

No. 12-777

In the
Supreme Court of the United States

KEITH A. LEPAK, *et al.*,
Petitioners,

v.

CITY OF IRVING, TEXAS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

**AMICUS CURIAE BRIEF OF CENTER FOR
CONSTITUTIONAL JURISPRUDENCE IN
SUPPORT OF PETITIONERS**

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional
Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

*Counsel for Amicus Curiae Center
for Constitutional Jurisprudence*

QUESTIONS PRESENTED

Does the “one person, one vote” rule of *Reynolds v. Simms*, permit the creation of voting districts where noncitizens are counted for purposes of the equal population rule, allowing votes in some districts to be weighted twice as much as votes in other districts?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES..... iii
IDENTITY AND INTEREST OF
 AMICUS CURIAE1
SUMMARY OF ARGUMENT1
ARGUMENT2
THE COURT SHOULD GRANT REVIEW TO
 RESOLVE HOW THE COMMANDS OF
 EQUAL WEIGHT FOR VOTES AND
 EQUALITY OF POPULATION IN
 DISTRICTS ARE IMPLEMENTED
 IN BORDER STATES WITH SIGNIFICANT
 NUMBERS OF ILLEGAL IMMIGRANTS2
CONCLUSION6

TABLE OF AUTHORITIES

Cases

<i>Arizona v. United States</i> , __ U.S. __, 132 S.Ct. 2492 (2012)	1, 2, 3
<i>Hadley v. Junior Coll. Dist. of Metro. Kansas City</i> , 397 U.S. 50, 52-53 (1970).....	3
<i>Hawaii v. Office of Hawaiian Affairs</i> , 556 U.S. 163 (2009).....	1
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983).....	3
<i>Kirkpatrick v. Preisler</i> , 394 U.S. 526 (1969).....	3
<i>Mahan v. Howell</i> , 410 U.S. 315, <i>modified</i> , 411 U.S. 922 (1973)	3
<i>National Federation of Independent Business v.</i> <i>Sebelius</i> , __ U.S. __ 132 S. Ct. 2566 (2012)	1
<i>Reynolds v. Simms</i> , 377 U.S. 533 (1964).....	i, 3
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	3, 4, 6

Other Authorities

James Madison, Federalist No. 54, <i>The Federalist</i> Papers (Clinton Rossiter, ed.) (1961)	5
Joseph Story, Commentaries on the Constitution, §635 (1833), in 2 <i>The Founders Constitution</i> , (Philip B. Kurland and Ralph Lerner, eds.) (1987).....	5

King, Theophilus Parsons: Notes of Convention Debates, 17 January, reprinted in 6 *The Documentary History of the Ratification of the Constitution* (Massachusetts No. 3) John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, editors (Univ. Virginia Press 2009).....4

Records of the Federal Convention in 2 *The Founders Constitution*, (Philip B. Kurland and Ralph Lerner, eds.) (1987).....5

Constitutional Provisions

U.S. Const. Amend. 14, §25

Rules

Sup. Ct. R. 37.3(a)1

Sup. Ct. R. 37.6.....1

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,¹ is dedicated to upholding and restoring the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the Founders intended to protect state political structure and preserve the right to vote. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *Arizona v. United States*, __ U.S. __, 132 S.Ct. 2492 (2012); and *National Federation of Independent Business v. Sebelius*, __ U.S. __ 132 S.Ct. 2566 (2012).

SUMMARY OF ARGUMENT

Last term, this Court noted the increasing difficulties that states face with illegal immigration. This case identifies yet another difficulty created by this immigration. Should people who are here unlawfully be counted for purposes of equalizing the population of electoral districts? No matter how the

¹ Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk. All parties were given notice of this brief more than 10 days prior to filing.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Court treats its cases requiring districts with roughly equalized populations, noncitizens should not be included in the count. Whether the rationale is equalizing the relative weight of votes or the equalization of the members of the polity represented by each elected official, the district at issue in this case fails the test. The vast numbers of people here unlawfully make it critically important that the Court take this case now.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO RESOLVE HOW THE COMMANDS OF EQUAL WEIGHT FOR VOTES AND EQUALITY OF POPULATION IN DISTRICTS ARE IMPLEMENTED IN BORDER STATES WITH SIGNIFICANT NUMBERS OF ILLEGAL IMMIGRANTS

The City Council Districts at issue in this case look equal on their face, but because the population counted includes noncitizens the districts are decidedly unequal in the weight they give to a particular voter's vote. The vote of voters in the challenged district is weighted twice as much as the vote of voters in districts. The court below ruled that the decision to include noncitizens in the count -- a decision initially imposed by the District Court -- was insulated from review by the political question doctrine. That conclusion, however, becomes an exception that swallows the rule requiring equalized districts. The problem created is most acute in Border States, but it is a problem likely to spread to other states.

In *Arizona*, this Court recounted the difficulties faced by states from illegal immigration. The Court noted that in Arizona, it is estimated that more than

six percent of the population is not lawfully present in the United States. 132 S.Ct. at 2500. Justice Scalia noted that this problem is even more acute because the President is declining to enforce laws against illegal immigration, leaving border states with no protection. *Id.* at 2521. If this population of noncitizens is counted in voting districts created by federal courts and local politicians, the concept of equalized districts and voting weight is lost.

This Court's decisions in *Wesberry v. Sanders*, 376 U.S. 1 (1964) and *Reynolds v. Simms*, 377 U.S. 533 (1964), set out two different bases for the conclusion that districts must be equalized by population. *Wesberry* talked about the weight of the vote, but was also concerned with the Court's reading of the original understanding of Article I, §2 as requiring equalized population in House districts. *Wesberry*, 376 U.S. at 16. *Reynolds* picked up on both of these bases for finding that the districts drawn by Alabama violated the Fourteenth Amendment. *Reynolds*, 377 U.S. at 562.

If *Reynolds* requires that votes be equally weighted, the districts at issue here violate the Equal Protection Clause. The votes in the challenged district have a relative weight twice that of votes in other districts. By any measure, this fails the substantial equality test of *Reynolds* and later cases. *Id.* at 562; *Karcher v. Daggett*, 462 U.S. 725, 731-34 (1983); *Mahan v. Howell*, 410 U.S. 315, 321-22, *modified*, 411 U.S. 922 (1973); *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 55-56 (1970); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

The districts here also violate the standard of equalized population. The question to answer here is who is to be included in the population to be counted. If this is to be based on the design of the House of Representatives, population equality was not designed to create equality of vote weight. This is clear when one considers that the Constitution left voter qualification up to the states in full recognition that states had different qualifications.

During the ratification debates, there was express recognition that different states would have different voter qualification requirements. *King, Theophilus Parsons: Notes of Convention Debates, 17 January*, reprinted in 6 *The Documentary History of the Ratification of the Constitution* (Massachusetts No. 3) John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, editors (Univ. Virginia Press 2009), at 1240-41. Because different states had different voter qualifications, the command to allocate representation in the House based on population, rather than voters, was not an attempt to equalize the weight of votes in states that voted by district. The design, as this Court recognized in *Wesberry*, was to ensure equality of representation. *Wesberry*, 376 U.S. at 16. That is something quite different from equally weighted votes.

Importantly, however, that equality of representation was meant to focus on representation of those who were members of the polity. This is indicated most strongly in the exclusion of “Indians not taxed”

from the calculation.² This exclusion was maintained in the Fourteenth Amendment. U.S. Const. Amend. 14, §2. The purpose of this exclusion was explained by Justice Story:

There were Indians also in several, and probably in most of the States at that period, who were not treated as citizens, and yet who did not form a part of independent communities or tribes exercising general sovereignty and power of government within the boundaries of the States. It was necessary, therefore, to provide for these cases though they were attended with no practical difficulty. There seems not to have been any objection ... in excluding Indians not taxed.

Joseph Story, *Commentaries on the Constitution*, §635 (1833), in 2 *The Founders Constitution*, (Philip B. Kurland and Ralph Lerner, eds.) (1987) at 141. James Wilson, made a similar point:

² The 3/5's Clause does not indicate a purpose to expand the "polity" represented to include the African Americans while they were unjustly held in slavery in the Southern States. Instead, the Constitution debates reveal that the purpose of this provision was to decrease the representation given to slave owners. Records of the Federal Convention in 2 *The Founders Constitution*, (Philip B. Kurland and Ralph Lerner, eds.) (1987), 106-09. Madison argued that slaves must be treated as people, rather than property, and that once their rights were restored, they would be entitled to "an equal share" of representation. James Madison, *Federalist No. 54*, *The Federalist Papers* (Clinton Rossiter, ed.) at 377 (1961). In any event, once this injustice was rectified by the Fourteenth Amendment, the representation calculation still excluded "Indians not taxed." U.S. Const., Amend. 14, § 2.

[A]ll elections ought to be equal. Elections are equal, when a given number *of citizens*, in one part of the state, choose as many representatives, as are chosen by the same number *of citizens*, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

Wesberry, 376 U.S. at 17 (emphasis added, quoting 2 The Works of James Wilson (Andrews ed. 1896) 15).

The population to be counted is the population of the polity. “Indians not taxed” were not considered as part of that polity, and there was no reason to include them in the population counted for House representation.

Similarly, noncitizens – particularly those who are in this country illegally – are not part of the polity. Because of their numbers, however, noncitizens create significant issues for rules of equalized population in voting districts.

CONCLUSION

Illegal immigrants and other noncitizens were not meant to be included in the polity for whom the Framers and Ratifiers of the Constitution sought to enshrine the principle of “equal representation.” Indeed, their inclusion in voting districts can lead, as is the case in the instant action, to significant underweighting of votes of citizens in other districts. This Court should grant review to clarify that the rule of

“one person, one vote” means “one *voter*, one vote.”
At the very least, any rule of equal population districts should only count citizens.

DATED: January, 2013.

Respectfully submitted,

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional
Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2866
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence