

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

SUE EVENWEL; EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, in his official capacity as
Governor of Texas; NANDITA BERRY, in her
official capacity as Texas Secretary of State,

Defendants.

Civil Action No. 1:14-cv-335

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Sue Evenwel and Edward Pfenninger (“Plaintiffs”) are qualified under Texas law to vote in the election of Texas State Senate members. Plaintiffs’ votes in Texas State Senate elections will not be weighted equally with those of other qualified electors because of the malapportioned senatorial voting districts enacted by the Texas Legislature on June 23, 2013 and signed into law by Governor Rick Perry on June 26, 2013 (“Plan S172”). Plaintiffs bring this action for a declaration that Plan S172 is unconstitutional under the Fourteenth Amendment to the United States Constitution, and for an order enjoining Texas from conducting further state Senate elections under Plan S172 and requiring the Texas Legislature to reapportion state senatorial voting districts in conformity with the Fourteenth Amendment.

BACKGROUND

2. The State of Texas recently adopted Plan S172 for the election of Members of the Texas Senate. Pursuant to Section 28, Article III of the Texas Constitution, the Texas Legislature initially re-apportioned the Texas Senate districts following the 2010 Federal Census. To “equally” apportion Texas’s population in these Texas Senate districts, Texas sought to equalize total population with Senate districts and gave no consideration to the number of electors or potential electors within each district.

3. Members of the Texas Senate are elected to their posts by majority vote of registered voters actually casting ballots in a particular election. In districts where the number of electors is relatively low, the number of voters required to elect a Senate member is fewer than the number of voters required to elect a Senate member in districts where the number of electors is relatively high. Thus, the vote of an elector residing in a district where the number of electors is relatively high, like the districts in which Plaintiffs reside, is given significantly less weight than the votes of those in districts where the number of electors is relatively low.

4. Texas did not take into account the number of electors or potential electors in the proposed districts when crafting Plan S172. There are, therefore, gross disparities in the number of electors between Texas Senate districts. For example, the votes of electors in Senate District 3, a district over-populated with electors, have only sixty-one percent (61%) of the weight of the votes of electors in Senate District 27, a district under-populated with electors. The gross disparities created by Plan S172 violate the fundamental requirement of voter equality under the Fourteenth Amendment.

5. By ignoring the discrepancies in the number of electors in each senatorial district, Plan S172 violates the “one person, one vote” principle of the Fourteenth Amendment to the United States Constitution. As the Supreme Court of the United States held in *Reynolds v. Sims*, the

Fourteenth Amendment prohibits “weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside.” By enacting, implementing, and enforcing Plan S172, the Defendants have run directly afoul of what the Supreme Court in *Reynolds* refers to as “the basic principle of representative government,” specifically, that “the weight of a citizen’s vote cannot be made to depend upon where he lives.” Defendants have done so despite the fact that equalization of elector populations can be achieved compatibly with equalization of total population in properly apportioned senatorial districts.

THE PARTIES

6. Plaintiff Sue Evenwel is a citizen of the United States and of Texas and resides in Titus County, Texas. She is a registered voter residing within the geographic boundaries of Senate District 1 under Plan S172. She regularly votes in Texas Senate elections, and plans to do so in the future.

7. Plaintiff Edward Pfenninger is a citizen of the United States and of Texas and resides in Montgomery County, Texas. He is a registered voter residing within the geographic boundaries of Senate District 4 under Plan S172. He regularly votes in Texas Senate elections, and plans to do so in the future.

8. Defendant Rick Perry is the duly elected Governor of Texas, and is the Chief Executive Officer of the State of Texas under Article IV, Section 1, of the Constitution of the State of Texas. Governor Perry signed Plan S172 into law on June 26, 2013, and is sued here in his official capacity.

9. Defendant Nandita Berry is the Secretary of State of the State of Texas, is an Executive Officer of the State of Texas under Article IV, Section 1, is appointed by the Governor of Texas by and with the advice of the Texas Senate under Article IV, Section 21, of the Constitution of

the State of Texas, and is the Chief Election Officer for the State of Texas. Ms. Berry is responsible for implementing and enforcing Plan S172. She is sued here in her official capacity.

JURISDICTION AND VENUE

10. Plaintiffs' claims arise under the United States Constitution and federal law, and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. Because Plaintiffs challenge the constitutionality of the apportionment of senatorial voting districts under Plan S172, this Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and (4).

11. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because all Defendants reside in Texas and each of the individual Defendants keeps his or her principal office in this district, and because a substantial part of the events or omissions giving rise to this complaint took place in this district.

REQUEST FOR THREE-JUDGE COURT

12. This action challenges the constitutionality of the apportionment of the Texas Senate, a statewide legislative body. Accordingly, “[a] district court of three judges shall be convened” 28 U.S.C. § 2284(a).

THE ONE-PERSON, ONE-VOTE PRINCIPLE

13. The Equal Protection Clause of the Fourteenth Amendment provides that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Relying on the Equal Protection Clause, the Supreme Court of the United States has held that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.” *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). This principle is referred to as “one person, one vote.” *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

14. The one-person, one-vote principle requires equality of each qualified person's power to elect. The Supreme Court has held that, in accordance with this principle, it is permissible to apportion legislative districts based on the number of electors residing in those districts. *See Burns v. Richardson*, 384 U.S. 73 (1966). The Supreme Court has never held that the one-person, one-vote principle allows a state to apportion legislative districts on the basis of total population alone, while grossly underweighting certain electors' electoral power.

15. A panel of the United States Court of Appeals for the Fifth Circuit was previously faced with the question of whether the one-person, one-vote principle required the City of Houston to craft districts solely on the basis of citizen voting age population or another metric that would account for the number of electors, rather than the total population of the districts alone. *See Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). The court held that the decision to apportion on the basis of total population rather than voting population was a political question and that the courts should not interfere with the city's decision. The Fifth Circuit did not consider the question whether voting population could be ignored when it could be harmonized with total population.

REDISTRICTING THE TEXAS SENATE

16. The one-person, one-vote principle of the Equal Protection Clause requires that the States periodically revise their apportionment schemes in order to take into account population shifts and changes throughout the State. The Supreme Court has held that decennial reapportionment of state legislatures meets the minimal constitutional requirements for maintaining a reasonably current scheme of legislative representation. *See Reynolds*, 377 U.S. at 583-84.

17. Section 28, Article III of the Texas Constitution requires the Texas Legislature to reapportion the Texas Senate at its first regular session following the publication of the federal decennial Census.

18. In response to the 2010 Census, the Texas Legislature undertook a Texas Senate redistricting process beginning in June 2010.

19. Section 25, Article III of the Texas Constitution provides that “[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator.” The Texas Constitution does not otherwise restrict districting by county, city, or other boundaries.

20. The Texas Constitution formerly included provisions requiring that “The State shall be divided into Senatorial Districts . . . according to the number of qualified electors, as nearly as may be” In 1981, however, Texas Attorney General Mark White opined that these aspects of the Texas Constitution were “unconstitutional on [their] face as inconsistent with the federal constitutional standard.” Att’y Gen. Op. No. MW-350 (1981). The opinion did not contain any analysis of the reason why those provisions were “inconsistent with” the federal Constitution. Those provisions of the Texas Constitution were repealed in 2001.

21. Consistent with Opinion No. MW-350, the Texas Legislature endeavored to re-draw the Texas Senate districts to equalize total population alone, and gave no consideration to also equalizing the number of electors in each Senate district.

22. It would have been possible for the Texas Legislature to adjust district boundaries so as to create 31 contiguous districts containing both relatively equal numbers of electors and relatively equal total population. *See Exhibit A (Morrison Declaration)*. In other words, Texas could have safeguarded both the constitutional one-person, one-vote electoral principle and its interest in equally populated Senate districts but chose not to do so.

23. The Texas Legislature initially created Plan S148 as a redistricting plan for the Texas Senate. The Texas House passed H.B. 150, a bill containing Texas’s congressional, state senate,

and state house redistricting plans, including Plan S148, on April 28, 2011. The Texas Senate passed H.B. 150 on May 21, 2011, and Defendant Governor Rick Perry signed H.B. 150 into law on June 17, 2011.

24. All three redistricting plans included in H.B. 150, including Plan S148, were challenged in federal court. In particular, Plan S148 was challenged as violating Sections 2 and 5 of the Voting Rights Act. A three-judge court of the United States District Court for the Western District of Texas found that there was a “not insubstantial claim that” Senate District 10 in Plan S148 violated Section 5 of the VRA. *Davis v. Perry*, No. 5:11-cv-00788-OLG-JES-XR, ECF No. 147 (W.D. Tex. Mar. 9, 2012). That court created Plan S172 as an interim plan for the 2012 elections to remedy the perceived problem with Senate District 10 in Plan S148 and to adjust three contiguous districts. It otherwise sustained the enacted plan.

25. After the district court decreed Plan S172 as an interim plan for the 2012 elections, the Texas Senate and Texas House passed a bill making Plan S172 the State’s legislatively enacted plan on June 14 and June 21, 2013, respectively. Governor Perry signed the bill on June 26, 2013. Plan S172 therefore superseded Plan S148.

**PLAN S172 FAILS TO SECURE ONE-PERSON,
ONE-VOTE RIGHTS TO PLAINTIFFS**

26. Plan S172 creates Texas Senate districts that have large disparities in the number of electors amongst the districts. Tables created by the State setting forth the total population (from the 2010 Federal Census) and citizen voting age population (“CVAP”) (from the three separate American Community Surveys (“ACS”)) for each of the 31 districts of the Texas Senate are attached hereto as Exhibits B through D. A table created by the State setting forth total voter registration and non-suspense voter registration for the 2008 and 2010 general elections is attached hereto as Exhibit E.

27. Many of the districts created by Plan S172 are severely over- or under-populated with electors relative to other districts in the State. The tables attached to this Complaint as Exhibits B through E reflect the fact that no consideration was given to the number of electors in the various districts: every conceivable measure of electors or potential electors demonstrates that Plan S172 distributes electors amongst the various districts in a remarkably unequal manner. Set out below are the variations from the ideal district using several different alternative metrics representing the number of electors or potential electors in Plan S172:

Metric	% Deviation From Ideal*
CVAP (2005-2009 ACS) (Exhibit B)	47.87%
CVAP (2006-2010 ACS) (Exhibit C)	46.77%
CVAP (2007-2011 ACS) (Exhibit D)	45.95%
Total Voter Registration (2010) (Exhibit E)	55.06%
Total Voter Registration (2008) (Exhibit E)	51.14%
Non-Suspense Voter Registration (2010) (Exhibit E)	53.66%
Non-Suspense Voter Registration (2008) (Exhibit E)	51.32%

28. Plaintiffs live in Senate districts that are among the districts most overpopulated with electors under Plan S172.

29. Plaintiff Evenwel resides in Senate District 1. The table below compares the number of electors (or potential electors) in Senate District 1 to the Senate District with the lowest number of electors (or potential electors) for that metric, expressed as a percentage deviation from the ideal district and as a ratio of relative voting strength:

* *Formula: number of electors in most-populated district minus number of electors in least-populated district, all divided by the average number of electors per district, expressed as a percentage of the average number of electors per district.*

Metric	Senate District 1	Low Senate District	Absolute Difference	% Deviation From Ideal	Voting Power
CVAP (2005-2009 ACS) (Exhibit B)	557,525	358,205	199,320	41.49%	1:1.56
CVAP (2006-2010 ACS) (Exhibit C)	568,780	367,345	201,435	40.88%	1:1.55
CVAP (2007-2011 ACS) (Exhibit D)	573,895	372,420	201,475	40.08%	1:1.54
Total Voter Registration (2010) (Exhibit E)	489,990	290,230	199,760	46.69%	1:1.69
Total Voter Registration (2008) (Exhibit E)	513,259	297,692	215,567	49.23%	1:1.72
Non-Suspense Voter Registration (2010) (Exhibit E)	425,248	252,087	173,161	47.23%	1:1.69
Non-Suspense Voter Registration (2008) (Exhibit E)	437,044	256,879	180,165	47.76%	1:1.84

30. Plaintiff Pfenninger resides in Senate District 4. The table below compares the number of electors (or potential electors) in Senate District 4 to the Senate District with the lowest number of electors (or potential electors) for that metric, expressed as a percentage deviation from the ideal district and as a ratio of relative voting power:

Metric	Senate District 4	Low Senate District	Absolute Difference	% Deviation From Ideal	Voting Power
CVAP (2005-2009 ACS) (Exhibit B)	506,235	358,205	148,030	30.81%	1:1.41
CVAP (2006-2010 ACS) (Exhibit C)	521,980	367,345	154,635	31.38%	1:1.42
CVAP (2007-2011 ACS) (Exhibit D)	533,010	372,420	160,590	31.95%	1:1.43
Total Voter Registration (2010) (Exhibit E)	466,066	290,230	175,836	41.10%	1:1.61
Total Voter Registration (2008) (Exhibit E)	468,949	297,692	171,257	39.11%	1:1.58
Non-Suspense Voter Registration (2010) (Exhibit E)	406,880	252,087	154,793	42.22%	1:1.61
Non-Suspense Voter Registration (2008) (Exhibit E)	409,923	256,879	153,044	40.57%	1:1.60

31. The effect of this severe overpopulation of electors is that the Plaintiffs' votes carry far less weight than the votes of other citizens in districts that are under-populated with electors.

32. The one-person, one-vote principle requires Texas to safeguard the right of electors like the Plaintiffs to an equally weighted vote in addition to equal representation based on total population.

33. The Supreme Court requires that States must "make a good-faith effort to achieve precise mathematical equality" in the apportionment of state voting districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). But the figures above confirm that Texas made no effort to ensure that the Plaintiffs' voting power was not substantially diluted when compared with votes of citizens living in other parts of the State.

34. Plaintiffs accept for purposes of decision that a jurisdiction might have a constitutional interest in creating legislative districts of roughly equal total population. But the Supreme Court's case law is clear that the Equal Protection Clause also protects the rights of *electors*, and that redistricting responsibility does not stop with total population equalization. States therefore must ensure that their apportionments protect the rights of electors, and they cannot apportion legislative districts based solely on total population where, as here, doing so would result in grossly unequal weighting of individual electoral power.

35. Plaintiffs recognize that the United States Court of Appeals for the Fifth Circuit held in *Chen v. City of Houston* that inequality of voting population among municipal legislative districts does not necessarily violate the one-person, one-vote principle because a jurisdiction can make a political decision to equalize total population rather than the number of electors. *Chen* did not consider whether electoral power could be ignored when it is possible to safeguard both interests. *Chen* also does not satisfy *Baker v. Carr* and *Reynolds v. Sims*, which not only protect electors' right to an equally weighted vote but also make justiciable legislative apportionment decisions that dilute the weight of votes. *Chen* is also distinguishable from the present case because the deviations amongst the districts in S172 with regard to the number of electors are greater than those that were presented in *Chen*. Finally, *Chen* is not binding on this Court because—as Texas recently recognized—only the Supreme Court has the authority to review the decisions of this three-judge court. See Plaintiff's Motion for Summary Judgment 38-40, ECF No. 347, *Texas v. Holder*, No. 12-cv-128 (D.D.C. Oct. 1, 2012) (“Texas contends that this three-judge district court is bound to follow only the precedent of the Supreme Court of the United States.” (citing *United States v. Ramsey*, 353 F.2d 650, 658 (5th Cir. 1965))).

COUNT ONE – 42 U.S.C. § 1983

36. The allegations contained in paragraphs 1-37 above are re-alleged as if fully set forth herein.

37. The right to vote is fundamental, and is preservative of all other rights.

38. The Defendants are responsible for the passage, implementation, and enforcement of Plan S172.

39. Defendants violated the Equal Protection Clause of the Fourteenth Amendment by enacting, implementing, and enforcing Plan S172, which took no account of the rights of electors to an equally weighted vote and which weights the votes of Texas citizens differently based on where they live. As a result of Plan S172, the vote of electors living in certain areas of the State will be given significantly greater weight than the votes of Plaintiffs in state senatorial elections.

40. Plaintiffs' fundamental constitutional rights as electors to a vote of approximately equal weight to that of all other electors in the same state is impaired by Plan S172.

41. Texas could have apportioned its Senate districts to safeguard the principle of an equally weighted vote without departing from the goal of equalizing total population, but chose not to do so.

42. For these reasons, Plan S172 violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

43. Plaintiffs have no adequate remedy at law other than the judicial relief sought herein. Unless the Defendants are enjoined from enforcing Plan S172 and ordered to draw a new plan that complies with the Constitution, Plaintiffs will be irreparably harmed by the continued violation of their constitutional rights.

RELIEF SOUGHT

WHEREFORE, Plaintiffs hereby request that this Court award the following relief:

- (a) Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, which declares (i) that Texas was required to account for electors' right to an equally weighted vote; and (ii) that Texas's failure to do so under the circumstances violated Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution;
- (b) Permanently enjoin Defendants from calling, holding, supervising, or certifying any elections under Plan S172;
- (c) Enter an order requiring Texas to establish constitutionally valid state senatorial districts prior to the next scheduled state senatorial election;
- (d) Award Plaintiffs all reasonable fees and costs incurred herein under 42 U.S.C. §§ 1973l(e) and 1988(b) and (c); and
- (e) Grant any and all further relief to which Plaintiffs shall be entitled.

DATED: April 21, 2014

Respectfully submitted,

/s/ Meredith B. Parenti

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

and I hereby certify that I have mailed by United States Postal Service certified mail return receipt requested the document to the following non-CM/ECF participants:

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