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 MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

STEVEN J. LECHNER*
**Counsel of Record*
JEFFREY W. MCCOY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a city violates the "one-person, one-vote" principle of the Fourteenth Amendment when it creates city council districts that, while roughly equal in total population, are grossly malapportioned with regard to eligible voters.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. Since its creation in 1977, MSLF attorneys have defended individual liberties and sought to ensure "equal protection of the laws." *E.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200

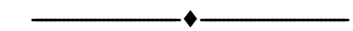
[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

(1995); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Concrete Works of Colorado, Inc. v. City & County of Denver*, 321 F.3d 950 (10th Cir. 2003).

In this case, the City of Irving changed its method of electing city council members following litigation under Section 2 of the Voting Rights Act. The new system divided the city into six electoral districts, each with one city council representative.[2] Although all six districts were roughly equal in terms of total population, District 1 had substantially fewer eligible voters within the district. As a result, Petitioners challenged the new electoral system as a violation of the Equal Protection Clause of the Fourteenth Amendment. The District Court granted summary judgment in favor of the City, holding that the choice to apportion voting districts based either on total population or total number of eligible voters was a political question properly left to the legislative body for determination. *Lepak v. City of Irving, Tex.*, 3:10-CV-0277-P, 2011 WL 554155 (N.D. Tex. 2011). Based on past precedent, the Fifth Circuit affirmed per curiam. *Lepak v. City of Irving Tex.*, 453 F. App'x 522 (5th Cir. 2011). This case demonstrates the potential for abuse that results from treating vote dilution under Section 2 of the Voting Rights Act differently than vote dilution under the Equal Protection Clause

[2] Under this system, the City Council is also comprised of two at-large council members and a mayor, who is also elected at-large.

of the Fourteenth Amendment. MSLF attorneys have often represented clients to prevent abuses of Section 2 of the Voting Rights Act. *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2004); and *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). Accordingly, MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding whether to grant the Petition.



SUMMARY OF THE ARGUMENT

This Court should grant the Petition in order to resolve the discrepancy within the Circuit Courts about what constitutes vote dilution. This Court has stated that the Equal Protection Clause of the Fourteenth Amendment protects against vote dilution and protects the principle of "one-person, one-vote." In cases involving Section 2 of the Voting Rights Act, the Circuit Courts often rely on citizen voting age population in order to determine whether vote dilution has occurred. In cases not involving racial minority groups, however, those same courts do not require that lower courts look to citizen voting age population to determine whether vote dilution has occurred.

As the Voting Rights Act is an exercise of Congress' enforcement power of the Fourteenth Amendment, the discrepancy cannot be attributed to the fact

that Congress created new statutory rights in the Voting Rights Act. Congress may not define the rights guaranteed by the Fourteenth Amendment, it can merely enforce them. Therefore, vote dilution must be analyzed the same way under the Fourteenth Amendment and the Voting Rights Act.

The right to vote is one of the most fundamental rights of being a citizen and this discrepancy increases the likelihood of electoral abuse. If this Court does not grant this Petition, and resolve the discrepancy of what constitutes vote dilution, governments will be able to infringe upon this fundamental right.

ARGUMENT

I. ALTHOUGH IT IS CLEAR THAT THE FOURTEENTH AMENDMENT PROTECTS AGAINST VOTE DILUTION, IT IS UNCLEAR HOW VOTE DILUTION SHOULD BE MEASURED.

Although it is clear that the Equal Protection Clause of the Fourteenth Amendment protects against vote dilution, the jurisprudence about how vote dilution should be measured is contradictory. In *Gray v. Sanders*, 372 U.S. 368, 381 (1963), this Court held that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one-person, one-vote." This Court reasoned that "[h]ow

then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" *Id.* at 379. In order to prevent this vote dilution, and ensure equal participation in the electoral process, the Equal Protection Clause guarantees that "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.* One year later, this Court made it clear that the "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

This Court, however, has never articulated how to measure vote dilution with respect to the "one-person, one-vote" principle, although it has analyzed vote dilution with respect to Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973. In *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986), this Court suggested that vote dilution under Section 2 of the VRA should be examined by looking at the number of eligible voters in an area. This Court emphasized that courts must look to voting power of racial groups in order to determine whether a government has unlawfully diluted their right to vote. *Id.* at 49-51. Even political cohesiveness of a particular racial minority

group was relevant because "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.* at 51. Thus, *Gingles* suggested that voters are the relevant demographic for courts to look at when determining whether vote dilution has occurred.

As a result, most Circuit Courts use Citizen Voting Age Population ("CVAP")[3] when analyzing vote dilution under Section 2 of the Voting Rights Act. *See Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *Campos v. City of Houston,* 113 F.3d 544, 548 (5th Cir. 1997); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1418-28 (9th Cir. 1989), *abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990). For example, in *Negron*, the Eleventh Circuit reasoned that:

> In order to elect a representative or have a meaningful potential to do so, a minority group must be composed of a sufficient number of voters or of those who can readily become voters through the simple step of

[3] The U.S. Census Bureau estimates CVAP through its ongoing American Community Survey. *See* U.S. Census Bureau, *American Community Survey*, *available at* http://www.census.gov/acs/www/about_the_survey/american_community_survey/ (last visited January 28, 2013).

> registering to vote. In order to vote or to register to vote, one must be a citizen.

113 F.3d at 1569. Since voting power can only come from those eligible to vote, the Eleventh Circuit held that CVAP was the relevant statistic for a court to determine whether a minority group's right to vote had been unlawfully diluted. *Id.* at 1569.

The Seventh Circuit, in *Barnett*, expanded the reasoning of *Negron* and stated that:

> Neither the census nor any other policy or practice suggests that Congress wants noncitizens to participate in the electoral system as fully as the concept of virtual representation would allow, although permanent resident aliens are permitted to make federal campaign contributions, 2 U.S.C. § 441e, as are certain other nonvoters.

141 F.3d at 704. Because "[t]he right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens" *Id.* As a result, the court agreed that "citizen voting-age population is the basis for determining equality of voting power." *Id.*

In 2009, this Court once again examined the issue of what metric to use to determine vote dilution in VRA Section 2 cases. *Bartlett v. Strickland*, 556 U.S. 1 (2009). In *Bartlett*, a plurality of this Court

stated that courts examining Section 2 claims must determine if "minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Id.* at 18 (plurality opinion). Although this wording implies that courts should look at voting age population ("VAP"), rather than CVAP, to determine if there is vote dilution, the opinion also made reference to CVAP. *Id.* at 19 ("The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district."). Therefore, it is unclear where this Court stands on how to measure vote dilution under Section 2 of the VRA.

Only two Circuit Courts have examined the issue after *Bartlett*. *See Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009); and *Pope v. County of Albany*, 687 F.3d 565 (2d Cir. 2012). In *Reyes*, the Fifth Circuit held that *Bartlett* did not require courts to abandon CVAP as the proper metric for determining minority vote dilution. 586 F.3d at 1023-24. In *Pope*, the Second Circuit used VAP to determine whether a VRA Section 2 violation had occurred, but the court noted that both parties relied on VAP and, as a result, the Court did not have to examine the issue of CVAP. 687 F.3d at 573 n.6.

Therefore, for the most part, the Circuit Courts have consistently held that CVAP is the proper metric to use to determine whether vote dilution has

occurred in VRA Section 2 cases. The Circuit Courts, however, have taken a different view when it comes to vote dilution under the "one-person, one-vote" principle.

The Ninth Circuit has held that the "one-person, one-vote" principle requires voting districts to be divided by total population. *Garza v. County of Los Angeles*, 918 F.2d 763, 773-76 (9th Cir. 1990). Astonishingly, the court stated that using CVAP would "dilute the access of voting age citizens in that district to their representative." *Id.* at 775; *compare to Romero* 883 F.2d 1418, 1426 (citing *Gingles v. Edmisten,* 590 F. Supp. 345, 381 (E.D.N.C. 1984), for the proposition that "for purposes of determining minority vote dilution, 'effective voting majority' [is the] appropriate standard").

Similarly, the Fifth Circuit views vote dilution differently in "one-person, one-vote" cases. *Chen v. Houston*, 206 F.3d 502 (5th Cir. 2000). Although the court did not hold that the Fourteenth Amendment requires voting districts to be divided by total population, it did reject plaintiffs' argument that "[s]ince [a 'one-person, one-vote'] inquiry focuses on the dilution of *votes,* it would be improper to allow the votes of two adult citizens to be weighed equally with the vote of a single adult citizen merely because the latter happened to live in proximity to a noncitizen ineligible to vote." *Id.* at 523 (emphasis in original). Instead, the court ruled that "the choice of population figures is a choice left to the political process." *Id*. The court ruled this way despite stating, three years earlier, that

CVAP must be used for VRA Section 2 claims because "only voting-age persons who are United States citizens can vote." *Campos*, 113 F.3d at 548.[4]

Although the Circuit Courts have consistently used CVAP when analyzing vote dilution under the VRA, no circuit has held that CVAP is the proper metric to use to determine whether a government has diluted a citizen's vote under the "one-person, one-vote" principle. This Court should resolve this discrepancy because it drastically affects the fundamental right to vote.

II. THE DISCREPANCY BETWEEN WHAT CONSTITUTES VOTE DILUTION UNDER THE VOTING RIGHTS ACT AND VOTE DILUTION UNDER THE "ONE-PERSON, ONE-VOTE" PRINCIPLE WARRANTS REVIEW.

Although words can have different constitutional and statutory meanings, the discrepancy between the standards applied to determine vote dilution under the VRA and those applied to determine vote dilution under the "one-person, one-vote" principle must be resolved because the Voting Rights Act does not create new statutory rights, it merely enforces those rights

[4] The Fourth Circuit has also held that the "one-person, one-vote" principle does not require voting districts to be divided in a certain way. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996). Although the Fourth Circuit did not contradict itself about what constitutes vote dilution, its decision still adds to the uncertainty of what constitutes vote dilution.

present in the Fourteenth Amendment. The Voting Rights Act was enacted pursuant to Congress' power to enforce the rights guaranteed by the Fourteenth Amendment and, therefore, the Voting Rights Act does not create protections different than those guaranteed by the Fourteenth Amendment.

In some cases, it is acceptable to have different standards for constitutional and statutory rights. For example, Title VII of the Civil Rights Act of 1964 did create statutory rights different than those protected by the Fourteenth Amendment. *See Ricci v. DeStefano,* 557 U.S. 557, 582 (2009). As a result, this Court did not consider "whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution." *Id.*[5]

The Voting Rights Act, however, does not create new statutory rights, it merely enforces those rights guaranteed by the Fourteenth Amendment. "Congress's power under § 5 [of the Fourteenth Amendment] extends only to 'enforcing the provisions of the Fourteenth Amendment[, which] [t]his Court has described . . . as 'remedial.'" *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). Congress

[5] Despite this difference between the statutory and constitutional rights, the Court still decided that "cases discussing constitutional principles can provide helpful guidance in this statutory context." *Ricci*, 557 U.S. at 583 (citing *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 993 (1988) (plurality opinion).

"has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.* That is, "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id*. at 329.

Therefore, vote dilution sought to be eliminated by the Voting Rights Act is no different than vote dilution sought to be eliminated by the "one-person, one-vote" principle. As a result, this Court needs to resolve the discrepancy between cases that require courts to look at CVAP to determine if there is vote dilution sufficient for a VRA violation and cases that hold that "one-person, one-vote" does not require a court to look at CVAP to determine if there is vote dilution. *Compare Reyes*, 586 F.3d at 1023-24, *with Chen v. Houston*, 206 F.3d at 523.

III. THE RIGHT TO VOTE IS ONE OF THE MOST FUNDAMENTAL RIGHTS OF BEING A CITIZEN AND THIS COURT HAS AN OBLIGATION TO PROTECT THAT RIGHT.

Without clarification of what constitutes unlawful vote dilution, the right to vote may mean different things to different citizens. The right to vote, however, is fundamental. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). A citizen thus "has

a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Gray*, 372 U.S. at 380 ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.").

Maintaining the discrepancy of what constitutes vote dilution increases the likelihood for abuse and the chance that a citizen's right to vote will be infringed upon. *See* Petition at 20 (pointing out that "[t]his case illustrates the concern and potential for abuse"). In VRA Section 2 cases, the Circuit Courts have recognized that a citizen's vote can only be diluted when compared to other citizens. Under the law of many circuits, however, governments are allowed to infringe on the right to vote in non-VRA cases.

As a result, this Court should grant the petition in order to ensure that all citizens are protected from vote dilution. As this Court has stated:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, short-changed if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another

> district half the size also elect one representative.

Bd. of Estimate of City of New York v. Morris, 489 U.S. 688, 698 (1989); *see also Wesberry,* 376 U.S. at 8 ("To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.' "); *Hadley v. Junior Coll. Dist. of Metro. Kansas City,* 397 U.S. 50, 56 (1970) ("[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); *Chapman v. Meier,* 420 U.S. 1, 24 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group."); *Lockport v. Citizens for Community Action,* 430 U.S. 259, 265 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight.").

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Dated this 28th day of January 2013.

Respectfully submitted,

STEVEN J. LECHNER*
*Counsel of Record
JEFFREY W. MCCOY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae