



MALDEF

The Latino Legal Voice for Civil Rights in America.

Fact Sheet on *Evenwel v. Abbott*

- *Evenwel v. Abbott* is being argued before the U.S. Supreme Court on **December 8** and should be decided by the Court sometime before the end of **June 2016**.
- The case comes to the Court directly from a **three-judge district court** in Texas. Because plaintiffs challenge Texas statewide redistricting (of the state Senate), *Evenwel* was heard by a three-judge trial court, with appeal directly to the U.S. Supreme Court, **bypassing the Fifth Circuit** Court of Appeals.
- Two previous similar test cases were heard and decided against plaintiffs by the Fifth Circuit, and the Supreme Court declined to hear the two cases.
- When it “**noted probable jurisdiction**” rather than dismissing the plaintiffs’ appeal in late May 2015, the Supreme Court indicated that it would hear and decide the case.
- *Evenwel* is funded by the same **moneyed extremists** behind ongoing challenges to affirmative action in higher education and other right-wing causes.
- The State of Texas and the Obama Administration have both urged the Supreme Court to reject the plaintiffs’ **radical legal theories**.

Issues in the Case

- For half a century, the Supreme Court has required that electoral districts be equalized (within reason) under the so-called “**one person, one vote**” doctrine. This **Fourteenth Amendment equal protection** principle is what triggers the redrawing of electoral districts at state and local level after each Census – to restore population equality among districts.
- The *Evenwel* plaintiffs argue that the Fourteenth Amendment requires that **voter population** be equalized, rather than **total population**. Equalizing based on total population has been the standard practice nationwide for more than half a century.
- Equalizing districts based on total population uses the **complete count** of all persons conducted by the **U.S. Census Bureau** each decade.
- The *Evenwel* plaintiffs have been unclear and inconsistent about what measure of voter population they believe must be used to equalize districts. There are three main possibilities:
 - **Citizen Voting Age Population (CVAP)** – estimates of the number of citizens over 18 years old, based on an annual **sample survey** by the Census that is then averaged over five years.
 - **Voter Registration** – numbers maintained at state and county level that may be influenced by efforts to create **barriers** to registration, **disqualifications** of certain citizens over 18 (such as ex-offenders in many states), and voter **purging** practices.
 - **Voter Turnout** – numbers maintained at state and county level with **high volatility** from election to election.
- Any measure of voter population would **completely discount children** under 18 **and immigrants** who have not yet naturalized.

Potentially Affected Districts

- Because the plaintiffs in *Evenwel* are making their argument under the U.S. Constitution, a decision in their favor would affect **all electoral districts**, from the local city council or school board up to state legislature and congressional districts.
- This potentially creates the “**apportionment anomaly**”: The Fourteenth Amendment expressly requires that congressional districts be distributed, or “apportioned,” among the states after each Census using “the **whole number of persons** in each State.” Therefore, if plaintiffs prevail, each state would be apportioned a certain number U.S. House of Representatives districts based on total population, but then would have to use voter population in drawing the boundaries of those congressional districts within the state.
- This also creates a **disturbing historical irony**: By requiring the use of total population in apportioning congressional seats, the Fourteenth Amendment repealed the abominable “**Three-Fifths Compromise**” of our original Constitution, which counted African American slaves as three-fifths of a person in allocating House seats.
- The plaintiffs in *Evenwel* argue that the very same post-Civil War amendment that eliminated the “Three-Fifths Compromise” also imposed a “**Zero-Fifths Rule**” for children and many immigrants in drawing districts, effectively rendering them **non-constituents** of the elected officials representing their area.

Possible Outcomes of the Case

- There are four main possible outcomes of the forthcoming Supreme Court decision:
 - **Voter Equalization** – If the Court decides in favor of the plaintiffs, every jurisdiction would have to redraw districts to attempt to equalize voter population. Depending on the measure of voter population, redistricting could be required more frequently than once per decade perpetually in the future.
 - **Total Population Equalization** – The Court could decide that districts must be equalized based on total population as determined by the decennial complete-count Census. Prevailing practice would continue nationwide. The narrowest possible ruling would simply hold that states *may* equalize on total population, without any comment on whether a state may use any other basis for equalizing districts.
 - **States’ Rights Decision** – The Court could decide, as urged by defendant State of Texas in *Evenwel*, that each state may decide on its own whether to use total population or voter population in equalizing electoral districts. This outcome would undoubtedly trigger a right-wing campaign in certain states to shift from total population to voter population.
 - **Dual Requirement** – The Court could decide that districts must be drawn to equalize both total population and voter population. This outcome would likely require the drawing of bizarrely snake-like districts – a phenomenon long disfavored by the Court – in many jurisdictions.

MALDEF's amicus brief and corresponding appendix are at the links below.

MALDEF's amicus brief: http://maldef.org/assets/pdf/2015_09-24_TX_SENATE_HISPANIC_CAUCUS_Appellees.pdf

Appendix to MALDEF's amicus brief: http://maldef.org/assets/pdf/2015_09-25_APPENDIX_TX_SENATE_HISPANIC_CAUCUS.pdf