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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY BRIEF

KENT D. KRABILL
JEREMY A. FIELDING
LYNN TILLOTSON
PINKER & COX, LLP
2100 Ross Avenue,
Suite 2700
Dallas, TX 75201
(214) 981-3800

WILLIAM S. CONSOVOY
*Counsel of Record*
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
wconsovoy@wileyrein.com

*Attorneys for Petitioners*

March 12, 2013

246531

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

*Cited Authorities*

*Cited Authorities*



**STATUTES AND OTHER AUTHORITIES**

## REPLY BRIEF FOR PETITIONER

As the Petition ("Pet.") explains, the Court should grant review because this appeal presents an important question that needs to be resolved in order to ensure voter equality in state and local redistricting. Respondents City of Irving ("City") and Robert Moon, *et. al.* ("Intervenors") do not dispute the national significance of this issue. Respondents instead oppose review because, in their view, Section 2 of the Voting Rights Act ("VRA") need not work in tandem with the Fourteenth Amendment. Respondents also believe that interpreting the one-person, one-vote principle to protect voters would violate the constitutional rights of non-citizens and that Citizen Voting Age Population ("CVAP") data—the same data used to create the City's majority-Hispanic district—is too unreliable to ensure the equal-protection rights of voters in the rest of the City. As explained below, Respondents' arguments not only are unsustainable, they underscore the need for the Court's intervention. The Court should grant certiorari and decide this important question.

### I. Respondents Acknowledge That The Petition Presents A Question Of National Importance.

Respondents do not dispute the importance of the question presented. They do not contest that shifting federal immigration policies have made this a national issue or that malapportionment has significant financial consequences for underrepresented districts. Pet. 15-18; Center for Constitutional Jurisprudence Amicus Brief 2-3. And they concede the pervasiveness of the problem, explaining that "governmental bodies across the United States rely almost uniformly on total population as the

measure by which the districts are to be judged" for one-person, one-vote purposes, even if it sometimes leads to malapportionment of voters. City Brief in Opposition ("BIO") 24; Intervenors BIO 17 n.7.

Respondents dispute only the need to resolve the tension between the lower courts' interpretation of the one-person, one-vote principle and Section 2 of the VRA. Pet. 18-22; Mountain States Legal Foundation Amicus Brief 10-12 ("MSL Br."); Cato Institute Amicus Brief 7-10 ("Cato Br."). Respondents acknowledge that voter population is what matters in a Section 2 vote dilution case, while the lower courts have interpreted the one-person, one-vote principle to allow states and localities to ignore voter equality. City BIO 23; Intervenors BIO 8-9. In their view, this tension can remain unresolved because there is "no reason why the measure used in the statutory analysis and that used in the constitutional analysis should be the same." City BIO 20; Intervenors BIO 10 (claiming that these are "separate and unrelated inquiries").

Respondents' view is untenable; if anything, it highlights the need for the Court's review. The one-person, one-vote principle is the constitutional foundation from which the concept of racial-bloc vote dilution emerged. *Shaw v. Reno*, 509 U.S. 630, 640-41 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 46-48 (1986); *Wise v. Lipscomb*, 437 U.S. 535, 541 n.5 (1978); *Burns v. Richardson*, 384 U.S. 73, 88 (1966). Absent the Court's recognition in the one-person, one-vote context that voting rights can "be denied by a debasement or dilution of the weight of a citizen's vote," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), there would have been no Fourteenth Amendment justification to strike down "practices such as multimember or at-large

electoral systems" that "can reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice ... when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength." *Shaw*, 509 U.S. at 641 (citations and quotations omitted). Nor would Congress have been authorized to prophylactically enforce that right by prohibiting, under Section 2 of the VRA, "[state] legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent." *Id.* (citations omitted).

Accordingly, it is quite important that Section 2 and the one-person, one-vote principle work in harmony. The Court has always shown concern when statutory rights and the foundational constitutional principles they are supposed to enforce are moving in "different directions" and has recognized the need "to reconcile them" if possible. *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009); *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (addressing the "tension" between Section 5 of the VRA and the Equal Protection Clause); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (same). That same concern exists here. The group-based anti-dilution right protected by Section 2 cannot be given precedence over the Fourteenth Amendment's one-person, one-vote right, especially when the two can be reconciled by ensuring that single-member districts created to protect the electoral power of minority voters do not undermine the equal-protection rights that the one-person, one-vote principle guarantees to individual voters. Pet. 20-21; *Abrams v. Johnson*, 521 U.S. 74, 98-101 (1997).

The City alternatively argues that the Court should address this issue in a Section 2 case. City BIO 18. But the concern is not with the use of a voter-based standard such

as CVAP under Section 2. "The protections of section 2" have appropriately been "limited to citizens." *Id.* 20. The problem is that the lower courts have not similarly limited the one-person, one-vote principle even though it derives from the conclusion that, "[w]ith respect to the allocation of legislative representation, all *voters*, as *citizens* of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565 (emphasis added). This problem can be remedied only in a one-person, one-vote challenge to an apportionment scheme.[1]

Respondents' attempt to minimize the importance of CVAP in Section 2 litigation also falls short. City BIO 21-24; Intervenors BIO 8-10. In a typical Section 2 case, a demonstration that the minority group has a CVAP sufficient to elect their preferred candidate of choice in a single-member district is "a necessary precondition

1. The City also incorrectly argues that "nothing has changed" since the Court denied certiorari in *Chen*. City BIO 12. As noted above, changing immigration policies have made this an issue of national importance and intensified the problem in those areas where non-citizen populations are concentrated. From the beginning, the Court recognized that "complexions of societies and civilizations change, often with amazing rapidity" and thus "[c]onceivably, in some future time, urban areas might again be in a situation of attempting to acquire or retain legislative representation in excess of that to which, on a population basis, they are entitled." *Reynolds*, 377 U.S. at 568 & n.3. That is what has occurred. Pet. 20-21; *see, e.g.*, Leah R. Sauter, *Hispanic in Everything But Its Voting Patterns: Redistricting in Texas and Competing Definitions of Minority Representation*, 46 Colum. J.L. & Soc. Probs. 251, 278-79 (2012); Gerald Benjamin, *At-Large Elections in N.Y.S. Cities, Towns, Villages and School Districts and the Challenge of Growing Population Diversity*, 5 Alb. Gov't L. Rev. 733, 734 (2012).

to establishing that an at-large election system is discriminatory" and, accordingly, "is an essential element of proving a [Section 2] violation." City BIO 22. And once a violation is found, CVAP data dictates the boundaries of the single-member districts replacing the at-large system. Indeed, that is what occurred here. Pet. 6-9. CVAP's role in Section 2 litigation is therefore anything but "limited." City BIO 23.

Finally, although the importance of this issue is the principal reason for review, Respondents wrongly attempt to minimize the circuit split by labeling the Ninth Circuit's rejection of voter population as mere dicta. City BIO 4-7; Intervenors BIO 3-6. Although initially suggesting that the issue might be left to the political process, the court went on to explain that "basing districts on voting population rather than total population would disproportionately affect [the First Amendment petition] rights for people living in the Hispanic district" by overpopulating it with non-citizens and crowding access to an elected official. *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990). In the Ninth Circuit's view, apportioning districts based on voter equality would "abridge the right of aliens and minors to petition that representative" and, therefore, "[a]doption of Judge Kozinski's position *would constitute a denial of equal protection* to these Hispanic plaintiffs and rejection of a valued heritage." *Id.* at 775-76 (emphasis added). That statement was not dicta.

But even if the Ninth Circuit had adopted the same reasoning as the Fourth and Fifth Circuits, the need to resolve this issue would be undiminished. These circuits contain more than one-half of the nation's non-citizens, Pet. 17-18, and they all allow states and localities to count

non-citizens in apportioning districts. By any measure, then, this case raises "important questions regarding the appropriate population standard a locality should use when drawing its election districts in compliance with the Equal Protection Clause principles established in *Reynolds v. Sims*." *Amicus Curiae* Brief of the United States 3 (5th Cir. May 23, 2011). Respondents' failure to address—let alone contradict—the United States' recognition of this case as nationally important is a tacit admission that the Petition meets the criteria for certiorari irrespective of any circuit split.

## II. Respondents' Attempt To Recast The Question Presented As Settled Is Unsustainable.

Respondents do not defend the conclusion below that this issue could be committed to the political process. Nor could they plausibly do so. Pet. 29-31; *Garza*, 918 F.2d at 784 (Kozinski, J., concurring and dissenting in part). Rather, the City seems to argue that the use of CVAP would actually violate the equal-protection rights of non-citizens. City BIO 23-24 & n.52. But that argument is as unviable as the Ninth Circuit's First Amendment "access" theory. The Constitution protects non-citizens in many ways. But its protection of voting rights extends only to those eligible to participate in the electoral process. *Reynolds*, 377 U.S. at 558 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters, but equality among those who meet the basic qualifications."); Pet. 26-29; Cato Br. 6 (collecting cases).

Instead of defending the Fifth Circuit, Respondents incorrectly argue that the question has already been decided. City BIO 9-11; Intervenors BIO 13-15. The Court

has "carefully left open the question [of] what population" base is relevant for one-person, one-vote purposes. *Burns v. Richardson*, 384 U.S. 73, 91 (1966). And the question remains open. *See Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 58 n.9 (1970); *Chen v. City of Houston*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from the denial of certiorari); *Chen v. City of Houston*, 206 F.3d 502, 524 (5th Cir. 2000); *Garza*, 918 F.3d at 785 (Kozinski, J.); *Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996).

Respondents' analogy to the Constitution's system for apportioning congressional districts also is misplaced. City BIO 12-17; Intervenors BIO 11-12. The "federal analogy" is "inapposite and irrelevant to state legislative districting schemes." *Reynolds*, 377 U.S. at 573; *Gaffney v. Cummings*, 412 U.S. 735, 740-43 (1973). The Fourteenth Amendment's history does not alter the equation: "the overall context in which the amendment was drafted prevents any firm conclusion being drawn as to the framers' intent regarding the question before us." *Chen*, 206 F.3d at 527.

Finally, the City seeks to evade this Court's review by claiming that even if state and local districts must be drawn to equalize voters, "the available data sources simply would not permit such districts to be drawn in a manner that offers any reasonable assurance that they in fact contain equal levels of CVAP." City BIO 28. But the City's attack on this data source is remarkable given its concession that CVAP is a necessary component of a Section 2 vote dilution claim. City BIO 21-24. Even Intervenors agree that "CVAP [data] has emerged as the most usable proxy for potential voting strength in a

district, and thus the best available measure of a minority groups' potential ability to elect its candidates of choice." Intervenors BIO 9. It is inconceivable that CVAP data is the single best statistical source for vindicating a vote dilution claim yet wholly unreliable in the one-person, one-vote setting.[2]

The City further argues that it cannot protect voter equality because the Census "long form" questionnaire no longer collects reliable CVAP data, having been replaced by the American Community Survey ("ACS"), which allegedly has a higher margin of error. City BIO 26-27. But "[m]athematical exactness" is not the standard; the City need not establish districts with perfect voter equality. *Gaffney*, 412 U.S. at 743. At the same time, the City cannot rely on total population when 55% of its voting-age Hispanics are non-citizens. Pet. 9-10. The City "must make an honest and good-faith effort to construct its districts ... so that the vote of any citizen is *approximately* equal in weight to that of any other citizen in the State." *Gaffney*, 412 U.S. at 743-44 (quotation omitted) (emphasis added).

---

2. Intervenors' claim that Petitioners ignore other categories of ineligible voters is misplaced. Intervenors BIO 2. There is no evidence that the distribution of children, college students, felons, and those suffering from mental incapacity are unevenly distributed. The same cannot be said of non-citizens given the City's demographics. As the Fifth Circuit correctly explained in summarizing the argument in favor of voter equality, when, as here, "a districting body knows that large numbers of those ineligible to vote are disproportionately concentrated in certain areas, it can no longer in good faith use total population as a proxy for potential voters. Instead, it is obligated to deploy a more sophisticated measurement, such as CVAP." *Chen*, 206 F.3d at 524.

Given this flexible standard, the ACS clearly provides the City with the CVAP data it needs to comply with its one-person, one-vote obligations. The ACS is an "ongoing survey that provides data every year—giving communities the current information they need to plan investments and services. Information from the survey generates data that help determine how more than $400 billion in federal and state funds are distributed each year. To help communities, state governments, and federal programs, [the Census] ask[s] about a variety of topics, including age, race, ethnicity, and citizenship."[3] "The Census Bureau ... aggregate[s] ACS data from three- and five-year periods to create reliable data for smaller populations." *Fabela v. City of Farmers Branch, Tex.*, 2012 WL 3135545, at *1-8 (N.D. Tex. 2012). In fact, in the Section 2 litigation below, the court found that "the Census Bureau considers ACS data reliable and intends for it to be relied upon in decisions such as [VRA] compliance." *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 721 (N.D. Tex. 2009).

Moreover, as in Section 2 cases, Intervenors BIO 9 n.4, parties can use a combination of ten-year Census data, ACS data, and expert reports to produce reliable CVAP data and construct districts that ensure voter equality. *See, e.g., Fabela*, 2012 WL 3135545, at *1-8; *Committee for a Fair and Balanced Map v. Ill. Bd. of Elections*, 2011 WL 5185567, at *5 (N.D. Ill. 2011) ("[C]itizen voting-age population can be shown through expert testimony; census data is not required."). In short, the Court should

3. Citizen Voting Age Population (CVAP) Special Tabulation From the 2007-2011 5-Year American Community Survey, CVAP Documentation, *available at* https://www.census.gov/rdo/data/voting_ age_population_by_citizenship_and_race_cvap.html.

reject the City's transparent attempt to avoid review by claiming that the ACS data on which it necessarily relies to fulfill its Section 2 obligations is somehow too unreliable to vindicate one-person, one-vote claims.

## III. This Case Is The Ideal Vehicle For Deciding This Important Question.

Respondents also do not dispute that this case is an ideal vehicle for resolving the question presented. Pet. 20-21. Although the City notes that the districts "have been redrawn to reflect population changes revealed by the 2010 census," City BIO 26, it neither argues that these minor changes solved the massive one-person, one-vote problem that exists if voter equality is constitutionally required, nor that the changes remedied Petitioners' injury given the City's demographics and the fact that several officials elected under this regime remain in office. Pet. 12 n.3; Pet. App. 3a n.1. Respondents bear the burden of showing that the minor changes made in response to the 2010 Census create a justiciability problem. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012). Respondents have not even attempted to mount such an argument, and would have failed if they had tried, *see, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327 (2000); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

The City also suggests that, even if the Court were to hold that voter equality is required, Petitioners might not prevail on remand on the ground that the City's own CVAP data is unreliable. City BIO 27-28. But the City's expert was not criticizing the CVAP data produced in this litigation, which came from the 2000 "long form" Census the City promotes as more reliable. Pet. 8 n.2. Rather,

the expert was hypothetically criticizing the margin of error that he believes would have existed if this data had come from the ACS. Murdock Declaration, Doc. 30 at PageID 428-29, 453. That criticism of the ACS data is misplaced for the reasons set forth above. But even assuming that the CVAP data in this case came from the ACS and assuming the greatest possible margin of error suggested by the City's expert—*i.e.*, assuming the highest number of citizens for District 1 (22,931) and the lowest number of citizens for District 3 (26,061)—there is still an unconstitutional deviation of 12.35% between the largest and smallest districts. City BIO 27. Thus, the question presented is decisive here even accepting the City's unfounded criticisms of the same data it relied on to draw these districts.

In sum, there can be no question that the choice between total population and voter population is decisive in this case as it led to the formation of a majority-Hispanic district where the votes of those eligible to cast a ballot are worth *twice* as much as those of voters elsewhere in the City. Pet. 9. The Court should grant review to decide this nationally important question and provide the lower courts with much needed guidance.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KENT D. KRABILL
JEREMY A. FIELDING
LYNN TILLOTSON
PINKER & COX, LLP
2100 Ross Avenue,
Suite 2700
Dallas, TX 75201
(214) 981-3800

WILLIAM S. CONSOVOY
*Counsel of Record*
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
wconsovoy@wileyrein.com

*Attorneys for Petitioners*

March 12, 2013