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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents object to the Question Presented in the Petition and believe that the Question Presented should properly be:

Whether the Fourteenth Amendment's Equal Protection Clause prohibits drawing electoral districts on the basis of total population where jurisdictions decide through their political process to do so.

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STATEMENT OF THE CASE

Petitioners' "Statement of the Case" errs in presenting as established a theory of unconstitutional malapportionment that has never been adopted by this Court or any of the Courts of Appeals. The "Statement" in the Petition also errs by implying that the measure proffered as an alternative for total population is a measure of the potential voters in a given district.

Petitioners' "Statement of the Case" erroneously articulates a theory, unsupported by decisional law, that the Constitution requires an equality of apportionment based on eligibility of voters rather than on total population. In *Reynolds v. Sims*, this Court held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats must be apportioned on a population basis." 377 U.S. 533, 568 (1964); *id.* at 577 (holding state legislative bodies must be "as nearly of equal population as is practicable"). *Reynolds* neither in operation nor in principle mandates that "the one-person, one-vote principle guarantees an equal vote to all electors." Pet. at 5. Rather, *Reynolds* stands for the proposition that "the fundamental principle of representative government in this country is one of *equal representation for equal numbers of people*, without regard to race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-61 (emphasis added). Indeed, this Court has considered the effect that using total population for apportionment will have on the relative distribution of potential electors – but it

has not held that this leads to unconstitutional malapportionment. *See Gaffney v. Cummings*, 412 U.S. 735, 746-47 (1973) (acknowledging apportionment based on total population may lead to disparities in number of eligible voters across districts).

Further, Petitioners' "Statement of the Case" obfuscates the incongruence between Petitioners' theory of the proper "basic constitutional standard" under the Fourteenth Amendment and their proposed method for achieving purported equality of electoral representation. This is because Petitioners are not advocating apportionment based on actual electors or potential electors. Petitioners' malapportionment theory, which uses CVAP (citizen voting-age population) as the criterion for district-drawing, selectively targets only two groups that are ineligible to vote – non-citizens and children – for exclusion, while keeping other ineligible populations within the equation.[1] Accordingly, the relief sought by Petitioners is not even designed to achieve Petitioners' articulated vision of the Constitution's requirements.

[1] Age and citizenship are only two of many requirements for voter eligibility. Other criteria include domicile (*e.g.*, college students who are domiciled or registered to vote outside the jurisdiction are not eligible to vote), having completed any period of probation or parole following a felony conviction, and mental capacity. *See* Tex. Elec. Code § 13.001.

ARGUMENT

I. THE ASSERTED CIRCUIT SPLIT AMOUNTS TO NO MORE THAN A SPLIT OF HAIRS.

Petitioners' argument that there is a circuit split warranting Supreme Court resolution is simply fantastical, amounting more to a split of hairs than a split of circuits. All three circuits to have addressed the issue – Fourth, Fifth, and Ninth – have deferred to state or local political judgments as to whether total population or some other measure ought to be used, refusing to conclude that the Constitution prohibits use of total population as the basis for districts where state or local policymakers have so decided.

The main basis for Petitioners' assertion of a circuit split is language concerning the use of total population in the Ninth Circuit decision that the Fifth Circuit later correctly summated as a "suggest[ion] that its usage may be required under the Equal Protection Clause in some circumstances." *Chen v. City of Houston*, 206 F.3d 502, 524 (5th Cir. 2000) (discussing Ninth Circuit decision in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). This suggestion, plainly dictum, does not create any circuit split.[2] In addition, Petitioners seem to rely upon the use of specific language

[2] While the Petitioners discuss at length the dissent in *Garza*, that discussion has no bearing on the existence of a circuit conflict. Simply put, dictum and a prolonged dissent do not a circuit split make.

that may be reminiscent of the "political question" doctrine in the Fourth and Fifth Circuit decisions that is absent in the earlier Ninth Circuit decision. Of course, it is important to note that none of the decisions actually states that the court is applying the "political question" doctrine. Each court simply determines whether the use of total population, where that choice has been made by a state, is constitutionally permitted. Thus, regardless of any linguistic hair-splitting, the outcome and reasoning of all three circuits are consistent – the decision to use total population is a constitutional permissible one when made by state or local policymakers.

The Court of Appeals in this case followed *Chen*, in which the Fifth Circuit previously concluded that it ought not interfere with a political decision about the population basis for districting: "our review of the history of the amendment cautions against judicial intrusion in this sphere – either for or against either particular theory of political equality." *Id.* at 528. In *Chen*, the Fifth Circuit chose to follow the Fourth Circuit decision in *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). In *Daly*, the court held that the appropriate base for districting is "quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment." *Id.* at 1227. In so holding, the Court reversed the District Court's decision to override the state of North Carolina's decision to use total population, overruling the court's imposition of voting age population as the basis of districts. *See id.* &

n. 13. Thus, both Fourth and Fifth Circuits have decided consistently with one another – and consistently against Petitioners' position – that a state or local decision to district based upon total population is permissible. Despite Petitioners' labored attempt to demonstrate otherwise, the Ninth Circuit's earlier decision is in complete accord.

In *Garza v. County of Los Angeles*, the Ninth Circuit reviewed a district court order remedying a violation of the Voting Rights Act. 918 F.2d at 773-76. The County objected to the use of total population rather than citizen voting age data in crafting districts for county supervisors. As the court put it, the question was whether use of total population is "erroneous as a matter of law." *Id.* at 773. In ultimately rejecting the County's objection, the Ninth Circuit was simply deferring to a decision incorporated into previously-adopted state law. The Circuit did not conclude that use of total population is constitutionally required in the absence of a local decision or in the face of a contrary local decision.

In *Garza*, the Ninth Circuit noted that "California state law requires districting to be accomplished on the basis of total population." 918 F.2d at 774 (citing Cal. Elec. Code § 35000). Thus, the court was simply faced with determining whether that political choice by California, followed by the District Court in adopting a remedy in the case at hand, ran afoul of the Constitution. The court had no occasion to determine whether the Constitution requires the use of total population because the State of California had

already made that selection in its Elections Code. Indeed, the Ninth Circuit expressly noted in the *Garza* decision that:

> The County is correct in pointing out that *Burns v. Richardson,* 384 U.S. 73, 91-92 (1966), seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts. It does not, however, *require* states to do so.

918 F.2d at 773-74 (emphasis in original). Thus, the Ninth Circuit understood and articulated its choice as simply determining whether the State of California was constitutionally permitted to base supervisorial districts solely on total population. In concluding that the District Court had not acted improperly in following state law and basing its redistricting remedy on total population, the Ninth Circuit deferred to a state political choice made by the empowered political decision-maker. In effect, then, the Ninth Circuit did precisely what the Fourth and Fifth Circuits have subsequently done – leave the decision to state or local policymakers.

In essence, then, the Petitioners' circuit "split" amounts simply to two circuits using different words in arriving at the same holding as a third circuit. All three circuits arrive at the same result – deference to local political decision-makers about whether to use total population as the basis for drawing districts – no more and no less. Thus, there is no circuit split warranting this Court's resolution.

II. PETITIONERS' REQUESTED CHANGE IN THE LAW WOULD CREATE A GREATER AND MORE SIGNIFICANT TENSION THAN ANY UNDER TODAY'S ESTABLISHED LAW.

While allotting not even a footnote to the contradiction they would introduce between apportionment among the states of congressional seats and apportionment within the states of legislative seats, Petitioners assert that "tension" between standards under Section 2 of the Voting Rights Act (VRA) and those under the Fourteenth Amendment argues for granting the petition. In fact, the asserted "tension" is both explicable and logical – as might be expected for different inquiries – while granting the petition could lead to an irreconcilable tension between related constitutional doctrines.

A. The "Tension" Between Voting Rights Act and Constitutional Test for Malapportionment is Illusory.

Any purported inconsistency between the test for judicial intervention under Section 2 of the Voting Rights Act (VRA), 42 U.S.C. § 1973, and the test for judicial intervention on the basis of unconstitutional malapportionment does not support the grant of certiorari here. Unless it is simply a tautological repetition of their selfsame argument that voters should be

equalized among districts,[3] Petitioners' assertion that "tension" between the standards for violation of Section 2 of the VRA and for constitutional malapportionment must be resolved amounts to not much more than a non sequitur.

The plea to reconcile rests on the faulty premise that because remedying a Section 2 violation – in the context of a challenge to redistricting or, as in Irving, a challenge to an at-large system – is followed in time by district-drawing, somehow the two processes must adhere to similar standards. To the contrary, having two dissimilar processes addressing different issues adhere to the same legal standard would be, at best, an odd coincidence, and at worst, an illogical exercise in jurisprudential shoehorning.

The use of CVAP in the Voting Rights Act context to demonstrate that vote dilution could be remedied through a changed (or new) districting scheme is simply an application of the basic principle that there must be a viable remedy before judicial intervention is warranted. A VRA plaintiff must show an ability to elect preferred candidates despite racially polarized

[3] It is possible to interpret Petitioners' argument as simply pointing out that eligible voters are eligible voters – as a component of their larger assertion that such voters should be the sole basis for district-drawing. Because eligible voters are necessarily the basis of any remedy under Section 2 of the VRA, it is possible that Petitioners are simply using that fact as a different – albeit plainly overwrought – basis for establishing that total population is not the same as eligible voters.

voting. As this Court stated in establishing the first of the preconditions to finding a Section 2 violation: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Thornburg v. Gingles*, 478 U.S. 30, 50 n. 17 (1986). In the years since that decision, CVAP has emerged as the most useable 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.[4] Thus, the inquiry into CVAP data in potential districts under VRA Section 2 relates to predictions of remediability – whether electoral outcomes might change as to ameliorate the harms of vote dilution.

By contrast, the inquiry in the context of unconstitutional malapportionment relates not to predictions of aggregate electoral outcomes but to a single individual's impact in a district, and his or her right to be roughly equally represented, rather than to have geography or other non-population-based

[4] Of course, CVAP is an imperfect measure because it includes some ineligible voters who are nonetheless citizens over 18. However, in the Section 2 remediability context, precision seems less necessary for two reasons. First, because in most circumstances there is at least some cross-over voting, a minority group can control electoral outcomes in a district even with less than a majority of voters. Second, a demonstration of CVAP majority is often supplemented by an expert's reaggregated election data demonstrating that if a proposed district had existed in the past, the minority group's electoral choices would in fact have prevailed.

boundaries determine that impact. The question is not one of remediability (of a vote-dilution violation) but of constitutional violation directly. These are separate and unrelated inquiries although they often follow sequentially in time. There is no logical basis for requiring that the two be rendered consistent.[5]

[5] Amici devote much of their briefs to a slightly different perspective on this issue, but their focus reduces to an objection to communities with significant numbers of non-citizens being able to employ Section 2 of the Voting Rights Act to secure a remedy of vote dilution. First, this is not the right case to address Section 2. Second, in addressing the issue, amici proceed as though concentrations of non-voters in particular areas is somehow a new phenomenon, but it is self-evident that, historically, when the franchise was restricted by race and gender, and as it is still today restricted by age, there have long been such concentrations, with no constitutional objection raised. Instead, amici seem to believe (and in one case explicitly state) that immigrant non-voters are somehow of a different constitutional import. Yet, the distribution of immigrants throughout American history has never been uniform. *See Chen*, 306 F.3d at 527 (noting debates about ratification of the Fourteenth Amendment demonstrated "the recognition by many representatives that aliens were unevenly distributed throughout the country"). So, the obsession seems to be that undocumented immigrants are of dramatically different import, yet, there is nothing in the Constitution to suggest such a unique concern. Indeed, it would be odd to accord such significance to the different attributes of non-voters as compared to other non-voters when the whole premise of the petition before the Court is that *voters* should be the sole constitutional area of focus and treated identically.

B. Petitioners Would Introduce an Inexplicable Constitutional Contradiction.

Indeed, focusing solely on this purported "tension," Petitioners ignore a far more troubling potential tension between related constitutional matters. In the context of representation in the House of Representatives, Section 2 of the Fourteenth Amendment expressly states that apportionment among the states shall be accomplished by "counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. While this amendment eliminated the original abomination of counting slaves as only three-fifths of a person, at both historical times – at the original framing and at the adoption of the Fourteenth Amendment – there were huge numbers of persons who did not have the right to vote, but were nonetheless counted in apportionment. Moreover, the distribution of such non-eligible persons differed significantly among the states.

Yet, nowhere in the Petition is there any explanation of why this Court ought to consider creating not just "tension" but an outright constitutional contradiction between how congressional seats are apportioned among the states and how legislative seats are then to be apportioned by states among their people. Petitioners' vain and calculated obliviousness to this tension that they seek to create only accentuates the fatuous impact of their own proffered "tension" in voting law. The asserted "tension" between the first precondition under VRA Section 2 and the

malapportionment inquiry provides no basis for this Court's review.

III. THE DECISIONS BELOW WERE CORRECTLY DECIDED.

Any asserted error in the decisions of the District Court and Court of Appeals does not support this Court's review. While Petitioners parse the language of *Reynolds v. Sims* as though it were itself an extended constitutional provision, this Court's longstanding reasoning and precedent support the decisions below.[6] As the Fifth Circuit in *Chen* correctly held, the Equal Protection Clause and this Court's jurisprudence allow states to apportion based on total population. Accordingly, the District Court below correctly held that the City of Irving's decision to apportion based on total population comported with the mandates of the Fourteenth Amendment. Petitioners cite no case supporting their position that the use of total population in apportionment violates the Equal Protection Clause, nor do any of the cases they cite undermine the notion that the Fourteenth Amendment protects the right to representational equality.

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[6] The parsing of a Court decision's language in relation to an issue that was not squarely or even indirectly presented to the Court seems a particularly unwise basis for further Court review. The circuit courts have consistently interpreted *Reynolds* as permitting districting based on total population.

A. *Reynolds* Establishes that Apportionment by Total Population is Permitted.

The City of Irving's redistricting plan – which distributes total population relatively equally among the city council districts – comports with the requirements for apportionment established in *Reynolds v. Sims*. In *Reynolds v. Sims*, this Court struck down a state redistricting plan that drew districts based on improper criteria, such as geographic territory, instead of the total population. 377 U.S. at 577 (requiring state legislative districts be "as nearly of equal population as is practicable"). The Court struck down the State's plan which sought to enhance the voting power of rural as opposed to urban areas of the state, because the Equal Protection Clause requires equality of representation for individuals, not for geographies. *Id.* at 562 ("Legislators represent people, not trees or acres"). *Reynolds* establishes that "as a basic constitutional standard, the Equal Protection Clause requires that the seats . . . must be apportioned on a population basis." *Id.* at 568. Further, *Reynolds* also makes it clear that the Equal Protection Clause incorporates the "fundamental principle of representative government is one of equal representation for equal numbers of people." *Id.* at 560-61; *see also Chen*, 206 F.3d at 527-28 (discussing considerations of representational equality in legislative history of the Fourteenth Amendment).

Petitioners cite no cases holding that using total population as the basis for drawing equipopulous districts is unconstitutional, even where such districts

result in variations in the eligibility of constituents to vote – including when those variations result from differences in age or citizenship. This Court has already considered this specific scenario and declined to hold that it constitutes a violation. In *Gaffney v. Cummings* this Court acknowledged that apportionment based on total population may lead to disparities in the number of eligible voters across districts. *Id.* at 746-47. Yet this Court in *Gaffney*, while explicitly considering the issue Petitioners assert would lead to a constitutional violation, declined to hold that there is a violation of the Equal Protection Clause. *See id.*

Thus, the *Reynolds* Court's holding that equalizing the apportionment of districts based on total population met the mandates of the Equal Protection Clause, combined with the Court's subsequent disregard in *Gaffney* for the notion of a constitutional violation when such districts produce inequality in the number of electors, means that states and other subdivisions may use total population for apportionment, without running afoul of the Equal Protection Clause, under well-established Court precedent. *See Burns*, 384 U.S. at 92 ("Unless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby") (citation omitted). Accordingly, the District Court and Fifth Circuit correctly held that the City of Irving's use of total population as the

basis for its district-drawing was constitutionally permissible.

B. There is No Authority for the Proposition that the Equal Protection Clause Requires Apportionment Based on Electors Rather than Total Population.

In several of the cases cited by Petitioners, the Court held that the jurisdictions' apportionment plans violated the Equal Protection Clause because they failed to sufficiently equalize the total populations of the districts and had not shown a reason sufficient to justify this departure. *See Chapman v. Meier*, 420 U.S. 1, 24-26 (1975) (dismissing rationales for variance based on lack of politically vulnerable minority, sparse population, and geographical factors); *Connor v. Finch*, 431 U.S. 407, 418-20 (1977) (dismissing rationales based on maintaining county lines); *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989) ("We agree with the reasons given by the Court of Appeals that the population-based approach of our cases from *Reynolds* through *Abate* should not be put aside in this litigation"). None of these cases considered whether the use of total population would or would not create deviations in the number of electors in each district. Accordingly, they offer Petitioners no support for their theory.

Petitioners' reliance on *Hadley v. Junior College District* is similarly misplaced. In *Hadley*, Appellants challenged a Missouri redistricting law that

distributed junior college trustees to each local school district based on which range of population the school district fell into, as opposed to distributing trustees to school districts based on population, and as a result, one urban school district, which contained approximately 60% of the enumeration in the junior college district, received only 50% of the trustees. *Hadley v. Jr. Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 51-52 (1970). The Court mandated that the apportionment be tailored more closely to the total *child population* than it had previously been. Thus, nothing in *Hadley* supports Petitioners' claim that CVAP should be used as an apportionment base. In fact, the case stands for the opposite proposition. This Court in *Hadley* observed, but was not troubled by the fact that apportionment for Missouri junior colleges was based almost exclusively on ineligible voters – specifically, children "between the ages of six and 20 years" – demonstrating that this Court has permitted what Petitioners claim is unconstitutional: to include in the apportionment process children ineligible to vote. *Id*.

Indeed, there is only a single case in which the Court has even *permitted* apportionment based on criteria other than total population, and that case does not purport to mandate equality of the electorate. In *Burns,* this Court allowed Hawaii, because of its large military and tourist population, to use *voter registration* – not CVAP – as a basis for apportionment. However, the *Burns* fact pattern was unique; the Supreme Court approved Hawaii's apportionment of population based on registered voters because the alternative –

inclusion of the many transient non-resident military personnel and tourists who were not constituents of Hawaii's elected representatives – would have distorted the true picture of the constituent population. *Id*. at 94-95. Indeed, this Court made it clear that it was allowing apportionment based on voter registration "only because [it would not produce a result that is] substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93. As the exception that proves the rule, *Burns* does not stand for the proposition that states are mandated to use CVAP to apportion districts.

All of this Court's longstanding precedent in reviewing various districting schemes supports the proposition that total population is a constitutionally permissible basis for districting.[7]

CONCLUSION

Because there is no circuit conflict, no conflict between related federal doctrines, and no conflict with this Court's controlling precedent, there is no

[7] The fact that the vast majority of jurisdictions has chosen to use total population demonstrates that a contrary principle would entail difficulties currently avoided by those jurisdictions. The well-established constitutional paradigm – that has resulted in the widespread use of total population – has successfully averted the "vast, intractable apportionment slough" that this Court sought to avoid in *Gaffney*. 412 U.S. at 749-50.

basis for granting the petition for certiorari in this case.

Respectfully submitted,

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