1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   SUE EVENWEL, ET AL.,   :

4   Appellants   : No. 14-940

5   v.   :

6   GREG ABBOTT, GOVERNOR OF   :

7   TEXAS, ET AL.   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, December 8, 2015

11

12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:08 a.m.

15 APPEARANCES:

16 WILLIAM S. CONSOVOY, ESQ., Arlington, Va.; on behalf

17   of Appellants.

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

19   on behalf of Appellees.

20 IAN H. GERSHENGORN, ESQ., Deputy Solicitor General,

21   Department of Justice, Washington, D.C.; for United

22   States, as amicus curiae, supporting Appellees.

23

24

25

```
 1                C O N T E N T S
```

```
15

16

17

18

19

20

21

22

23

24

25
```

1   P R O C E E D I N G S

2   (11:08 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4 next this morning in Case 14-940, Evenwel v. Abbott.

5   Mr. Consovoy.

6   ORAL ARGUMENT OF WILLIAM S. CONSOVOY

7   ON BEHALF OF THE APPELLANTS

8   MR. CONSOVOY: Mr. Chief Justice, and may it

9 please the Court:

10   This appeal presents a fundamental question.

11 That question is whether the one-person, one-vote rule

12 affords eligible voters any reasonable protection. We

13 submit that the answer must be yes under this Court's

14 decisions, and as a consequence, Appellants have stated

15 a claim under the the Equal Protection Clause.

16   The districts at issue here, District 1 and

17 District 4, have deviations as measured by eligible

18 voters approaching 50 percent under any metric available

19 to voters elected. No decision of this Court has ever

20 sustained vote dilution of that magnitude under a

21 one-person, one-vote case. Beginning with Gray,

22 continuing to Wesberry, through Reynolds, and the

23 Court's many decisions since then, the issue has always

24 been vote dilution.

25   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 Westbrook 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 Sate 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 quality, 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.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

A

a.m 1:14 3:2
Abbott 1:6 3:4
ability 12:14
  28:12 45:23
able 6:22 30:21
  37:7
above-entitled
  1:12 54:9
absent 52:13
  54:5
absolutely 36:11
abstract 13:25
  17:17
abstractly 53:6
acceded 9:12
accept 6:12 21:6
  32:22 33:1
accepted 27:3
access 7:8,10,11
  7:14,16,23
  10:2 33:10
  34:7
accommodate
  53:15
accommodated
  31:13
accomplish 21:4
accomplishing
  12:12
account 14:10
  28:21 45:24,25
accuracy 41:17
accurate 23:12
  51:16
accurately 49:18
ACS 15:10
  16:10,18,18,19
  16:20,25 23:10
  37:20,20,25
  41:3,16,22
Act 27:11,14,16
  38:1,21,22
activity 23:4
acts 40:23
actual 36:5

49:19 53:8
additional 9:19
address 38:19
adequate 25:5
adequately
  22:19
adjustment
  49:25
adjustments
  49:18
adopted 18:25
  47:20
adversary 37:20
affect 47:2
affords 3:12
afoul 29:23
age 32:24
agree 20:14 40:3
  44:12 45:8
agreed 19:17
  21:17
AL 1:3,7
Alabama 8:18
  14:9 19:25
Alaska 36:10
  46:24
aliens 43:24
  44:3
Alito 29:1,15,25
  42:15 43:3,7
  43:19,22,24
  44:2,6,9 48:8
  48:24
Alito's 32:11
allegation 14:25
  28:22 35:23
alleged 14:14
  16:4 28:7
  52:23
allocating 47:14
  47:15
allow 15:23
  30:15 51:8,23
  51:24 52:4
allowed 36:24
  52:19
allows 7:19

Amendment
  11:16 12:2
  18:18,20,23
  27:5 40:20,22
  48:6
America 33:22
American 37:10
amicus 1:22
  2:10 36:8
  38:25 39:21
  45:17 46:16,22
amount 33:17
analysis 37:23
Anglo 45:12
answer 3:13 4:9
  16:12 26:25
  46:10
answering 5:2
answers 13:17
  20:20
anybody 42:17
anymore 4:8
  53:20
apologize 20:10
appeal 3:10
APPEARAN...
  1:15
Appellants 1:4
  1:17 2:4,14 3:7
  3:14 50:7
Appellees 1:19
  1:22 2:7,11
  26:19 39:22
Appendix 17:18
  17:20
apply 20:9,13,16
  20:18
apportion 8:2
apportioned
  9:18
apportioning
  47:13
apportionment
  8:6,7,9 10:20
  11:1 19:9 20:2
  20:4 21:8 27:4
  28:20 34:16

38:2 40:23
approaching
  3:18
approved 5:7
  49:17
April 41:22
arbitrary 24:16
area 19:13
areas 26:8 32:17
  36:5 37:2
argue 13:18
  15:22 24:23
  51:24
argued 10:25
argues 13:16
  22:2
arguing 12:18
  51:23
argument 1:13
  2:2,5,8,12 3:3
  3:6 16:13
  19:24 21:15,25
  23:3 26:12,18
  29:7,10,13
  38:20 39:20
  48:8,11 50:6
arguments 29:2
  29:15
Arizona 9:2
  53:8,14
Arlington 1:16
Article 8:9
as-yet-undefin...
  40:5
asked 17:22
asking 5:2 23:17
  24:2 25:9
asserted 10:7
assume 18:7,8,8
  31:3 46:6
assumed 10:12
assumption
  15:18,21
attorney 24:14
Austin 1:18
authors 52:7
autonomy 8:10

availability
  18:12
available 3:18
  32:6
average 37:9
  41:22
averages 38:5
aware 35:21,21
  37:11
awful 33:20
  50:17

B

back 5:19 12:17
  12:24 16:12,15
  16:17 18:16
  19:3,10 21:16
  24:17 28:2
  37:12 52:21
  53:14
Baker 5:21,21
  5:23 9:17,19
  13:22 16:12,14
  42:19
balance 26:15
balancing 53:5
ballot 43:17
Bartlett 17:3
base 6:13 26:10
  27:4 28:20
based 31:12
baseline 54:1,3,4
bases 27:24
basic 22:24
basis 5:22 8:22
  8:22 10:14
  13:23 19:1
  20:6 21:9
  25:23 29:11,19
  30:24 31:2
  32:19 33:13
  34:8 38:18
  39:25 40:4,8
  40:18,23,25
  41:21
beginning 3:21
  23:6

congruent 39:14
consequence
  3:14
consider 31:24
  36:20
consideration
  7:18 22:4
  31:14
considered
  12:23 18:20
considering
  24:15 27:17
consistent 30:1
  44:17
consonant 39:12
Consovoy 1:16
  2:3,13 3:5,6,8
  4:9 5:13 7:2
  8:1,7 9:7,14
  10:21 11:20
  12:5 13:17
  14:1,6,22
  15:16,21 18:15
  19:17,21,23
  20:20 22:14
  24:6,12,21
  25:6,15,22
  26:5,9 50:4,6,8
  50:21,25 51:7
  51:21
constituents
  33:17 45:3
constitution 8:5
  9:2,4,17,20
  13:1,5,13 19:2
  19:5,6,8 28:6
  31:3,12 40:14
  44:23
constitutional
  13:11 21:11
  34:10 41:6
  47:6
constitutionally
  9:2 38:16 41:4
context 19:15
  35:10,18 42:21
continues 4:14

continuing 3:22
continuity 35:7
contrary 4:5
core 30:20 35:11
correct 14:13,13
  20:3 31:6,7
counsel 26:16
  47:8 50:3 54:6
counsel's 44:22
count 22:16,17
  27:18 28:17
  44:23 49:23
  51:12
counted 26:11
  42:17 43:20
counties 46:22
  46:23,24
counting 12:3
  51:25
country 12:10
  17:13 36:3
  42:11 46:14
  47:3,23
counts 22:2 29:3
county 7:17 8:20
  53:1
couple 48:12
course 8:1 9:17
  32:3 36:3
  38:15 40:24
  42:22 44:22,25
  48:13 51:3
court 1:1,13 3:9
  3:19 4:1,20
  5:22 6:6 8:14
  8:18 9:4,8,9,10
  9:16 10:12
  11:5,7,23
  12:11,23 13:22
  13:22 14:9
  15:4,24,25
  16:8,11 17:12
  21:1,21 22:4
  24:7 25:11,15
  26:21,22 28:5
  29:18 30:14
  31:16,20 34:23

35:3,9 37:16
38:16,25 39:16
39:24 40:6
41:6 42:9,19
42:20 46:1
47:6,20,21
49:15,17,25
51:13,24 52:19
53:6,19
Court's 3:13,23
  17:13 21:20
  28:16,24 30:18
covered 43:16
cracking 39:9
  39:10
critical 46:1,20
crowds 52:10
cue 20:21
cues 25:17
curiae 1:22 2:10
  39:21
current 26:24
cuts 39:1
CVAP 17:20,21
  17:23 18:4
  38:14 41:10
  53:11

—————————
        D
—————————
D 3:1
D.C 1:9,21
dash 4:14
data 16:10,18,18
  16:19,20,23,23
  16:25 17:10,14
  17:18 18:4,12
  18:13,13 23:9
  23:18,18,19,19
  23:20,22 27:1
  32:4,5,5,7,8,9
  37:25 38:4,10
  38:14 41:2,3,7
  41:11,14,15,16
  41:19,21,22,23
  42:7,7,7,11
  47:5 49:16,16
  49:18 50:25

day 17:1
de 36:23
deal 12:20,21
  45:11 46:4,5,7
dealing 28:2
decades 27:2
  28:10
December 1:10
  41:23
decide 23:13
  24:20 40:7
decided 10:16
  11:6 24:10,18
deciding 23:7
  37:22
decision 3:19
  11:7 15:20
  18:21 30:16
decisions 3:14
  3:23
decisively 15:12
defend 21:9
deferring 6:17
defined 30:10
degrees 13:24
Delaware 36:17
deliberations
  18:24
demand 41:6
democracy 13:4
  13:7
demographer
  18:13 34:25
  35:1
demonstrative
  34:21 35:24
deny 7:16
Department
  1:21
depend 23:7
depending 38:8
depends 23:3
Deputy 1:20
designed 27:22
determine 17:11
  37:16 42:5
determining

  12:4
deviated 9:3
deviation 5:7
  7:21,22 17:15
  18:10 24:7,22
  25:21 28:23
  31:9,19 34:18
  35:5 36:23,25
  37:8,9 38:15
  53:10
deviations 3:17
  23:25 24:10
  25:1 35:1,2
  53:8,11
difference 32:16
  33:10 36:6
  46:24
differences
  46:18
different 4:10
  8:8 15:25 16:7
  21:11,12,12
  31:19 32:7
  42:3,9
dignity 30:20
dilution 3:20,24
  21:24 28:8
  54:2
diminishing
  7:11,14,23
  33:10 34:7
direction 37:15
disagree 38:21
  40:6
disconnect 22:9
  52:3
discretion 6:14
discriminated
  34:11
discriminates
  26:12
discriminating
  22:3
discrimination
  21:5 28:4
  29:24 31:21
  37:14 52:14

54:5
discussed 38:23
discussion 15:9
48:4
disenfranchise
51:17,19,20
52:2
disenfranchised
11:23 12:14
26:1,2 51:2
disenfranchis...
12:7
disparate 28:5
37:15
disparity 31:14
dispositive 43:1
dispute 49:16
disregard 35:6
disregarded
34:18
dissent 16:14
21:23 53:24
distinguishing
5:3
distribute 22:16
distributes
22:20
distribution
22:17
district 3:16,17
10:13 17:6,9
17:22 18:1,7,8
34:5,23 38:7
42:25 44:20
48:21 49:3,4,5
49:6,8,9,11
52:12 53:12,12
districting 8:8
10:11,22 11:2
16:24 40:23
41:20 45:1
51:12 53:1,15
districts 3:16
4:17 5:16 7:5
7:13 10:3
15:15 18:14
23:21,22 30:9

38:12 47:15
52:10
doctrine 28:24
30:18
doing 11:24
28:14 45:9,19
dominate 53:18
doubles 23:2
doubt 9:14
drafting 19:3
48:6
drafts 18:23
draw 4:16 5:16
16:10 17:23,23
18:14 23:22
drawing 21:5
23:5 52:21
53:14
drew 23:16,21
dual 6:10

E

E 2:1 3:1,1
earlier 27:6
38:23
economic 47:25
effect 44:25 46:6
46:10
eight 32:24
either 4:22 8:18
22:13 29:15
30:23 32:1
43:13
elect 27:17
28:13
elected 3:19
election 9:24
29:5 30:7
50:11
elections 30:21
35:11
electoral 21:2
27:25 31:25
42:5
elevate 34:10
eligibility 24:16
41:10

eligible 3:12,17
5:18 10:14
11:10,19 15:11
17:9 22:2
24:23 25:23
26:10 29:6
30:7 49:10,12
52:11
eliminate 45:23
eliminates 45:10
Empire 33:24
enact 21:18
ends 23:7 45:22
enemy 25:8
enfranchise
51:10
engage 53:17
England 33:23
ensure 43:16
enter 23:7
entitled 10:6
enumeration
32:7
equal 3:15 4:1
4:11,12 5:24
7:24 8:15 10:6
12:6,12,19,20
12:24 13:14
19:12 26:23
27:3 28:3 29:4
29:23 30:9
31:25 34:9
37:22 40:2,2
43:16 47:24,24
54:4
equality 14:16
14:17 15:7
27:25 28:1,15
29:11,19 30:23
31:24,25 32:23
34:14
equalize 27:2
30:4 35:4
equalized 34:24
error 18:3,3,5
18:11
especially 34:15

53:4
ESQ 1:16,18,20
2:3,6,9,13
essentially 23:2
23:5
establish 24:23
established
47:22
establishes 10:4
ET 1:3,7
ethical 31:4
Eventually 12:9
Evenwel 1:3 3:4
everybody 33:24
43:19
evidence 16:2,8
24:24 52:13
exact 14:7 19:24
20:18 42:22
exactly 20:2
45:3 47:19
examine 25:23
examined 25:22
example 41:11
41:21 45:12,17
examples 36:14
exceeding 24:22
exclude 24:20
30:17
exclusive 34:13
excuse 11:4 22:6
exist 41:14,17,19
expected 35:24
expert 14:19,20
expire 49:1
explain 37:19
43:1 44:4
explained 15:25
32:19
explains 5:2
22:18
explicit 19:11
explicitly 18:20
extent 34:25
extreme 48:25
49:1
eyes 23:24 24:3

F
---
facie 24:24
31:21
fact 4:20 9:3
13:1,22
factor 17:6 42:4
factors 35:7
42:8 45:11
failed 16:6 52:22
fair 10:15
fairest 23:11
fairly 22:19 26:7
49:6
false 32:15
family 32:23
50:12
famous 52:5
far 7:11 13:20
fashioned 37:16
feasible 35:22
Federal 6:23 9:5
11:1 27:1 32:5
Federalism-ba...
20:8
felons 41:12
51:2
fenced 37:17
figure 6:14
figures 29:5
find 15:10 21:13
42:25
fine 37:20
first 4:11 17:6
31:16 34:20
37:12 40:12
41:4 48:12,13
49:15
five 21:7 38:6
44:24 50:12,12
five-year 37:9
38:4,13 41:22
flatly 11:5
flawed 15:17,18
flexibility 45:10
focused 8:10
followed 14:9

30:1 31:11
interpretation
12:1 24:14
39:11 40:13
interpreted
13:15
intrastate 8:7
10:22 11:2
introduces
18:22
invidious 21:5
24:24 28:4,7
29:24 31:21
32:6 37:13
invidiously 24:5
28:11 34:11
invisible 33:14
involve 53:19
involved 5:10
51:3
irrelevant 48:9
48:11,16
issue 3:16,23
6:21 9:21,25
10:15 11:6,21
12:8,9 18:11
18:12,20 20:6
20:7 25:8
33:16 34:6
36:11 47:2
53:13
issued 41:20
issues 8:10
14:11 38:3,9
43:2 53:20

_____

J

job 15:5
joint 18:23
judicially 16:15
jurisdiction 5:23
jurisdictional
53:10
jurisdictions
42:10 46:13,14
47:3,4
Justice 1:21 3:3

3:8,25 5:6 6:9
8:1,25 9:11
10:18 11:15,25
12:16,17 13:3
14:1,2,12,19
15:8,17 18:15
18:16 19:17,19
20:12 21:23
22:1,10 24:4,9
24:17,25 25:4
25:12,18 26:4
26:6,16,20
27:5,7,10,12
27:20 29:1,15
29:25 31:1,8
32:10,11 33:9
33:20 34:1,12
35:13,18 36:1
36:12,15,22
37:3,4,19
39:17,18,23
40:12 41:16,25
42:13,15 43:3
43:7,19,22,24
44:2,6,9 45:6
48:8,24 50:3,9
50:15,22 51:6
51:15 52:20,25
53:23 54:6
Justice's 45:6
46:3
justiciable 13:18
justify 8:16

_____

K

Kagan 8:1 10:18
13:3 14:1
18:15 19:19
20:12 22:1
25:4 27:5
40:12
Kagan's 12:17
keep 23:16
keeping 35:8
Keller 1:18 2:6
26:17,18,20
27:9,11,13,23

29:14 30:14
31:7,16 33:9
33:25 34:4,20
35:17,20 36:8
36:14,17 37:3
37:24 45:9
Kennedy 31:1,8
34:12 35:13,18
37:4 52:20,25
Kennedy's
42:14 45:6
kind 8:16 13:3,7
22:5 23:25
41:14
Kirkpatrick
10:12,24
knew 24:9
know 6:3 10:10
16:25 18:19,21
21:13 24:12,13
30:12 32:14
50:16,17,18,22
52:15 53:5,6
54:2
knowing 50:16

_____

L

lack 39:5,6
language 32:1
large 45:12 46:6
46:10
largely 45:10
larger 38:12
late 10:11
latitude 25:9
Laughter 19:22
46:8
law 5:24 9:5,6,9
15:6 24:14
25:1 34:10
52:17
law's 11:14
learn 52:8
leave 17:17
led 6:12 9:4
ledger 13:21
leeway 30:19

35:10
left 30:17
legal 20:4
legislative 40:14
45:1
legislatively
53:21
legislators 22:16
22:17,20
legislature 6:24
12:4 15:5
23:12,15 24:2
30:10 34:22
legislatures 4:16
legitimate 4:4
6:17,20 25:3
27:24 28:15,16
31:11 32:3
33:19 34:8
38:18
legitimately
31:23
lens 43:13,14
level 10:14,22,23
11:1 38:5
41:17,19,19
45:23 47:5,5
levels 15:18 38:8
liable 37:25
liberty 31:4
limit 25:17
limitations 41:4
line 48:18
lines 4:16 7:17
21:6 23:5 53:1
lists 17:21
literally 52:9
litigation 35:25
little 34:2
live 7:1
local 42:10
46:14 47:3,4
locale 51:18
logic 13:20
long 40:17
look 13:5 17:18
17:25 23:25

32:4
looked 48:3,3,3
48:4,6
looking 32:13
lot 32:17 33:20
36:4 50:17
low 39:4 45:15
LULAC 17:13

_____

M

magnitude 3:20
Mahan 25:16
49:17,20,22
major 32:15
majority 17:5
40:20
making 14:2,3
28:14 29:13,14
45:4
malapportioned
12:22
manage 14:15
manageable
16:15
mandate 32:1
mandated 19:14
mandatory
50:16
Manhattan
45:18,20 46:21
map 14:21,23
15:3,4 16:11
17:23,24 23:16
23:23 35:24
margin 18:3,3
18:11
margins 18:5
marry 10:6
Marshall's
21:23
Maryland 36:17
matter 1:12 5:23
5:24 8:14
12:13 20:4
24:19,23 47:6
54:9
matters 16:21

43:12
mean 12:1 15:9
20:13 32:18
33:5 34:1 36:2
48:25
means 11:16
17:8 36:18
meant 19:12
measure 23:10
23:12 29:22
40:5,8 41:8,9
42:12,24 46:15
53:24 54:3
measured 3:17
measures 15:13
16:21 29:9
meet 16:6 22:24
member 34:6
members 8:2
44:9
mentally 41:13
51:19
mentioned
40:12
mere 28:5
method 22:15
47:13,15
metric 3:18 8:3
22:19
military 5:12
mind 23:16
minimis 36:23
minor 36:23
minorities 11:22
12:8 22:6
minority 12:10
17:8 22:8 39:3
54:2
minus 18:2
minutes 50:4
mirrored 20:2
mirrors 8:20
misreading
47:11
Missouri 10:13
mix 51:1,2
model 14:8 21:3

21:8 22:5
modeled 20:1
moment 21:16
morning 3:4
43:6
motion-to-dis...
14:24
move 18:10
26:10
moved 21:1
moving 37:14
multiple 27:24

_____
N
_____

N 2:1,1 3:1
nature 36:21
37:6
Navy 49:23
nearly 7:22
necessarily
36:18
necessary 44:5
need 6:18,21
25:4,9 30:19
needed 41:18
neighbor 20:25
21:7
neighboring
49:8
never 4:4 13:22
37:16 42:21
49:1 52:16
new 16:10 26:3
31:18 36:8,10
36:10
Ninth 7:9
non-voter 7:4,5
43:11
non-voters 7:14
22:3 30:17
33:14 38:23
noncitizen 12:13
noncitizens 6:25
46:19 51:1
noted 28:5,16
42:19
notice-and-co...

34:22
number 41:3
43:2 45:2,2
49:5
numbers 4:12
17:21,23,25
18:2,9,25 19:4
19:4 32:21
33:6 36:5 40:2
47:24

_____
O
_____

O 2:1 3:1
objective 13:12
occurred 54:3
odd 40:13 41:5
offices 9:25
okay 22:13
25:13 49:12
once 11:24
one's 27:18
one-person 3:11
3:21 6:7 11:10
12:6,15 22:8
22:23 24:1,6
24:21 27:21
28:24 29:3
52:8,16 53:25
one-vote 3:11,21
6:7 11:10 12:6
12:15 22:8,24
24:1,7,22
27:21 28:24
29:3 52:8,17
53:25
onerous 37:5
ones 11:11,12,12
open 11:8 24:3
opinion 7:9
opinions 17:13
21:20
opportunity
27:17 42:5
53:17
opposed 10:23
38:9
opposite 20:19

33:1 35:9
option 34:12
oral 1:12 2:2,5,8
3:6 26:18
39:20
order 31:10
ordinarily 22:21
23:11
original 19:3
originally 19:2
originated 4:13
other-than-vo...
40:21
outcome 29:4
30:6
outer 25:17
overcome 7:23
overpopulated
7:13 18:8
overseas 41:12
overwhelmingly
4:6

_____
P
_____

P 3:1
p.m 54:8
packing 39:9,10
page 2:2 17:19
32:12 38:25
44:14 53:10
pains 5:8
pair 45:14
pairing 45:20,21
paragraph 15:1
parents 25:25
26:1,7
Parliament
33:22
part 30:18,20
35:11 45:13,16
45:20,21 46:20
particular 36:13
parts 12:25 13:5
peculiar 5:11
people 4:12 7:1
13:4,7 16:22
18:1 22:7

32:17,25 33:23
34:1 36:3 38:6
40:2 45:20
47:25 50:18
51:10
percent 3:18
7:19,21,21,22
14:17 17:8,10
17:16 18:10,10
24:7,11,22
25:2,7,11,13
25:14,16,16
28:23 31:9,19
34:24 35:4
37:1,8,9 38:15
45:18,19,23
46:21,21,23,24
46:25 47:1
49:9,11 53:9
53:12,13
percent-deviat...
38:11
perfect 25:8
perfectly 6:20
Perkins 21:21
permissible 9:13
9:16 27:4
29:16 31:2
48:15
permit 18:17
Persily 38:25
39:3
person 12:14
19:19 20:24
29:4 30:9
52:12
personnel 49:24
persons 43:16
phase 35:24
phrase 4:11,21
pick 42:13 45:5
47:7
picked 6:20
picking 41:15
44:21
place 16:11 48:1
places 15:13

36:9
Plaintiff's 44:22
47:8
plaintiffs 41:9
plan 8:19 19:25
34:21 37:7
38:8,9,13 39:5
52:12
plausible 35:23
play 15:9,19
please 3:9 26:21
39:24
plenty 25:1
plurality 21:22
plus 18:2
point 11:2,5
14:5 17:22
24:18 31:10
38:21 41:16
45:3,6 47:7,12
51:4 52:20
pointed 53:23
pointing 14:3
points 48:12
49:13
political 16:16
23:3 37:18
45:24 52:14
53:3,17
polls 25:24,25
population 4:2,3
4:3,7 5:1,3,7
5:12 6:13,20
8:3,21,22 9:3
9:15 10:16
16:2 17:5
22:12 23:11
25:14 26:25
27:4 28:9,11
28:19,21,23,25
29:5,12,16,17
29:22 30:4
31:2,17,20
32:9 33:13
34:14 35:5
36:4,20,25,25
37:8 38:18

40:1,5,8,9,11
40:19,21 41:1
41:1,11 42:6
45:13 46:15
48:14,19 49:5
49:10,11
populations
9:13 15:13,14
16:21 27:2
45:15
ported 49:24
posit 15:10
position 5:17,18
8:4 18:6 19:23
20:15 21:17
27:14,15 29:2
29:21 33:4
37:24 43:13
44:22 50:17
possibility 15:9
possible 29:6
34:3 35:23
possibly 36:10
37:6
power 28:12
33:2 37:17
54:4
practical 15:8
42:24 46:6,10
practicality
15:19,24
practically
35:22
practice 26:24
precedence 32:2
precinct 23:20
precise 8:22
precisely 8:20
48:2
precluded 15:6
24:15,20
predicated 6:4
premise 16:18
presented 19:25
presents 3:10
pretty 50:23
prima 24:24

31:21
principally 23:9
principle 4:1
13:12 19:1
28:19 32:22
34:9 40:1
47:19,20,23
48:2 50:10
principles 37:12
prior 10:17
prison 49:7,8
prisoners 43:25
51:17
probable 35:14
probably 32:16
problem 6:9
9:19 11:21
12:19 36:2,19
37:2 45:9 51:9
problems 41:2
procedure 34:23
proceed 17:9
22:4
process 37:18
53:19
prohibited
19:14
prohibits 8:6
property 19:4
proportional
39:14
proportionate
13:9
proposition 11:4
20:24 22:15
protect 5:17
16:3 27:22,23
38:23 53:25
protected 6:1
20:22 27:16
39:15
protecting 6:24
6:25 31:5
protection 3:12
3:15 4:23 5:24
8:15 12:6,19
12:21,25 13:14

22:7 26:23
27:3 28:3
29:23 31:25
34:9 43:16
protects 12:7
21:12
prove 14:20
16:5
proven 15:12
provision 21:12
proxy 29:6
pull 17:25
purpose 17:2,14
42:3
purposely 24:5
purposes 10:12
11:18 12:3,5
34:17
put 23:20 33:2

_____
Q
_____
qualifications
8:11 20:8
22:25
quality 34:14
question 3:10,11
4:9 5:2,4,20
8:3 11:7,20
12:17 16:7,16
17:11 18:16
19:10 26:22
29:18 32:11
42:14,19,20
46:3 48:13
50:9
questions 15:25
39:16
quite 18:19
19:15 31:20
37:5 47:9
51:15,18
quote 14:3
quoted 33:7

_____
R
_____
R 3:1
race 47:25

racial 52:13
53:3,17
raised 8:4 18:16
47:8
ran 18:9
range 25:11
46:22
rarely 16:23
rates 39:4 45:14
45:16
rational 51:18
reach 29:18
reaction 33:8
read 5:13 13:3
real 8:12 22:9
29:11 41:3
really 5:11 7:3
7:10 12:23
24:16 28:6
34:6 47:10
reapportion
26:25 30:25
34:8
reapportioned
33:13
reapportions
32:8
reason 6:18 9:1
15:2 25:3,5,6
45:8 47:16
reasonable 3:12
reasons 20:3
22:22 37:4
40:11 48:17
REBUTTAL
2:12 50:6
receive 13:9
recognize 31:11
recognized
30:19 38:17
49:15
recognizing
31:18
redistrict 27:25
29:20 40:4,8
41:18
redistricted

40:21,25
redistricting
16:20 28:17
35:7 36:21
37:6 39:5,25
40:15,16,18
42:12 45:11
46:2,15 47:18
53:19
reduce 28:12
reduced 35:2
referring 19:2
reflected 47:17
regard 47:25
registered 22:12
22:20,25 23:19
rejected 11:6
13:22 19:24
51:13
rejects 21:14,14
relevant 13:1
reliable 29:22
37:25 38:2
relied 21:17
rely 4:22 11:3
15:15 23:10
remaining 50:5
Remember
49:22
render 39:13
report 21:19
represent 33:24
representation
4:2,12 6:11
12:4,10 13:9
19:12 30:10,16
30:23 32:25
33:11 39:6
40:2 47:24
50:10
representatio...
6:15,21 7:3
9:25 10:7
14:16 22:5
24:19 25:4
28:1,15 29:10
29:19 31:24

43:14,18 50:19
representative
7:6,7,15 8:21
33:18 34:7
47:23 48:23
representatives
8:23 14:10
28:13 33:11
44:19 45:2
47:14 48:5
represented
25:19,24,25
33:15,23 34:2
34:5 50:19,20
Republican 13:2
13:6
required 9:2
11:1 28:25
31:10 40:4,11
40:23 41:5,9
requirement
20:15,17
requires 8:5
26:23 40:15
requiring 35:4
47:6
reserve 26:14
reserved 5:4,5
42:19
reserving 5:14
residence 48:1
residents 49:19
resolve 26:22
42:21
resolved 12:9
resolves 11:7
respect 4:11 8:5
8:6,11 10:10
19:13 41:15
42:3
response 21:13
49:14
rest 8:21
retreat 13:13
return 38:24
reviews 23:13
Reynolds 3:22

5:3,24 8:14,18
8:23 9:1,15,16
11:23 12:11,20
13:15 14:6
19:24 20:11
21:14,18,23
28:19 40:3
42:16 43:15
44:14,16,18,21
47:20,21 48:17
48:18,20 50:11
right 6:4 7:24
9:22 18:1
20:21,23 21:12
22:21,24 23:6
33:15 39:14
43:15 44:13,16
44:17 46:5
48:19,20 52:1
52:6
rights 5:25 6:7
16:3,9 27:10
27:11,13,16
38:1,21,22
52:6
road 35:3
ROBERTS 3:3
26:16 27:7,10
27:12,20 36:1
36:12,15,22
39:18 41:25
50:3 54:6
robust 32:5
Roemer 53:24
rolling 37:9
rule 3:11 5:20
7:6 10:5,20
11:10 12:6
22:6 24:22
34:10 36:19
42:22 44:12
52:3,8 53:4,4
run 23:1
running 29:23
rural 46:25 49:4
49:6

S

S 1:16 2:1,3,13
3:1,6 50:6
sampling 37:10
Sate 34:11
satisfactory 19:1
21:13
satisfy 28:24
saying 4:8 5:8
9:11 11:25
23:3 24:11
25:13 32:23
42:9 52:18
says 5:17 6:6
10:5,25 18:2
18:24 19:3
20:15 22:23
25:1 37:20
39:3 52:5
Scalia 53:23
scenario 37:11
schemes 45:1
SCOTT 1:18 2:6
26:18
second 15:2
40:17 41:8
48:16 51:14
Section 17:1,4,7
21:16,18,25
22:1,1,7 23:23
26:11,12 27:5
27:8,9,13
37:21,21 38:1
38:20,22,24
39:2,12,13
42:1,3,4 53:22
see 5:1 23:25
25:20 35:24
semi 8:19
senate 7:5 17:22
21:19 38:9,13
52:10
Senator 18:22
sense 10:9 11:9
sentence 4:13,14
4:22 44:25

52:5,7
serve 30:12
serves 34:16
set 32:6,7
sex 47:25
show 9:23 16:9
17:4 46:16
showing 16:2
shown 4:7
shows 13:12,20
50:25
side 4:23 7:4,12
10:8 13:19,21
19:20
simply 35:1
Sims 12:20
13:15 42:16
43:15 50:11
situation 5:11
7:20 30:3,4,8
37:7 45:14
46:17
small 49:6
smaller 38:7
socioeconomic
42:8
sole 42:11 49:16
solely 11:3
Solicitor 1:18,20
solve 14:13
16:15 51:9
solved 53:20
solves 13:15
somebody 34:2
somebody's
44:23
someone's 37:16
somewhat 13:25
20:1
sorry 10:18
15:16 44:8
sort 21:2 43:1
SOTOMAYOR
6:9 8:25 9:11
14:19 15:8,17
24:4,9,17,25
25:12 26:4,6

41:16
sounds 33:20
35:13
sovereign 30:20
sovereignty 20:9
30:21 35:12
speak 14:7
specify 34:25
stage 14:25 16:4
stand 52:4
standard 4:4
20:2 41:7
standing 6:3,4
11:11 42:16
43:8,11
start 20:23
22:14
starts 20:23
State 6:17,22
7:18 9:6,9
10:22,23 12:2
12:4 15:6
19:14 20:9
22:18 24:13
26:2,24 27:25
28:10,17,18
29:20 30:21,22
31:19,23 32:4
32:17 33:4,13
33:16,16,18
34:8 36:20
37:25 38:9,13
40:14 42:10
44:25 45:13,16
47:16 48:1
49:4,17,19,22
50:12 51:8,9
51:22 52:15
State's 39:8
45:10,23
State-by-State
52:17
stated 3:14
statement 53:11
states 1:1,13,22
2:10 4:6,15
6:13 8:10

10:25 11:18
16:20 20:5,18
22:11 26:2
27:2 28:10
30:15,17,19
33:12 35:4,5,9
38:17 39:21
40:17,18,21,25
46:13,17 47:3
47:14 51:9,11
51:16,18,24
States's 27:15
38:20 39:1
statewide 9:24
18:14 50:11
status 22:8
47:25
step 12:24 21:4
stop 53:5
Strickland 17:2
17:3,14
stripped 18:17
structure 30:21
35:10
studies 35:16
subdivisions
45:24
submerge 28:18
submit 3:13
submitted 34:21
54:7,9
substantially
34:18
successful 17:3
SUE 1:3
sufficient 16:9
16:10 39:6
suffrage 20:7
suggest 41:9
46:23
suggested 37:4
suggesting 20:16
36:16 51:21,22
suggestion 9:19
39:8
suggests 36:9
Supplemental

17:18,20
support 29:2
supported 17:14
supporting 1:22
2:11 39:21
supports 5:16
5:18
suppose 25:18
25:20 49:3,4
supposed 20:22
Supreme 1:1,13
sure 20:7 31:21
33:7,9
surprised 52:8
surrender 8:19
Survey 37:10
suspect 52:22
sustainable
52:13
sustained 3:20
14:8
system 33:14
52:10

T

T 2:1,1
table 32:12,13
take 7:18 13:11
14:10 15:18,21
20:21 25:17,20
28:21 32:1
33:4 37:1
45:12,17,24,25
taken 15:1 16:5
52:6,23
talking 16:19,24
19:8 25:4
46:12
talks 18:24
target 28:11
tax 27:14 39:12
taxation 8:10
20:6
tell 43:3,7 50:24
temporary 5:12
ten 44:24
Tennant 16:1

Tennessee 9:17
9:20
terms 36:5
test 28:3 37:13
37:15
Tex 1:18
Texas 1:7 7:5
14:14 15:4,5,6
17:21,22 23:15
24:15 25:18
26:3 27:1 28:9
28:14 31:10
32:6 33:12
34:11,22 35:19
38:13 40:1,4,7
46:22 48:14
thank 26:16,20
39:16,18 50:2
50:3,8 54:6
theirs 7:7
theory 14:7,13
19:5,6,8 30:15
39:1 50:19,20
thing 11:24 19:7
19:7 21:3 52:4
things 12:12
20:5 25:9
45:24 46:1,17
think 6:23 9:22
10:14,19 12:23
13:19 14:7
15:12,16 16:11
16:12,18 20:3
22:20 23:9,15
24:4,12 25:6
30:11 32:11,21
39:1 40:13
41:6 42:23
43:1,9,10,12
44:5,11,12,13
44:15,16 46:10
47:10 48:11,15
48:16 49:19
thinking 50:15
third 21:4 41:2
41:15
thought 5:6,6

9:15,16 32:15
44:18
thousands 42:10
46:13
three 4:10
thrown 14:4
till 12:2
time 4:20 8:9
11:24 29:17
32:4 40:19
48:25
timeliness 41:18
timely 41:21
times 3:25 44:24
today 5:5 28:10
told 52:19
total 6:13,20 8:2
9:3,12,15 16:2
23:18 25:14
27:2,4 28:9,23
29:5,16 31:17
32:9 35:5 36:3
36:25 37:8
39:25 41:1
48:14,19 49:5
49:5
tough 34:3
50:23
tracks 29:17
tradition 4:25
5:20,20,25
traditional 35:6
45:11 53:1
translated 48:7
tremendous
5:11
trouble 23:1
true 8:2 15:1
16:5 21:6
32:14,15 52:23
truly 22:19
trump 5:25
try 15:22 35:3
52:16,18,21
Tuesday 1:10
turn 13:24,24
17:19 18:6,9

turning 21:16
turnout 42:7
turns 42:23
twice 44:19,19
  48:21
two 13:17 15:25
  20:20,24 22:21
  29:1,25 30:9
  30:23 32:16,23
  44:24 49:13

_____ **U** _____
unanimously
  40:25
unclear 47:9
unconstitutio...
  4:19 39:13
under-popula...
  18:7
underpopulated
  53:13
understand
  10:19 20:14,15
  25:9
understanding
  43:11 53:23
understood
  48:20
undocumented
  44:2
unequal 45:2
United 1:1,13,21
  2:10 10:25
  27:15 33:12
  38:20 39:1,8
  39:21
unqualified 9:18
unravels 54:5
unusual 6:5
  16:11
upheld 31:17
urban 46:25
use 5:15 8:2
  22:12,19 25:14
  26:24 27:8
  28:15,25 29:12
  31:17 32:6

34:19 36:3
37:22 38:2,10
38:13 42:11
46:14 48:14,18
uses 4:20 10:16
  28:10

_____ **V** _____
v 1:5 3:4 10:24
  12:20 13:15
  42:16,19 43:15
  53:24
Va 1:16
vague 17:2
valid 31:5 34:16
validly 27:1
variety 42:7
vast 40:20
view 11:13,14,14
  11:15 22:10
  40:10 43:13
  44:17 47:9
viewed 44:14
vindicate 48:19
vindicates 40:1
violate 28:6
  44:23
violated 6:8 16:9
violation 16:14
Virginia 49:23
voice 4:18 6:15
  43:18 48:22
vote 3:20,24 6:6
  7:24 10:6 13:8
  13:8 20:25
  21:23 23:8
  28:7 39:14
  44:20,23 50:13
  51:8,10,11,23
  52:6 54:2
vote-dilution
  21:18
voter 5:25 6:4
  7:24 8:11 15:7
  20:7 21:5
  23:19 24:15
  26:24 28:11,25

29:17 31:1,12
31:20 32:23
33:13 34:14
35:5 36:20,25
40:5,9,11,19
41:1,10 42:24
42:25 44:15
46:14 50:20
53:16
voter-based
  34:15
voters 3:12,18
  3:19 4:17,24
  5:18 6:24 9:18
  10:5,14 11:11
  11:19 12:7,13
  12:22 15:11
  17:9 19:4 22:2
  22:13,20,25
  24:24 25:20,23
  26:10 27:14,15
  27:18,22,23
  29:6 30:6,8
  31:5,15 33:2
  39:6 41:13
  45:21 48:9,11
  48:16,19,20
  49:10,12 52:11
  53:25 54:4
votes 20:24 21:7
  50:12
voting 6:11,22
  7:12 14:16
  20:23 22:25
  27:10,11,13,16
  28:12 37:17,23
  38:1,20,22
  39:10 42:7
  52:3,9 54:4
voting-age 17:5
  22:12 23:10
voting-eligible
  29:22

_____ **W** _____
wake 40:22
want 12:17 13:7

15:3,4 17:17
23:24 25:7,19
30:4 51:11,12
53:3
wanted 13:4
  20:5,6 24:18
Warren 12:11
Washington 1:9
  1:21
wasn't 9:5
way 4:17 5:14
  5:21 6:20 11:9
  15:10 16:15
  20:19 21:12
  30:10 43:15
  44:13,16,17
ways 4:10
we'll 3:3 24:13
  52:16
we're 5:8 6:24
  7:21 14:24
  16:12,15,24
  22:2 23:5,17
  24:2 28:2
  29:14 35:21,21
  38:15 45:4
  46:7,12 51:21
we've 43:5
weight 12:12
weighting 21:2
weren't 52:18
Wesberry 3:22
  4:13 11:4,6
  40:3 42:21
  47:9,11,12,13
  47:16,19,22
  48:3 52:5
Westbrook 11:3
widely 21:19
WILLIAM 1:16
  2:3,13 3:6 50:6
win 52:22
women 11:18
  12:3,7
word 5:1 46:5
words 10:16
  13:3,3,4 28:19

36:24
work 19:15
  53:22
working 32:18
works 52:17
worry 33:22
wouldn't 9:8
write 15:4
written 35:15
wrong 11:17
  12:1

_____ **X** _____
x 1:2,8

_____ **Y** _____
years 11:16
  40:24
York 26:3 31:18
  36:10,10
York's 36:8

_____ **Z** _____

_____ **0** _____

_____ **1** _____
1 3:16 18:1
1-year 16:19
10 7:19 17:16
  24:7,11,22
  25:2,7,10,13
  25:14 34:24
  35:4 37:1,8,9
  38:11,15 45:23
  49:9
10.1 7:21
11:08 1:14 3:2
12:04 54:8
14 44:14
14-940 1:4 3:4
15 7:21
16.5 25:16
1750 33:21
180 13:24
1868 11:17
1869 12:2
1920 11:17 12:2

1960s 6:19
1969 10:11,24
  11:5
1981 24:15

2
---

2 17:1,4,7 21:16
  21:25 22:1,1,7
  23:23 26:11,12
  27:5,8,9,13
  37:21 38:1,20
  38:22,24 39:2
  39:12,13 42:1
  42:3,4 53:22
20 14:17 17:16
  25:11,13,16
  46:25
2015 1:10
2016 41:23
2021 41:22
22 15:1 53:13
23 42:20
26 2:7 38:25
  53:10
29 31:19

3
---

3 2:4
3,000 16:22 38:6
30 45:19 46:21
  47:1 52:11,11
31 7:5 52:10
35 46:23
37 47:1
39 2:11

4
---

4 3:17
45 18:10 31:9
47 17:16 18:10
49.9 17:10

5
---

5 17:19 21:18
  37:21
5-year 16:20
50 2:14 3:18

  7:22 40:24
  46:12
50.1 17:8
54 53:12
557,000 18:1

6

6,784 18:2
600 38:6
60s 11:22
65,000 15:14

7

8
---

8 1:10 53:9,12
8-1 19:24
8.04 28:23

9
---

9 32:12 45:18
  46:21,23
90 49:11