised because of a felony conviction. *See* E. Ann Carson, *Bureau of Justice Statistics, Prisoners in 2013* 3 (2014), *available at* www.bjs.gov/ content/pub/pdf/p13.pdf; Christopher Uggen, Sarah Shannon, & Jeff Manza, The Sentencing Project, State Level Estimates of Felon *Disenfranchisement in the United States, 2010*, 16 (2012), *available at* http://sentencingproject.org/doc/publications/fd_State _Level_Estimates_of_Felon_Disen_2010.pdf.

CVAP statistics not only include ineligible voters, they also exclude eligible ones, such as U.S. citizens living abroad. Although we do not know with specificity the number of eligible overseas and military voters, the counts used for apportionment of seats in the U.S. House of Representatives (as compared to

the PL 94-171 datafile) include overseas U.S. military and federal civilian employees and their dependents. *See* U.S. Census Bureau, *Congressional Apportionment, Who's Counted*, *available at* http://www.census.gov/population/apportionment/about/who.html. For Texas, the 2010 Census counted 122,857 overseas military and federal employees and their dependents. U.S. Census Bureau, *Table 3. Overseas Population of the 50 States and the District of Columbia: 2010 Census* (2010), *available at* https://www.census.gov/population/apportioment/files/Overseas%20Population%202010.pdf. But that estimate includes children and excludes several hundred thousand overseas voters who do not work for the government, but are nevertheless eligible to vote. For the 2008 Election, Professor Michael McDonald of the University of Florida, the foremost expert on the differences between the voting eligible population and the voting age population, estimated the size of the overseas voting eligible population for Texas to be 549,216, constituting 3.79% of the state's eligible voter population. *See* Michael McDonald, *United States Election Project: How is the overseas eligible population estimated?*, *available at* http://www.electproject.org/home/voterturnout/faq/overseas; Michael McDonald, *2008 General Election*, *available at* https://docs.google.com/spreadsheets/d/1deCSqgLqrzFgpUa_S8Gk8mKrPq47pkx1eqKwZGtSqA/edit#gid=1424011440; *see also* Michael McDonald, *The 2010 Election: Signs and Portents for Redistricting*, 44 PS: Pol. Sci. & Pol. 311 (2011); Michael McDonald, *Redistricting Developments of the Last Decade—and What's on the Table in This One*, 10 Election L. J. 313 (2011); Michael McDonald, *The True Electorate: A Cross-Validation of Voter File and Election Poll Demographics*, 71 Pub. Op. Q. 588 (2007); Michael

McDonald, *The Turnout Rate Among Eligible Voters for U.S. States, 1980-2000*, 2 State Pol. & Pol'y Q. 199 (2002); Michael McDonald & Samuel Popkin, *The Myth of the Vanishing Voter*, 95 Am. Pol. Sci. Rev. 963 (2001).

Despite the best efforts of political scientists and data analysts, these partial estimates of the voting eligible population remain ballpark figures, at best, and are available, if at all, at the state level. None are available in a format or at a level of geography that could be used for redistricting. No state can identify with precision the number of eligible voters in particular neighborhoods, let alone census blocks or precincts used to build redistricting plans. As the Texas data demonstrate, these discrepancies between the eligible voter population in the state and any available redistricting data (even those relied on by Appellants) can be quite large: differences amounting to several million people. Therefore, Appellants' argument that the Constitution requires redistricting on the basis of equal numbers of eligible voters necessarily implies a new and radical constitutional mandate that forces the government to collect heretofore unavailable information about the eligibility and location of any potential voter. Under current circumstances, Appellants' constitutional standard simply cannot be satisfied.

II. SURVEY DATA CONCERNING CITIZENSHIP ARE INAPPROPRIATE AS THE POPULATION BASIS FOR DETERMINING COMPLIANCE WITH ONE PERSON, ONE VOTE.

Appellants and *amici* rely on citizenship data derived from the American Community Survey (ACS) as a second-best attempt to approximate the eligible voter population. As noted above, such data do not come close to representing the eligible voter population. ACS data have additional shortcomings as the population standard for one person, one vote, however. The ACS is a very valuable and important survey, but it is not a census. It is not mandated by the Constitution and could be eliminated at any time. In fact, the House of Representatives has previously voted to end it, and due to the government shutdown in 2013 and a reduction in funding in 2004, the survey suffered from low response rates.[3]

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[3] *See* Catherine Rampell, *The Beginning of the End of the Census?*, N.Y. Times (May 19, 2012), http://www.nytimes.com/2012/05/20/sunday-review/the-debate-over-the-american-community-survey.html (noting the vote in Congress and quoting Representative Daniel Webster as saying "We're spending $70 per person to fill this out. That's just not cost effective."); U.S. Census Bureau, *American Community Survey: Response Rates*, *available at* http://www.census.gov/acs/www/ methodology/sample-size-and-data-quality/response-rates/ (noting a 7.4 percentage point drop in the response rate from the previous year and explaining "[a]s a result of the 2013 government shutdown, the ACS did not have a second mailing, a telephone followup, or a person followup operation for the October 2013 housing unit panel."); *see also id.* ("Similarly, due to a reduction in funding in 2004, the telephone and personal visit followup

The ACS, while revolutionary and essential as a tool to inform public policy, is not designed to produce districts that conform to constitutional requirements. Its yearly estimates of the citizen voting age population (CVAP) come with an impermissibly high margin of error to serve as the standard for one person, one vote. If used as the touchstone for judging malapportionment, five-year averages of yearly ACS surveys would lead to districts based on stale data that are half a redistricting-cycle old. In short, even if one were to ignore the mismatch between the ACS data and the eligible voter population, requiring that districts be drawn on the basis of survey results introduces new errors and controversies into the redistricting process.

Virtually all data concerning the current rates of citizenship of the U.S. population come from the American Community Survey. The ACS draws from a sample of approximately 2.5 percent of American households, derived from rolling surveys of roughly 295,000 people per month throughout the year. The Census Bureau publishes yearly estimates of the relevant survey items, as well as three and five year averages of those items, along with accompanying margins of error. U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know* 3 (2008), *available at* https://www.census.gov/content/dam/Census/library/publications/2009/acs/ACSAIANHandbook.pdf. However, highlighting the uncertain future of the ACS, the Census Bureau it-

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operations for the January 2004 panel were dropped, which resulted in a comparable effect on the overall 2004 response rate."). The response rate for Texas in 2013 was 88.4 percent. *See id.*

self has now even proposed eliminating the three-year averages of the ACS due to "tight budgetary considerations."[4]

The ACS is not a survey primarily concerned with issues related to citizenship, let alone the redistricting process. It replaced what was known as the census "long form," which had been given to one out of every six Americans at the time of the decennial census. The ACS provides information concerning all matter of population and housing characteristics. The survey asks questions on everything from a house's plumbing, heating fuel, internet connectivity, and tax rates, to its occupants' citizenship, marital, employment, and veteran status. *See* U.S. Census Bureau, *American Community Survey*, *available at* http://www.census.gov/programs-surveys/acs/. "The ACS puts this up-to-date information about important social issues at the fingertips of people who need it, including policymakers, researchers, businesses and nongovernmental organizations, journalists, teachers, students, and the public." U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know*, at 2.

The American Community Survey does not provide reliable, up-to-date estimates of the citizen voting age population (CVAP) at the level of granularity most appropriate for redistricting at lower levels of geography. The data released in time for redistricting are derived from data half a census cycle old or

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[4] U.S. Census Bureau, *Census Bureau Statement on American Community Survey 3-Year Statistical Product* (2015), *available at* http://content.govdelivery.com/accounts/USCEN-SUS/ bulletins/eeb4af

released at too high a level of geography to be useful. Requiring redistricting based on ACS CVAP will introduce new types of errors into the redistricting process and create great uncertainty as to the appropriate benchmarks for evaluating compliance with one-person, one-vote.

A. Yearly Estimates of the Citizen Voting Age Population from the American Community Survey Cannot Be Used To Establish Redistricting Plans That Comply with One Person, One Vote.

No one, including Appellants or their supporting *amici*, suggests that the ACS one-year estimates would be appropriate for redistricting. *See* App. Br at 9 (presenting only five-year ACS CVAP averages). Due to the annual survey's small sample size, ACS one-year estimates are only released for census places (usually cities and towns), county subdivisions, and other levels of geography that have a total population in excess of 65,000 people. *See* U.S. Census Bureau, *American Community Survey: 2010 Release Schedule*, *available at* http://www.census.gov/programs-surveys/acs/news/data-releases/2010/release-schedule.html. Even assuming that such estimates provided accurate coverage to an entire state, one cannot patch together large population units to build redistricting plans that comply with one person, one vote. In fact, for the majority of states, districts for the lower house of the state legislature have fewer than 60,000 people. *See* Nat'l Conference of State Legislatures, *2010 Constituents Per State Legislative District Table*, *available at* http://www.ncsl.org/research/about-state-legislatures/2010-constituents-per-state-legislative-district.aspx. In other words, the released one-year

data are for levels of geography that themselves are larger than most lower house state legislative districts. The same can be said for the thousands of towns (census places) that need to redistrict, but population data from the ACS are released only for the town as a whole. (Even in the unlikely event the Census continues to provide them, the three-year averages, which are released for areas of 20,000 or more people, would be inappropriate building blocks for redistricting for the same reasons.[5])

In addition, data from the yearly ACS are not compiled and delivered in time to complete redistricting for upcoming elections for some jurisdictions. ACS estimates are released approximately nine months after the end of the survey year. For example, 2010 ACS estimates were released in September 2011. *See* U.S. Census Bureau, *American Community Survey: 2010 Release Schedule*. States, such as Virginia and New Jersey, need to redistrict well in advance of that date in order to prepare for their legislative elections that year. The ACS yearly surveys cannot be released in as timely a fashion as the decennial census, given that the survey is taken each month throughout the year, and some period must be allowed for compiling the data for the previous twelve-month period.

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[5] *See* U.S. Census Bureau, *Census Bureau Statement on American Community Survey 3-Year Statistical Product*, ("As a result of tight budgetary considerations, the U.S. Census Bureau has proposed permanently discontinuing [the 3-year] statistical product from the American Community Survey beginning in fiscal year 2016.").

B. Five-year Averages of ACS CVAP Data Are Too Old To Serve As the Population Basis for Determining Compliance with One Person, One Vote.

Because the single-year ACS data, as well as the three-year averages, are insufficiently granular for use in redistricting, Appellants and *amici* suggest using the five-year averages of ACS data. *See* App. Br. at 9-13; Br. of Demographers Peter A. Morrison, Thomas M. Bryan, William A. Clark, Jacob S. Siegel, David A. Swanson and the Pacific Research Institute as *Amici Curiae* in Support of App., at 12-15 (hereinafter PRI Br.). Five-year averages are unfit for redistricting for similar reasons as the other data releases, but also for the added fact that the averages are not fresh enough to ensure that plans actually reflect the population at the time of redistricting.

Five-year averages, by their very nature, describe what the citizenship rate *was*, not what it *is*. Under the best of circumstances, a jurisdiction would redistrict on the basis of data, some of which is more than five years old at the time of the line-drawing. To draw districts for the 2012 elections, for example, the "best" ACS five-year averages available would have been for the period 2006-2010. *See* U.S. Census Bureau, *American Community Survey: 2010 Release Schedule* (noting release of five year ACS averages from 2006 to 2010 on December 8, 2011, which would still have been too late for states such as New Jersey and Virginia, which held state legislative elections one month prior). Unlike the decennial census, which provides a snapshot of the population at the time, averages of the rolling ACS surveys give only a

rough sense of what the population may have been, sometime in the past.

Indeed, the situation is even worse. The stated CVAP for a given geography may *never* have been accurate, even if we assume each survey was performed perfectly. An average – as opposed to a median, for example – is simply the sum of all the years' estimates, divided by the number of years. As such, significant, recent changes in the CVAP would not be accurately reflected in the multiyear averages. For this reason, the Census Bureau itself cautions against their use for such purposes: "Multiyear estimates cannot be used to say what is going on in any particular year in the period, only what the average value is over the full period." *See* U.S. Census Bureau, *American Community Survey: Multiyear Accuracy of the Data* (2014), *available at* http://www2.census.gov/programs-surveys/acs/tech_docs/accuracy/MultiyearACSAccuracyofData2013.pdf.

C. The Margins of Error for ACS CVAP Create Novel Problems for Assessing Compliance with One Person, One Vote.

Redistricting with survey data, instead of the census enumeration, necessarily invites new controversies concerning the margin of error in surveys and the related uncertainty of the population estimates for districts. Even though the one-person, one-vote rule permits departures from precise mathematical equality in district populations, never has this Court engaged with the question of the degree of uncertainty the Constitution would permit for the reported population estimates of such districts. In other words, redistricting on the basis of survey results re-

quires some new constitutional rule, not about how equal districts must be, but rather how confident courts must be that the reported estimates reflect the "true" population counts.

Uncertainty in the ACS CVAP estimates is expressed by confidence intervals and related margins of error. Margins of error are familiar to any consumer of public opinion polls – such as when a poll says "45 percent of Americans approve of the job the President is doing, plus or minus three percentage points." Ordinarily, such statements reflect the conclusion that the observer is 95 percent confident that the true value is somewhere within the margin of error – in this example, somewhere between 42 percent and 48 percent. The ninety-five percent confidence interval is the standard normally used to establish "statistical significance." *See* Federal Judicial Center, *Reference Manual on Scientific Evidence* 124, 194 (2000).

The American Community Survey provides margins of error for each estimate and states the confidence interval. The ACS releases data and error margins at the 90 percent confidence interval. *See* U.S. Census Bureau, *American Community Survey: Multiyear Accuracy of the Data*, at 11 ("All ACS published margins of error are based on a 90 percent confidence interval."); U.S. Census Bureau, *American Community Survey: Sample Size Definitions*, *available at* https://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/sample-size-definitions.html ("You can be 90 percent confident that the interval within the margin of error from the estimate includes the true value.") The ACS should not be faulted for doing so; it simply

reflects the degree of statistical confidence the Census Bureau has in the numbers it is releasing based on the size of the sample. In other words, ten percent of the time, one should expect the CVAP estimates to be outside the stated margin of error.[6]

The size of the margins of error in the stated CVAP averages, moreover, will depend on the size of the average population of the given geography. For areas with larger numbers of people, a greater number of ACS respondents should be expected and the estimates of the average population over the time period should be more reliable. The building blocks of a dis-

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[6] Another source of error in the CVAP estimates comes from nonresponse to the citizenship question on the ACS. When a respondent does not respond, sometimes the Census will then fill in a response based on the best guess (using standard statistical imputation techniques) as to what the citizenship of the respondent is. These errors are not insignificant. In the 2013 ACS, 5.2% of responses to the citizenship question were "allocated" by the Census because the respondent did not answer the question. *See* U.S. Census Bureau, *American Community Survey: Item Allocation Rates*, *available a*t http://www.census.gov/acs/www/methodology/sample-size-and-data-quality/item-allocation-rates/#note1; *see also* U.S. Census Bureau*, American Community Survey: Item Allocation Rates Definitions*, *available at* http://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/item-allocation-rates-definitions.html ("Allocation . . . involves using statistical procedures, such as within-household or nearest neighbor matrices populated by donors, to impute for missing values."). *Cf. Utah v. Evans*, 536 U.S. 452, 506 (2002) (Thomas, J., dissenting) ("I am persuaded that much like earlier methods of estimation, hot-deck imputation—a modern statistical technique that the Census Bureau refers to as 'estimation'—is not constitutionally permissible."); *id.* at 508-09 ("Because hot-deck imputation is an estimation procedure that includes persons not 'actually' counted, its use to adjust the census for apportionment purposes runs afoul of the Constitution.").

trict will have greater margins of error than the district itself, just as districts within a city or state will have greater margins of error than the city or state itself.

As an example, consider a small city, such as Alamo, Texas, which has a large noncitizen population. The most recent ACS five-year averages suggest that the total estimated population from 2009 to 2013 was 18,660 (with a margin of error of 43), with a total estimated CVAP of 10,580 (with a margin of error of 826). *See* U.S. Census Bureau, *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP)*, *available at* http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html. In other words, it would be accurate to say, with 90 percent confidence, that the "true" average CVAP of Alamo over that five-year period was somewhere between 11,406 and 9,754. Even if a city like Alamo were not further divided into districts, the error in the estimated CVAP is plus or minus 7.8 percentage points. Were it divided into districts, the estimated errors for the CVAP within such districts would be much greater.

Amici are incorrect to suggest that existing one-person, one-vote jurisprudence accommodates such margins of error. *See* PRI Br. at 29-31. First, as the example above suggests, for many jurisdictions, let alone the districts within them, the error margins would be well outside the presumptively constitutional range of plus or minus five percentage points. *See Brown v. Thompson*, 462 U.S. 835, 842 (1983); *Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993). Second, even if the range of CVAP estimates between districts is within those bounds, margins of error are

different than principled departures from population equality. A plan with purportedly equal CVAP districts with a five percent margin of error (based on a 90 percent confidence interval) is different than a redistricting plan with districts that depart from population equality by five percent. With redistricting based on ACS survey results, the disparity between districts represents the lack of confidence as to what the true population of the districts actually is. In the familiar situation courts confront, in contrast, the population difference between districts represents the variance from the ideal population per district. In evaluating those departures from population equality, the courts can then decide whether such departures are justified by legitimate districting principles. *See, e.g., Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). The fact that courts ordinarily allow for departures from perfect equality in order to accommodate other state interests is not a license, then, to draw districts, in which the population estimates are themselves surrounded by considerable uncertainty.

D. The Granularity of the Census Enumeration Makes It Superior to Five-Year Averages of ACS CVAP Data As a Population Basis for Redistricting.

ACS data, unlike decennial census data, are not released at the census block level. Census blocks are the smallest level of geography for which the Census releases data. Census blocks "nest" in all other levels of census geography, such as block groups, tracts, county subdivisions, and counties. Census blocks are the atoms, in other words, out of which all other data aggregations are produced. Because the ACS — even

the five year averages — rely on yearly 2.5 percent samples of the population, the Census Bureau does not release citizenship estimates at the census block level.

Amici casually assert that redistricting plans could, instead, be built from data at the census block group level. *See* PRI Br. at 23-26. Because the Census releases five-year ACS CVAP averages for block groups, *amici* argue that one need only aggregate these block groups together to form districts. Several problems occur, however, when one attempts to do so.

First, as with the single-year ACS data, many block groups are too large to serve as effective building blocks for redistricting plans. ACS CVAP data from Texas illustrate the point. Fort Bend County has two block groups, in which the estimated CVAP was 19,300 and 14,030. *See* U.S. Census Bureau, *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP)* (Block Group 1, Census Tract 6729, Fort Bend County, Texas; and Block Group 1, Census Tract 6731.01, Fort Bend County, Texas). These block groups are at the extreme high end of the range, but hundreds more Texas block groups exist with CVAP estimates exceeding 3000 people.[7] Texas is not unique in this respect. *See id.*

Because block groups contain many more people than do blocks, it is necessarily more difficult to draw a redistricting plan that will have relatively equal districts. As with a building that needs to be certain

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[7] *Amici* are, therefore, off the mark when they say that "a block group is a cluster of census blocks that contains between 600 and 3000 people." PRI Br. at 12.

dimensions, it will always be easier to achieve a desired configuration if the bricks one can choose are relatively small, rather than ones that are relatively large. Districting for local bodies or small state legislative districts might be impossible with such data as inputs. Even when it is possible to draw plans (such as for larger state legislative districts) with roughly equal estimated CVAP, all other legitimate redistricting goals would become more difficult to achieve.

One such goal is respect for precincts. Census block groups do not "nest" in voter tabulation districts (the census geography that usually refers to precincts). *See* U.S. Census Bureau, *Standard Hierarchy of Census Geographic Entities*, *available at* http://www2.census.gov/geo/pdfs/reference/geodiagram.pdf. To be sure, some states (such as Texas) ignore precinct lines when they redistrict, while others pay great attention to them. But when the geographic layer used for redistricting does not nest within precincts, districts will be more likely to cross more precincts, requiring that precinct boundaries be redrawn following the redistricting.

This particular critique is indicative of the larger problem of drawing districts with large population building blocks. The "chunkier" the building blocks for redistricting plans, the more difficult it will be to accommodate any number of other redistricting concerns while also complying with one person, one vote. Whenever block groups cross the geographic boundary of some community, the data constraints imposed by the choice to use the ACS will take precedence over those other concerns.

Of course, one could use different statistical techniques to break block groups into their component

blocks. *See* PRI Br. at 27 n. 29 (describing "raking" process"). In doing so, however, one must make certain assumptions about the distribution of the citizen population within the block group among its component blocks. Doing so introduces further error into the CVAP estimates and the resulting districts. Indeed, were this process free of error, the Census Bureau would release averaged CVAP data at the block level.

E. The Use of CVAP Data in Litigation Under the Voting Rights Act Does Not Demonstrate Its Appropriateness As the Standard for Determining Compliance with One Person, One Vote.

The ACS dataset is incredibly valuable for certain purposes, just not for redistricting in compliance with one person, one vote. As the Census promotional materials for the ACS argue, "the ACS enables decision-makers to appropriately fund school-lunch programs, place new hospitals, build new businesses and take other actions that lead to healthy towns and cities." *See* U.S. Census Bureau, *How Do We Know? An American Community*, *available at* https://www.census.gov/library/infographics/acs_community.html. One other purpose for which ACS data can be valuable is to demonstrate a violation and a potential remedy under section 2 or, previously, section 5 of the Voting Rights Act (VRA). *See* 52 U.S.C. §§ 10301, 10304; *see generally* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 776, 778-81 (2011).

The legal questions to which CVAP data provide an answer are different for VRA litigation than for mal-

apportionment cases. In both section 2 cases, and previously, section 5 enforcement actions, citizenship data are employed to demonstrate the ability of a minority community to elect its candidate of choice.[8] Those provisions require some assessment as to whether a redistricting plan is, independently, responsible for a minority group's inability to elect its preferred candidates. CVAP data can be useful in proving (or disproving) whether the minority community is large enough to elect its preferred candidates.

Section 2 redistricting litigation requires an immense amount of data from varied sources. Census population data are the starting point, but much more information is necessary for courts to assess compliance with section 2. Data regarding citizenship, voter turnout, primary and general election returns, voter registration, and any number of other sociopolitical variables concerning the community at issue will be relevant to the litigation. *See* Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 197 (Bernard Grofman & Chandler Davidson, Eds., 1992). In addition, to demonstrate the "Senate Factors" relating to historical discrimination in voting, section 2 litigation often features historians and political scientists as expert witnesses offering detailed examinations of the relationship of different election regulations to rates of minority political participation

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[8] Here, we only discuss section 2 cases because the issues with section 5 enforcement actions were very similar. Moreover, following the Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), jurisdictions no longer need to submit their redistricting plans for preclearance.

and representation. *See generally* S. Rep. No. 97-417 (1982); Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* 20-49 (2005) (assembling cases that discuss each Senate Factor).

Citizenship data can come into the litigation at different stages. Plaintiffs alleging the illegality of a redistricting plan or at-large scheme under section 2 must show that their community is (1) large enough to constitute a majority in a single member district; (2) votes cohesively; and (3) is systematically outvoted by the majority racial group, which also engages in bloc voting. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). These threshold considerations must be satisfied because, otherwise, no remedy will be available to ensure that minorities can elect their preferred candidates. If the minority group has very low rates of citizenship, then the redistricting plan is not to blame for their lack of representation. Rather, their lack of sufficient voters is. Likewise, if election returns show that the minority community does not vote together, then it is the community's lack of political cohesion, rather than the redistricting plan, that is responsible for their lack of electoral success. As with citizenship data, no one believes that the proffered data concerning previous election results constitutes a precise predictor of how a given candidate will fare in an election in a hypothetical district.

This Court has never had occasion to grapple with the statistical issues concerning the ACS CVAP data, because the Court has not considered a section 2 case since the ACS was developed. *Cf. Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438 (2006) (opinion of Kennedy, J.) (noting the ACS, but rejecting it be-

cause only decennial census data were presented to the District Court). The CVAP estimates for every section 2 case considered by this Court were based on results from the Census long form, distributed to one-sixth of the U.S. population at a single time along with the decennial U.S. Census. Therefore, no previous case in this Court has had to deal with the problems detailed here concerning the staleness, variability, and margins of error in the ACS data, or the small size of the ACS sample and the problems involved in averaging such data over several years.

This is not to say that the Court should disregard ACS CVAP data were it to entertain a new section 2 challenge involving a community with low rates of citizenship. Those data, constituting as they do the best and only information on citizenship rates, will be indispensable for both plaintiffs and defendants in section 2 challenges. Ballpark CVAP estimates of the style provided by the ACS will often be necessary to show that the plaintiffs' lack of electoral success is not due to widespread voter ineligibility and that a remedial districting plan is feasible. The concerns related here, however, only demonstrate the importance of not treating the ACS data as unreasonably precise. Plaintiffs' section 2 claims should not rise or fall on the basis of demonstrating, according to ACS data, that their community is exactly fifty percent plus one of a hypothetical district's CVAP. Like the many other sources of information involved in a section 2 case, ACS CVAP data should be viewed in context and considered alongside the body of information concerning the history of minority electoral success in the relevant jurisdiction.

III. VOTER REGISTRATION DATA ARE TOO VARIABLE AND OPEN TO MANIPULATION TO BE MANDATED AS THE CONSTITUTIONAL STANDARD FOR ONE PERSON, ONE VOTE.

The other second-best solution proposed as a proxy for eligible voters is registered voters. Some of the same problems regarding CVAP also arise with this alternative, such as the lack of an existing database in some states. Different problems arise as well, though, such as the dramatic yearly variability in voter registration estimates and the risk that such data would be politically manipulated.

It might appear that Appellants are on safer ground with this alternative, given that the Court, in *Burns v. Richardson*, 384 U.S. 73 (1966), considered registered voters as the redistricting basis. However, the *Burns* Court merely held that registered voters *could* be the population basis for redistricting, not that it was mandatory. Indeed, it only upheld the use of registered voters there, given the unique challenges Hawaii faced in its interim redistricting plan and the fact that registered voters served as an adequate proxy for the state's citizen population. *See id.* at 97 ("We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."); *id.* ("[W]e hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have re-

sulted from the use of a permissible population basis.").

The reservations the *Burns* Court expressed continue to ring true. In particular, the Court worried about political manipulation of voter registration data. *Id.* at 92-93 ("[Such data are] susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of prior malapportionment.'"). Those concerns have only increased since 1966, as issues of voter eligibility and access have become a political flashpoint in recent years. *See, e.g.*, *Arizona v. Intertribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *see generally* Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* (2012). Voter registration data are inherently manipulable, as states can time purges of voter databases in the run up to redistricting.[9]

Second, voter registration data vary tremendously depending on the election calendar. As the Court rightly noted, "'fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions.'" *Burns*, 384 U.S. at 93 (quoting *Ellis v. Mayor & City Council of Baltimore*, 352 F.2d 123, 130 (4th Cir. 1965)). In particular, the voter registration lists that coincide with a presidential election year will differ

[9] Such purges must comply with the National Voter Registration Act, 52 U.S.C. §§ 20501 – 20511, and cannot be done close to an election. Nothing prevents an otherwise legal purge, however, from being timed to coincide with a redistricting process.

dramatically from those in an off-year election. *See* U.S. Census Bureau, *Voting and Registration: Historical Time Series Tables*, *available at* http://www. census.gov/hhes/www/socdemo/voting/publications/ historical/index.html (presenting tables demonstrating consistently lower registration rates for congressional election years than presidential election years). Depending on the level of competitiveness of the races on the ballot, moreover, the rates of registration could vary considerably within a state in a given year, as political parties and other groups initiate registration drives in anticipation of the election.[10]

Third, voter registration lists are notoriously inaccurate. As the Report of the Presidential Commission on Election Administration, detailed, roughly eight percent (or sixteen million) voter registration records are invalid or significantly inaccurate. *See* Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 23 (2014), *available at* https://www. supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf. The degree of inaccuracy varies considerably by state and over time. For some states, as many as fifteen per-

[10] The United States is unique in its reliance on voters to take affirmative steps to register to vote. In most countries, the government takes responsibility for registering voters. This difference in practice is responsible, some suggest, for the comparatively low voter turnout in the United States. *See* Rafael Lopez Pintor & Maria Gratschew, *Voter Turnout Since 1945: A Global Report* 23-26, 79 (2002); Steven Taylor et al., *A Different Democracy: American Government in Thirty-One Country Perspective* (2014); Peverill Squire, Raymond E. Wolfinger & David P. Glass, *Residential Mobility and Voter Turnout*, 81 Amer. Pol. Sci. Rev. 45 (1987).

cent of the names on their voter registration list constitute "deadwood": names of people who have likely moved or died since they were registered at the given address. *Id.* As a result, states conduct periodic purges of their voter rolls, as regulated by the National Voter Registration Act of 1993 (NVRA). 52 U.S.C. §§ 20501-20511. Whether a jurisdiction redistricts on the basis of a list before or after a purge can lead to different results. To guard against disenfranchisement by way of purging, furthermore, states retain different lists of voters: an active voter list of those who have regularly voted and an inactive voter list, which includes people who have missed voting in the last few elections. *See* App. Br. at 9 (presenting Texas data concerning total voter registration and "non-suspense" voter registration). As with the ACS citizenship data, mandating redistricting on the basis of "registered voters" does not settle the question concerning the proper population base for redistricting: It would require further decisions as to which voter registration list, at which time.

Finally, as with the collection of citizenship or eligible voter data, in general, the Constitution does not require voter registration or the collection of voter registration data. North Dakota, in fact, does not require voter registration, so could not redistrict on that basis. More than a dozen other states allow for Election Day registration. *See* Nat'l Conference of State Legislatures, *Same Day Voter Registration* (2015), *available at* http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx. In those states, registration statistics will vary considerably in the period before and after an election. *See* Demos, *Same-Day Registration* (2014), *available at* http://www.demos.org/sites/default/files/ publica-

tions/SameDayRegistration-2015.pdf (noting that, on average, ten percent of voters in same-day registration states register on Election Day). In such states, were voter registration the touchstone for one person, one vote, the population basis for redistricting for a given area may change a substantial amount in a single day.

CONCLUSION

Rarely can one say of a constitutional argument that it is not only wrong, but it is impossible. Such is the case here. Even if Appellants were to receive the ruling they seek, districts could not then be drawn on the basis of equal numbers of eligible voters. A national database of eligible voters does not exist and will not exist in the foreseeable future.

Second-best solutions, such as drawing districts based on available survey data concerning the citizen voting age population, do not satisfy the suggested constitutional standard. Even if a survey, like the ACS, continues to be funded in its current form, the propriety, timeliness, and accuracy of the data it produces prevent it from serving as a standard for one person, one vote. Worse still, a move away from the census enumeration as a safe harbor for one person, one vote, will inevitably force this Court into the kinds of knotty questions of survey design and statistics described above. Appellants' argument, thereby, raises concerns reminiscent of those involved with this Court's consideration of sampling and the census:

> The prospect of this Court's reviewing estimation techniques in the future, to determine which of them *so obviously* creates a distortion that it cannot be allowed, is not a happy one. (I foresee the new specialty of "Census Law.") Indeed, it is doubtful whether–separation-of-powers considerations aside–the Court would even have available the raw material to conduct such review effectively.

Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 349 (1999) (Scalia, J., concurring); *cf.* Persily, *The Law of the Census*, *supra*.

For similar reasons, the judgment of the U.S. District Court for the Western District of Texas should be affirmed.

Respectfully submitted,

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September 25, 2015