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**

## RESPONDENT CITY OF IRVING'S BRIEF IN OPPOSITION


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## BRIEF IN OPPOSITION

Respondent, City of Irving, respectfully requests that this Court deny the petition for writ of certiorari.

## STATEMENT OF THE CASE

While the petitioners' Statement of the Case is generally accurate, the City of Irving believes that certain additions, corrections, and explanatory comments are appropriate.

1. The discussion entitled "The One-Person, One-Vote Principle of the Fourteenth Amendment" is legal argument rather than the content specified in Rule 14(g) of this Court's rules. The issue is a complex and nuanced one, and the city does not concede that the brief discussion in the petitioners' Statement of the Case is a complete or correct statement of the legal principles.

2. The discussion of the section 2 litigation brought by Manuel A. Benavidez against the City of Irving[1] and the court order in that case, which the petitioners have attached as Appendix D at pages 13a-68a of the petition, are not part of this litigation. While the section 2 case may provide some context, the petitioners in this case (collectively referred to as Dr. Lepak) were not parties to that

[1] Petition for writ of certiorari, at 6-10.

litigation, and the issues resolved in that case are not before the Court in this petition.

3. Although the city doubts the relevance of the discussion of the section 2 litigation, it does note that the statement that Mr. Benavidez sought adoption of a 6-2-1 election system in that case and tailored his proof to show that a city council district with a Hispanic citizen-voting-age population (CVAP) majority could be drawn if the city had six single-member districts is not correct. Mr. Benavidez's proof assumed a plan with eight single-member districts. The 6-2-1 concept emerged as a compromise between the parties in that case after the district court issued its Memorandum Opinion.

4. This is a case that was decided on summary judgment so the record is limited to the affidavits, deposition excerpts, and similar material submitted as summary judgment proof. The most relevant facts relate to the demographic composition of the single-member districts.

5. It is correct that the population data reflected in the table on page 9 of the petition was provided by the city; however, the record of that production is clear that the CVAP numbers in the table are merely estimates that come from sample data and are subject, among other things, to rounding and

suppression.[2] The CVAP numbers in the table are derived from census 2000 "long form" data.[3] Estimates based on the census 2000 long form are subject to sampling error, which, although much less than the sampling error associated with the American Community Survey that is now the only source for CVAP, is still significant.[4]

6. As the petition notes, the districts at issue in this suit have since been redrawn to conform to the results of the 2010 census.[5] Long form data is no longer available from which to compute CVAP.[6] Instead, it is now necessary to rely on the American Community Survey, which, unlike the long form data, is not gathered at the same time as the decennial census and, for any given year, results in a much smaller sample.[7] As a result, when used to generate CVAP for small geographic areas as is necessary for redistricting, the data has substantial margins of error.[8] The

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[2] Appendix in Support of Plaintiffs' Brief in Support of Summary Judgment, PageID 244-54. All citations to a PageID # are to the district court PACER entry for this case, *Lepak v. City of Irving*, No. 3:10-CV-0277-P (N.D. Tex.).

[3] *Id.*

[4] *Id.* at PageID 267.

[5] Petition for Writ of Certiorari, at 12, n.3.

[6] Appendix to Brief in Support of City's Motion for Summary Judgment, at PageID 426.

[7] *Id.*

[8] *Id*.

city's expert, Dr. Steven Murdock, who was the Director of the U.S. Census Bureau in 2008-09, explained the magnitude of the uncertainty in the CVAP numbers derived from the American Community Survey when he testified in his affidavit that, at a 90 percent confidence level, the actual number of citizens in District 1 falls somewhere between 17,698 and 22,931, or a range of 5,233.[9] Dr. Murdock concluded that citizenship data has such a low probability of being accurate that "it cannot be used in actually drawing population-balanced districts."[10]

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO CIRCUIT CONFLICT.

#### A. The three courts of appeals to consider the question all reach the same conclusion on the issue presented in this case.

The courts of appeals in three circuits – the Fourth, Fifth, and Ninth – have addressed the issue of whether total population rather than some more restrictive measure such as voting-age population or citizen-voting-age population is a constitutionally permissible apportionment base.[11] If this case had arisen

[9] *Id.* at PageID 428, 453.

[10] *Id.* at PageID 429.

[11] *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Garza v. County of*

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in any of the three circuits that have addressed the issue, the decision would have been the same – *i.e.*, the City of Irving's decision to use total population as the apportionment base would have been upheld. Nonetheless, Dr. Lepak claims that there is a conflict among the circuits. Specifically, he contends that the Ninth Circuit requires the use of total population as the measure by which electoral districts are determined to be in balance, while the Fourth and Fifth Circuits merely permit the use of a total population apportionment base while being flexible enough to allow the use of other measures such as voting-age population or citizen-voting-age population if the political jurisdiction chooses.

Of course, the distinction between being required or merely permitted to use total population as the measure for equalizing districts is irrelevant in this case. The City of Irving, like virtually every other jurisdiction, chose to use total population as its apportionment base.[12] Accordingly, the question presented by this case is whether the city's choice of using total population is permissible. All three of the circuits that have written on the subject would answer that

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*Los Angeles*, 918 F.2d 763 (9th Cir. 1990). Of course, the instant case also raises the question. Since it arose in the Fifth Circuit, it was governed by the earlier *Chen* case. *Lepak v. City of Irving*, 453 F. App'x 522 (5th Cir. 2011).

[12] J. Fishkin, *Weightless Votes,* 121 YALE L.J. 1888, 1890 (2012) ("line-drawers across the nation rely almost uniformly on total population," an approach "that has become the de facto national policy").

question in the affirmative.[13] To the extent there is any dispute between the Ninth Circuit and the Fourth and Fifth Circuits on the constitutionally required apportionment base, it will have to await a case with different facts before that issue is squarely presented.

To be sure, the Ninth Circuit opinion in *Garza* is extensively discussed in the Fourth and Fifth Circuit cases that post-dated it. In large part, though, the discussion related to the dissent in *Garza* rather than to the opinion of the majority. Judge Kozinski wrote a lengthy and scholarly dissent in *Garza* that framed the issue as a choice between two theories of representation.[14] One theory assumes that districts are drawn to represent people without regard to whether they are voters. Under this theory, which is known as representational equality, children, non-citizens, felons, and other persons who are not eligible to register and vote would be included along with eligible voters in determining the apportionment base. Districts drawn under a representational equality system contain equal numbers of people and reflect the concept that elected officials represent all their constituents, not merely those who are eligible to vote.

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[13] *Chen*, 206 F.3d at 528; *Daly*, 93 F.3d at 1228; *Garza*, 918 F.2d at 774-76.

[14] *Garza*, 918 F.2d at 778 (Kozinski, J., concurring and dissenting in part).

The competing theory is known as electoral equality, and it is achieved when districts contain equal numbers of voters or potentially eligible voters. The *Garza* dissent concluded that the Constitution requires electoral equality and conversely that it forbids representational equality or drawing districts balanced by total population – at least in those cases where equal population districts did not also produce equal numbers of voters. The dissent did not convince either of the other two members of the panel and, thus, did not command a majority. Nor did any of the judges in the Fourth and Fifth Circuits who considered the issue conclude that the Constitution requires electoral equality and forbids a representational equality system in those circumstances where districts drawn to achieve representational equality do not also produce electoral equality.[15] Thus, insofar as the issue presented by this case is concerned, there is no conflict among the courts of appeals. Whatever disagreement exists is between a solitary dissenting judge and the eleven judges who constituted the majority in four cases decided by three different courts of appeals.

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[15] The judges who rejected Judge Kozinski's view (and the view of the petitioners here) that electoral equality, rather than representational equality, is constitutionally required were Judges Luttig and Chapman (Fourth Circuit), Senior District Judge Clark (E.D. Virginia, sitting by designation on the Fourth Circuit panel), Judges Garwood, Duhé, Benavides, Owen, Clement, and Dennis (Fifth Circuit), and Judges Nelson and Schroeder (Ninth Circuit).

### B. To the extent there is any conflict, it is on an issue that is not presented by the facts of this case and is with dictum in the Ninth Circuit opinion rather than with the holding of that case.

Further, to the extent there was any disagreement between the Ninth Circuit on one hand and the Fourth and Fifth Circuits on the other, it related to dictum in the Ninth Circuit's *Garza* decision. In discussing the constitutional standard, the *Garza* majority held that "population is an appropriate basis for state legislative apportionment."[16] The court then noted that California law expressly "requires districting to be accomplished on the basis of total population."[17] While the *Garza* majority went on to suggest that total population was a more constitutionally appropriate apportionment base than a measure based on voters or potentially eligible voters, that discussion, as noted by the Fifth Circuit in *Chen*,[18] was

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[16] *Garza,* 918 F.2d at 774.

[17] *Id.* (citing CAL. ELEC. CODE § 35000 (West 1988)). That section of the California Election Code provides, in part:

> Following each decennial federal census, and using population figures as validated by the Population Research Unit of the Department of Finance as a basis, the board shall adjust the boundaries of any or all of the supervisorial districts of the county so that the districts shall be as nearly equal in population as may be.

CAL. ELEC. CODE § 35000 (West 1988). County supervisor districts were the type of districts at issue in *Garza.*

[18] *Chen,* 206 F.3d at 526.

dictum. So long as the use of total population as an apportionment base was appropriate and California law required population-based districting, any discussion of whether representational equality or electoral equality is the constitutionally preferred model was unnecessary to the decision and is merely dictum.

## II. THERE IS NO UNRESOLVED IMPORTANT ISSUE OF LAW PRESENTED BY THIS CASE.

### A. This Court has addressed the issue.

#### 1. This Court has made it clear that the Constitution does not require excluding non-voters from the apportionment base.

The petition in this case claims that it "presents an important question that remains undecided."[19] While issues relating to apportionment of electoral districts may be important, they are not ones that this Court has failed to address. Districts throughout the United States are almost always balanced on total population rather than some other measure;[20] however, this Court has also recognized other measures for determining if a district meets the requirements of one person-one vote jurisprudence. As the Court noted in *Burns v. Richardson*,[21] on the day it

[19] Petition for Writ of Certiorari, at 2.

[20] *See* n.12, *supra.*

[21] 384 U.S. 73, 91 (1966).

decided the landmark case of *Reynolds v. Sims*,[22] a case where the size of the districts was measured by total population, it also decided *WMCA, Inc. v. Lomenzo*,[23] where citizen population, rather than total population, was the relevant measure. As the Court noted in *Burns*, referring to *Reynolds*, *WMCA*, and the other cases decided that day, "our discussion carefully left open the question what population was being referred to," and the opinions "discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population."[24]

The Court then expressly addressed the issue of whether the Constitution requires non-voters to be excluded from the apportionment base. This Court stated that:

> Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves

[22] 377 U.S. 533 (1964).

[23] 377 U.S. 633 (1964).

[24] *Burns*, 384 U.S. at 91.

> choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, [citation omitted] the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.[25]

As the Fourth and Fifth Circuits recognized,[26] this Court in *Burns* expressly addressed the issue of whether non-citizens should be part of the apportionment base and concluded that there was no constitutionally founded barrier to a jurisdiction's deciding either to include or exclude them. Although the issue has not been resolved in the way Dr. Lepak would like, it is simply incorrect to say it is a question that this Court has not yet addressed.

### 2. This Court denied certiorari when the same issue was presented to it twelve years ago. This is the only case since that time to present the issue in a court of appeals, and there has been no change in jurisprudence to suggest that the Court should grant certiorari now.

The issue most recently came before this Court in the petition for writ of certiorari in the *Chen* case.

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[25] *Burns*, 384 U.S. at 92 (footnote omitted).

[26] *Chen*, 206 F.3d at 526-27; *Daly*, 93 F.3d at 1225.

The Court declined to grant the petition in that case.[27] More than a decade later, this case, *Lepak*, has been the only case to present the issue in the courts of appeals. The Fifth Circuit decided the case on the basis of its *Chen* precedent. From a legal standpoint, nothing has changed since *Chen* to suggest that this Court's decision not to grant the petition in that case should be revisited. Perhaps the only change is a practical one, as now the ability to measure citizen-voting-age population has been diminished so that any requirement to construct districts on the basis of CVAP has become more difficult, if not impossible, to implement.[28]

### B. The issue was specifically considered and addressed by the framers of the Fourteenth Amendment.

Not only has this Court addressed the issue of whether apportionment by voters, rather than population, is constitutionally required, but the framers of the Fourteenth Amendment actually considered, debated, and decided that issue, at least in respect to section 2 of that Amendment.

At the same time the Congress was writing the text of section 1 of the Fourteenth Amendment, which contains the Equal Protection Clause and is the

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[27] *Chen v. City of Houston,* 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of petition for certiorari).

[28] *See* discussion at pages 24-28, *infra.*

relevant constitutional provision in this case, it was also drafting section 2, which required the framers to confront differing theories of representation and to choose among them. Section 2 of the Fourteenth Amendment revises article I, section 2, of the Constitution, which provides for apportionment of representatives among the several states. The prior article I provision was drafted as part of the original version of the Constitution in 1787 and apportioned representation in the House of Representatives on the basis of the whole number of free persons and "three-fifths of all other persons" – *i.e.,* slaves. That section, of course, was one of the compromises in the 1787 Constitutional Convention between the slave-holding states and the free states. Once the Civil War and the Thirteenth Amendment resolved the slavery issue, the three-fifths clause was an anachronism that needed to be addressed.

At the time the Fourteenth Amendment was being debated in the Congress, the Civil War had recently ended and the Thirteenth Amendment, which ended slavery, had only recently been ratified. In most of the country, the former slaves and other African-Americans were not yet permitted to vote.[29]

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[29] The Thirteenth Amendment was passed by the Congress on January 31, 1865. It was ratified by the necessary number of states and added to the Constitution on December 18, 1865. 4 Encyclopedia of the U.S. Congress 1959 (Thirteenth Amendment), Simon & Shuster (1995). The Fourteenth Amendment was debated in 1866. 2 Encyclopedia of the U.S. Congress 882 (Fourteenth Amendment). In 1867, the Congressional Reconstruction

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Similarly, women, minors, and non-citizens were denied the franchise, although it was theoretically possible for states to vary the qualifications for voting.[30]

Thus, as the framers eliminated the three-fifths clause, they were required to confront basic questions regarding the nature of representation. Although they did not use that terminology, the fundamental issue was whether they would adopt a representational model that apportioned congressional representatives on the total number of persons, including women, children, non-citizens, and disenfranchised African-Americans, or, instead, would pursue an electoral equality model that was limited to the number of persons eligible to vote. As Judge Garwood explained in *Chen*, "the drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated this question, and rejected a proposal rooted in – among other things – the principle of electoral equality."[31]

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system required the former confederate states to permit African-Americans to vote. The border and lower northern states, however, did not extend the right to vote to African-Americans until the Fifteenth Amendment was adopted. That amendment was enacted by the Congress in 1869 and ratified on March 30, 1870. 2 Encyclopedia of the U.S. Congress 831-33 (Fifteenth Amendment).

[30] 39th Cong., 1st Sess., Congressional Globe 357 (January 22, 1866) (Rep. Conkling).

[31] *Chen*, 206 F.3d at 527.

Indeed, different proposals considered in the course of drafting and adopting the Fourteenth Amendment had political ramifications that affected various portions of the country differently depending on which model of representation was used. For example, a total population measure was said to favor the north where there was a large number of aliens.[32] On the other hand, a proposal to use eligible voters would be advantageous to western states where there was a smaller percentage of women.[33] Although there was support for a pure electoral equality model that would assign congressional seats on the basis of potential voters, a majority did not favor that approach, and ultimately some senators were willing to compromise to obtain the necessary two-thirds vote and present the issue to the states for ratification.[34] In

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[32] 39th Cong., 1st Sess., Congressional Globe 2986-87 (June 6, 1866) (Sen. Wilson noting that the northern states contained 2.1 million unnaturalized foreigners who would be excluded from the apportionment base if citizenship were the standard).

[33] 39th Cong., 1st Sess., Congressional Globe 877 (February 16, 1866) (Sen. Hendricks noting that the female population of the six New England states exceeded the male population by 50,000, while in the six agricultural states of the west – Ohio, Indiana, Kentucky, Illinois, Missouri and Iowa – the male population exceeded the female population by 297,758). Women were generally ineligible to vote in 1866. Universal female suffrage awaited the ratification of the Nineteenth Amendment in 1920.

[34] 39th Cong., 1st Sess., Congressional Globe 2986 (June 6, 1866) (Sen. Sherman: "I am bound on that question to defer my own opinion to that majority who differ from me in order to secure the passage of this resolution.").

doing so, they coalesced around the proposal to base representation on "persons," which resulted in a total population or representational equality model.[35]

The bottom line is that the framers of the Fourteenth Amendment expressly considered a representational scheme that would have excluded non-citizens and other persons who were not eligible to vote – essentially the same sort of apportionment system urged today by Dr. Lepak. In the end, though, the Congress chose to base representation in the House of Representatives on the total population in each state, which had the effect of counting children, non-citizens, and other persons who were not eligible to vote, when determining how to allocate seats in the House of Representatives among the several states. The way the framers accomplished this result was by drafting section 2 in terms of "persons" rather than using some less inclusive noun such as "voters" or "citizens." The term "persons" was very deliberately chosen for the specific purpose of ensuring an apportionment base composed of the total population, which the framers were well aware included persons who were not eligible to vote.

Admittedly, section 2 of the Fourteenth Amendment governs apportionment of congressional seats and does not apply to city council positions. Nevertheless, it is highly relevant to the issue in this case. First, given the language and background of section 2

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[35] *Chen,* 206 F.3d at 527, n.19.

of the Fourteenth Amendment, it is not possible to conclude that our fundamental concepts of representation are based on electoral equality rather than representational equality. Second, the framers' very careful and deliberate choice to use the noun "person" in section 2 gives us insight as to what they intended when they used the same noun in section 1 – which was, in fact, the immediately preceding sentence. When the framers were so careful to use the term "persons" to make it clear that apportionment was to be conducted on a representative rather than an electoral model, it is inconceivable that they could use the same word in the preceding sentence and intend it to have the opposite effect.

## III. THERE IS NO CONFLICT BETWEEN SECTION 2 OF THE VOTING RIGHTS ACT AND ONE PERSON-ONE VOTE JURISPRUDENCE.

Dr. Lepak urges this Court to grant the petition to resolve "the tension . . . between the one-person, one-vote principle and Section 2 of the VRA."[36] This is also the primary argument of two of the three amici that have submitted briefs in support of the petition.[37] Any tension or conflict, however, is illusory rather than real.

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[36] Petition for Writ of Certiorari, at 18.

[37] *See* Amicus Brief of Mountain States Legal Foundation and Amicus Brief of Cato Institute.

The argument assumes that because the Voting Rights Act was adopted to enforce the Fourteenth Amendment,[38] the Act and the constitutional provision have the same scope so that any doctrine arising from the Fourteenth Amendment, such as the principle of one person-one vote, must address the same concerns as section 2 of the Voting Rights Act.[39] That argument, however, has two fundamental flaws. First, this is not a Voting Rights Act suit. While the city was a defendant in an earlier suit brought under section 2 of the Voting Rights Act, Dr. Lepak was not a party to that suit, and it was terminated before the current suit was filed. Dr. Lepak asserts no claim under the Act. Rather, his claim rests solely on the Fourteenth Amendment. Thus, his argument about the permissible scope of the Voting Rights Act is irrelevant to the suit now before the Court.

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[38] In fact, the Act is generally understood to have been enacted pursuant to section 2 of the Fifteenth Amendment. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 325-27 (1966). Additional authority to adopt the Act can be found in section 5 of the Fourteenth Amendment and article I, section 4, of the Constitution.

[39] *See, e.g.*, Amicus Brief of Mountain States Legal Foundation at 10-11 ("[T]he Voting Rights Act does not create new statutory rights, it merely enforces those rights 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.").

Second, his argument that the Fourteenth Amendment does not create substantive rights cuts against his position. To obtain the relief he seeks, Dr. Lepak must find a substantive right to electoral equality (districts drawn to contain equal numbers of voters) that overrides any ability to have representational equality (districts drawn to contain equal numbers of people). Dr. Lepak asserts that is the case, but, as noted above, this Court rejected that claim in *Burns* when it said it had been shown no constitutionally founded reason to interfere with a jurisdiction's decision either to include or exclude non-citizens and other categories of persons who are ineligible to vote in the apportionment base.[40] Dr. Lepak would have the Court reject its conclusion in *Burns* and find that section 1 of the Fourteenth Amendment denies states and local governments the ability to adopt a system of representational equality while, at the same time, section 2 of the Fourteenth Amendment mandates that system of representation for the House of Representatives.

Further, Dr. Lepak argues that the courts should not permit the use of one standard (CVAP) to determine if there is a Voting Rights Act violation while permitting a different measure (total population) when drawing districts to comply with constitutional requirements for one person-one vote.[41] There is,

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[40] *Burns*, 384 U.S. at 92.

[41] Petition for Writ of Certiorari, at 20.

however, no reason why the measure used in the statutory analysis and that used in the constitutional analysis should be the same. Not only do the two measures relate to two different rights, they have two different roles and are directed to different groups.

The protections of section 2 of the Voting Rights Act are limited to citizens.[42] The Fourteenth Amendment, on the other hand, is more expansive as its protections extend to non-citizens whom Dr. Lepak seeks to exclude from the apportionment base.[43] In

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[42] 42 U.S.C. § 1973 (prohibiting any practice "which results in a denial or abridgement of the right of any *citizen of the United States* to vote") (emphasis added).

[43] *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (Equal Protection Clause extends to lawfully admitted aliens). It should be noted that one amicus poses the issue solely in terms of illegal immigrants, whom it conflates with non-citizens generally. Amicus Brief of Center for Constitutional Jurisprudence. While it is undoubtedly true in Irving, as in any large city, that some of the non-citizens may not be lawfully residing in this country, the evidence in this case relates to non-citizens generally and does not distinguish between persons lawfully and unlawfully in this country. The Census Bureau does have a question on the American Community Survey sample survey on citizenship, but it does not ask if the respondents are lawfully in this country. There are national estimates that most non-citizens are legal residents. Jeffrey S. Passell and D'Vera Cohn, "Unauthorized Immigrant Population: National and State Trends, 2010," Washington, D.C. Pew Hispanic Center (February 1, 2011), at 10, Table 3 (noting 14.1 million legal permanent resident aliens and legal temporary migrants versus 11.2 million unauthorized immigrants) (found at http://pewhispanic.org/files/reports/133.pdf). Further, the protection of the Equal Protection Clause also extends to non-citizens who were not lawfully admitted to the United States, although the level of scrutiny may not be as high

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essence, he is attempting to graft the more narrowly focused nature of the Voting Rights Act on to the much broader scope of the Equal Protection Clause.

The use of CVAP is simply an evidentiary factor in determining if there is a violation of section 2 of the Voting Rights Act. It is not an end in itself and does not establish a right to have a district where the plaintiff group has a CVAP majority. CVAP is a factor in section 2 litigation because it is part of the *Gingles* three-part threshold test.[44] It relates to the first prong of the analysis, which asks if the minority group is sufficiently large and geographically compact to be able to constitute a majority in a single-member district.[45] The Court in *Gingles* did not expressly designate the population measure to be used in determining if the group could constitute a majority, but in cases where a significant part of the population is ineligible to vote, courts of appeals that have considered the issue have consistently determined that CVAP is the appropriate measure.[46] Although not specifically ruling

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as it is for lawfully admitted resident aliens. *Plyler v. Doe,* 457 U.S. 202, 210-15 (1982).

[44] *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

[45] The other two elements of the test are that the minority group is politically cohesive and that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances – usually to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 51.

[46] *See, e.g.*, *Valdespino v. Alamo Heights Ind. Sch. Dist.,* 168 F.3d 848, 853 (5th Cir. 1999); *Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *Negron v. City of Miami Beach*, 113

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on the question of whether CVAP was the required measure, this Court analyzed at least one case in those terms where the parties were all in agreement that CVAP was the appropriate measure.[47] Moreover, the three-part *Gingles* test does not finally establish a violation under section 2 of the Voting Rights Act, but it is a necessary precondition to establishing that an at-large election system is discriminatory.[48] In essence, the three-part threshold test is a way that a plaintiff both demonstrates the existence of an injury and establishes his or her standing to bring the action by showing a causal link between the challenged election system and the plaintiff's injury.[49]

While the test employing CVAP is an essential element of proving a violation, it neither itself establishes a violation of section 2 of the Voting Rights Act nor necessarily mandates a remedy consisting of

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F.3d 1563, 1569 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989), *abrogated on other grounds, Townsend v. Holman Consulting Corp.,* 929 F.2d 1358 (1991) (en banc).

[47] *League of Latin American Citizens v. Perry*, 548 U.S. 399, 427-30 (2006).

[48] *Gingles*, 478 U.S. at 50.

[49] *Id.* at 50 n.17 (explaining the first prong of the threshold test in terms of linking the alleged injury to the challenged election practice); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 473 (1982) (exercise of judicial power limited to "litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate").

districts drawn to have a CVAP majority.[50] An appropriate remedy might instead be a different election system such as one employing cumulative voting or eliminating numbered places. There may be instances where a district without a CVAP majority can be shown to afford the minority group an equal opportunity to elect and, thus, could constitute an effective remedy district. Given the limited role of CVAP in the section 2 analysis, there is no reason that the use of CVAP as a factor in enforcing the Voting Rights Act is also required by the Fourteenth Amendment for one person-one vote purposes, particularly where the effect of using CVAP as the standard under the constitutional provision would be to limit the scope of that provision's protections.

While CVAP is the measure used to determine if there is a link between the challenged practice and the claimed injury under section 2, the population measure used to draw districts addresses choices about the nature of representation – choices with which this Court has previously seen no constitutionally founded reason to interfere.[51] Indeed, were the Court to find that the Fourteenth Amendment mandated that governments reject a representational equality theory where children and non-citizens are included in the apportionment base, it would raise serious questions about the scope of the Fourteenth

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[50] *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

[51] *Burns*, 384 U.S. at 92.

Amendment's protections set out in this Court's previous jurisprudence.[52] It is important to note that Dr. Lepak's theory is not merely that the Equal Protection Clause permits children and non-citizens to be excluded from the apportionment base, but that, in appropriate cases, it mandates that they be excluded. Were that theory to be accepted, it would significantly alter equal protection jurisprudence.

## IV. AVAILABLE DATA SOURCES ARE INSUFFICIENT TO SUPPORT THE STANDARD THE PETITION URGES THIS COURT TO ADOPT.

When drawing districts, governmental bodies across the United States rely almost uniformly on total population as the measure by which the districts are to be judged to determine if they balance.[53] In Texas, there were 340 districting or redistricting submissions to the Department of Justice for review under section 5 of the Voting Rights Act in the period of redistricting following publication of the 2000 census – *i.e.,* in 2001-03. All 340 used total population as the apportionment base.[54]

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[52] *See, e.g., Graham*, 403 U.S. at 371 (Equal Protection Clause extends to lawfully admitted aliens); *In re Gault*, 387 U.S. 1, 13 (1967) (protection extends to children).

[53] J. Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1890 (2012).

[54] Declaration of Robert S. Berman, Appendix to Amicus Brief of the United States, *Lepak v. City of Irving*, No. 3:10-CV-00277-P (N.D. Tex.). Doc. 32-2, at PageID 561-62. In 57 of those

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It is not surprising that total population is the virtually universal apportionment basis. First, it is the one set out in the Constitution for the federal House of Representatives. Second, total population, along with voting-age population, is the only highly accurate source of data available for the small geographic areas that have to be used for drawing districts. As one respected legal and political science scholar observed, "[a] constitutional rule requiring equal numbers of citizens would necessitate a different kind of census than the one currently conducted (or for that matter, the one the text of the Constitution requires)."[55] He went on to explain that for the purposes of balancing districts, "the only relevant citizenship data available from the census gives ballpark figures, at best, and misleading and confusing estimates at worst."[56]

As this case was decided on cross-motions for summary judgment, the record is sparse. One point, though, on which that record is clear is that citizenship data does not exist that is sufficiently accurate to draw and balance districts on the basis of CVAP.

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340 submissions, the prison population was subtracted from the total population count. In Texas, a person who is an inmate in a penal institution does not acquire residence at the place where the institution is located. TEX. ELEC. CODE § 1.015(e).

[55] N. Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L.R. 755, 776 (2011).

[56] *Id.*

There are numbers showing the population and CVAP for the City of Irving single-member districts that existed at the time this suit was filed.[57] Those numbers were produced from the sample detail file accompanying the 2000 census and came from data collected from the "long form" questionnaire. That data was collected at the same time as the rest of the census and came from a massive sample of roughly one in every six households.[58] Those districts, though, no longer exist, as they, along with virtually all electoral districts in the country, have been redrawn to reflect population changes revealed by the 2010 census. For the 2010 and subsequent censuses, the long form data is no longer available to determine the number of citizens in each district. Instead, the long form has been replaced by the American Community Survey, which, rather than being taken at the same time as the census, is a much smaller statistical sampling that is continually in the field throughout the decade with the reports being aggregated and reported in one-year, three-year, and five-year increments. Because of the large margins of error associated with the smaller sample, the Census Bureau releases one-year data only for geographic units containing at least 65,000 persons. The three-year data

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[57] *See, e.g.,* petition for writ of certiorari, at 9.

[58] Declaration of Steven H. Murdock, Appendix to Brief in Support of City's Motion for Summary Judgment, *Lepak v. City of Irving*, No. 3:10-CV-00277-P (N.D. Tex.), Doc. 30, at PageID 425.

set is available only for units of at least 20,000 persons, with the five-year data being the only set available for smaller jurisdictions and geographic units.[59] Even so, the sampling error is significant.

The city's expert in this case was Dr. Steven H. Murdock. Dr. Murdock is a distinguished demographer who is currently on the faculty of Rice University. Most significantly, he was the Director of the United States Census Bureau in 2008-09.[60] Using data collected by the Census Bureau to test the accuracy of the American Community Survey as compared to the long form data, he estimated the margins of error for the CVAP totals for each of the six Irving single-member districts if one has to rely on American Community Survey data, which now and going forward is the only source for determining the number of citizens.[61] For District 1, the district containing the highest numbers of non-citizens, he concluded that he could be 90 percent confident that the actual number of citizens fell somewhere between 17,698 and 22,931 – a range of 5,233 persons.[62] The other five districts produced ranges of uncertainty from a low of 1,785 to a high of 3,215.[63] Obviously, if the available data used to determine the number of

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[59] *Id.,* at PageID 426-27.

[60] *Id.,* at PageID 455.

[61] *Id.,* at PageID 452-53.

[62] *Id*., at PageID 429, 453.

[63] *Id.,* at PageID 452-453.

citizens in a district gives us only enough precision to know that there is a 90 percent chance that the actual number falls somewhere in a range fully 5,200 persons wide in one district and from almost 1,800 to 3,200 persons wide in the others, any conclusion that the districts are balanced in CVAP is little more than a guess. Accordingly, Dr. Murdock, the former census director, concluded that CVAP simply could not "be used in actually drawing population-balanced districts."[64] Or, as Professor Persily concluded, the available data sources leave us with something between a ballpark figure and a misleading and confusing estimate.[65]

The city believes that Dr. Lepak seeks to vindicate a constitutional right that does not exist. If, however, it were to be determined that he is correct and he has a right to districts balanced by CVAP, 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.



[64] *Id.*, at PageID 429.

[65] Persily, *supra* note 55, at 777.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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