No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,
v.
GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANTS

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador to Costa Rica, Curtin Winsor, Jr.; former Ohio Secretary of State, J. Kenneth Blackwell; former prosecutor, Voting Rights Section, U.S. Department of Justice, J. Christian Adams; and former Counsel to

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

the Assistant Attorney General for Civil Rights and member of the Federal Election Commission, Hans von Spakovsky.

This case is of interest to the ACRU because it is concerned to protect the sanctity and integrity of voting.

STATEMENT OF THE CASE

Appellants Sue Evenwell and Edward Pfenninger are registered voters residing respectively in Texas Senate District 1 and Texas Senate District 4. Both vote regularly. App. 5a.

Appellants filed suit in the United States District Court for the Western District of Texas under 42 U.S.C. Section 198 challenging the current Texas Senate Election District map, alleging that the currently drawn districts violate the one-person, one-vote principle of the Equal Protection Clause. They seek a permanent injunction against further use of the current Texas Senate District map in future elections. App. 34a.

After every decennial Census, the state legislatures of every state, including Texas, redraw the election districts for every state legislator, as well as for each of the state's Congressional representatives. Well established precedents of this Court establish fundamental principles guiding how these election districts may be drawn. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Simms*, 377 U.S. 533

(1964); and *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50 (1970), among several others.

These precedents establish the one-person, one-vote principle, requiring roughly equal numbers of voters in each district, so that effectively every voter in a state would carry roughly equal weight as far as practicable. This principle stems from the basic, equal right of every voter to participate in elections.

The Texas Senate Redistricting

Article III, Section 28 of the Texas Constitution provides that the Texas Legislature shall reapportion the State's election districts at its first regular session after publication of the latest federal decennial Census. The Constitution further provides in Article III, Section 25 that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator."

The Texas Legislature first carried out these duties by passing Plan S148 as the redistricting plan for the Senate after the 2010 decennial Census. That was included in H.B. 150, which also covered redistricting for the State House, and Congressional districts, signed into law by former Governor Rick Perry on June 17, 2011.

After legal challenges were brought against all three redistricting plans in H.B. 150, a three-judge panel of the United States District Court for the Western District of Texas found there was "a not insubstantial claim" that Plan S148 violated Section 5

of the Voting Rights Act. The three-judge panel consequently created Plan S172 as an interim map for the 2012 State Senate elections. *Davis v. Perry*, 991 F. Supp. 2d 809, 817-18 (W.D. Tex. 2014). On June 21, 2013, the Texas Legislature adopted Plan S172 as the permanent Senate election district map for the post 2010 decennial Census, signed into law by Governor Perry on June 26, 2013.

The finally adopted Plan S172 can be evaluated under different metrics for measuring the population of each district. Those include (1) the Citizen Voting Age Population (CVAP) from the three American Community Surveys ("ACS") conducted by the U.S. Census Bureau for the 2010 decennial Census; (2) the total voter registration numbers for each district as counted by the State of Texas for 2008 and 2010; and (3) the non-suspense voter registration numbers counted by Texas for 2008 and 2010.[2]

Theoretically "ideal," relatively equal Senate district populations were calculated based on each of the three alternative measures of district population specified above. The Plan 172 districts varied from these "ideal" district populations by 46% to 55%, depending on which of the three above alternative population measures is used for the calculation. App. 26a-30a; Supplemental Appendix ("SA") 2-12.

That means the votes of the residents of some districts count roughly one and a half as much as the

[2] Non-suspense voter registration is total voter registration minus previously registered voters who fail to respond to confirmation of residence notices sent by the county voter registrar to the registered residence address of each voter.

votes of the residents of other districts. That results because redistricting Plan S172 was based on creating districts of relatively equal total population, not equal numbers of voters. Because extensive localities in Texas include large numbers of non-citizens who cannot legally vote, Plan S172 effectively favored such areas with more political power over other areas composed more homogenously of American citizens.

The Present Litigation

Appellee/Defendants responded to the present litigation by filing a motion to dismiss for failure to state a claim on which relief can be granted, which the district court granted on November 15, 2014. App. 3a-14a. The district court recognized that the present suit was based on data showing "that the [Senate election] districts vary widely in population when measured against various voter-population metrics." App. 5a.

The district court concluded that the choice of which population metric to use in apportioning districts should be "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." App. 13a. (Based on *Burns v. Richardson*, 384 U.S. 73 (1966); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). The district court essentially decided that the proper population metric to use for the Constitution's fundamental one-person, one-vote principle was a political question best left to the political process rather than to Constitutional principle ensuring an equal vote for all.

Most fundamentally, the district court ruled, "the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" App. 11a.

SUMMARY OF ARGUMENT

The question on the appeal in the present case, which asks what measure of population should be used for determining whether the population is equally distributed among the districts, is obviously substantial, justifying plenary review. Justice Thomas made that point in dissenting from the denial of certiorari in *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001). Thomas pointed out that this Court "has never determined the relevant 'population' that States and localities must equally distribute among their districts," and, therefore, the Court has "left a critical variable in the requirement undefined."

Indeed, the present case raises a critical but still unsettled constitutional issue, whether the one-person, one vote principle protects the rights of voters to an equal vote, or whether election districts can be drawn to grant more political power to residents who are not American citizens (and may even be in the country illegally) and so are prohibited from voting by federal and state law.

Dissenting in *Garza v. County of Los Angeles*, 918 F.2d 763, 785 (9th Cir. 1991), Judge Kozinski supported the same position as Appellants in this case, arguing that, "[T]he name by which the Court has

consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors [voters], making sure that each voter gets one vote—not, two, five, ten or one-half." 918 F.2d at 782.

Kozinski is quite right. The precedents of this Court make clear that the one person, one vote doctrine protects the right of every voter to an equal vote.

These precedents are the reason why redistricting and other suits brought by the U.S. Justice Department under Section 2 of the Voting Rights Act have been based on Citizen Voting Age Population (CVAP), or otherwise focused on the rights of citizens who can vote, or on "voters," rather than on total population. The Justice Department, as the designated chief enforcer of the Voting Rights Act, concentrates on the numbers of eligible *citizen* voters when evaluating possible violations of the law and allegations of unequal treatment. The Department of Justice has plainly used citizenship data in redistricting case after redistricting case, voting case after voting case. This policy is plain on the face of the complaints in Lake Park, Euclid, Osceola, Georgetown, Boston, Alamosa, Crockett County, etc.

But the decision of the district court below declined to follow the above long line of precedents of this Court, and the practice of the Justice Dept. itself, protecting the right of voters to an equal vote. The court below said whether the doctrine of so-called one-person, one-vote protected the right of voters to an

equal vote, or the right of total population to supposed equal chances to get on their representative's appointments calendar, was a political question that each state was free to decide on its own. The decision below consequently failed to protect the right of voters to an equal vote, in conflict with the precedents of this Court.

For all of these reasons, this Court should note probable jurisdiction and set this case for oral argument.

THE QUESTION PRESENTED IS SUBSTANTIAL

The immediate issue before this Court at this stage is only whether to note probable jurisdiction and set the case for oral argument or to summarily affirm the district court's decision below. The Court should grant review in this case because the question presented is substantial.

Indeed, the present case raises a critical but still unsettled constitutional question, whether the one-person, one vote principle protects the rights of voters to an equal vote, or whether election districts can be drawn to grant more political power to residents who are not American citizens (and may even be in the country illegally) and so are prohibited from voting by federal and state law.

I. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER THE ONE-PERSON, ONE-VOTE PRINCIPLE PROTECTS THE RIGHTS OF VOTERS TO AN EQUAL VOTE.

The practice for direct appeals such as the present case is that the Court notes probable jurisdiction and sets the case for oral argument as long as the question presented is substantial. *Hicks v. Miranda*, 422 U.S. 332, 344 (1976). Such plenary review is warranted unless "after reading the condensed arguments presented by counsel in the jurisdictional statement and the opposing motion, as well as the opinion below, the Court can reasonably conclude that there is so little doubt as to how the case will be decided that oral argument and further briefing will be a waste of time." E. Glassman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 304 (10th ed. 2013).

The question on the appeal in the present case, "which asks what measure of population should be used for determining whether the population is equally distributed among the districts," is obviously substantial. Justice Thomas made that point in dissenting from the denial of certiorari in *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001). Thomas pointed out that this Court "has never determined the relevant 'population' that States and localities must equally distribute among their districts," and, therefore, the Court has "left a critical variable in the requirement undefined." *Id*. *ACCORD*: *Burns*, 384 U.S. at 91 (The Court has "carefully left open the question [of] what population" base is paramount for one-person, one-vote purposes"); *Hadley*, 397 U.S. at 58, n.9 (same); *Chen*, 206 F.3d at 524 (Judge Garwood noted that the "Supreme Court has from the beginning

of this line of cases been somewhat evasive in regard to which population must be equalized"); *Garza v. County of Los Angeles*, 918 F.2d 763, 785 (9th Cir. 1991) (Kozinski, J., concurring in part and dissenting in part).

That major undefined gap remaining in this Court's one-person, one-vote jurisprudence alone makes the question presented in this case substantial, justifying plenary review. As Thomas further explained in dissenting from the denial of certiorari in *Chen*, "The one person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means." *Id*.

In *Garza*, the Ninth Circuit panel majority held that the Equal Protection Clause constitutionally required Los Angeles County to use total Census population in redistricting, regardless of how many voters resided in each district as a result. The Ninth Circuit majority said, "the people, including those who are ineligible to vote, form the basis for representative government," and, therefore, total population as counted by the Census was the "appropriate basis for state legislative apportionment." 918 F.2d at 774.

The Ninth Circuit majority ruled that basing the districts on total *voter* population would violate the Equal Protection Clause by producing "serious population inequalities across districts" which would result in "[r]esidents of the more populous districts [having] less access to their elected representative." *Id.* The panel majority further argued basing the

districts on voter population would also violate the Petition Clause of the First Amendment by denying voters fair access to their elected officials, saying, "Interference with individuals' free access to elected officials impermissibly burdens their right to petition the government." 918 F.2d at 775.

But in dissent, Judge Kozinski supported the same position as Appellants in this case, arguing that, "[T]he name by which the Court has consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors [voters], making sure that each voter gets one vote—not, two, five, ten or one-half." 918 F.2d at 782.

Kozinski explained that the Equal Protection Clause "protects a right belonging to the individual elector [voter] and the key question is whether the votes of some [voters] are materially undercounted because of the manner in which districts are apportioned." 918 F.2d at 782. He added that this right "assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of [voters] in another location." *Id.*

The issue that Kozinski identifies is exactly the issue/problem in the present case before this Court. Plaintiffs in this case allege precisely that their votes "are materially discounted because of the manner in which districts [in Plan S172] are apportioned," and "dilution of that important right by having their vote given less weight than that of [voters] in another location." Because the Senate districts in Plan 172 are

based on total population, rather than on citizens that have the right to vote, the weight of voters in some Senate districts (with fewer non-citizen residents that cannot vote) counts roughly one and a half times as much as the vote of Plaintiffs in their districts.

That problem would be solved if the Senate districts at issue in this case were apportioned based on equal numbers of citizens with the right to vote, rather than equal numbers of total population. That would be consistent with the one-person, one-vote principle, as it would protect the right of all voters in the state to an equal vote with the same weight. As Kozinski rightly explains, "at the core of one-person, one-vote is the principle of electoral equality, not that of equality of representation." 918 F.2d at 782.

Again, because this case involves a direct appeal from a three-judge district court panel ruling on constitutional rights, and not a petition for certiorari, that argument is decisive, as it cannot be seriously argued that Justice Thomas and Judge Kozinski are not only wrong, but so clearly wrong that oral argument and full briefing would be a waste of time.

To the contrary, we agree with Justice Thomas and Judge Kozinski that the constitutional right protected by the one-person, one-vote principle is the right to an equal vote of the same weight as all other voters, not a right of equal access to representation by non-citizens as full American citizens. As Kozinski said, that is why the principle is called "one-person, one-vote." There is no evidence in the present case that districts of equal voters, rather than equal population, would leave non-citizens without effective access to

their district's Senator, which would be an implausible claim on its face.

Moreover, the Fifth Circuit agreed as well that Judge Kozinski's opinion cannot so easily be dismissed out of hand. Judge Garwood recognized for the court in *Chen* that Judge Kozinski had made "a powerful case that the general tenor of the Court's opinions mandates protection of the individual potential voter." 206 F.3d at 525. Even though the Fifth Circuit reached a different conclusion in *Chen*, that does not mean in a direct appeal like this that the question is not substantial. Continued differences on the issue only further confirms that this Court should proceed with plenary review of the present case.

Indeed, even the district court below admitted that this issue presents a "close" question, App. 14a, as the court in *Chen* did, 206 F.3d at 523. The present case provides this Court with a timely opportunity to now definitively resolve this fundamental question at the foundation of the one-person, one-vote principle.

II. THIS COURT'S ONE-PERSON, ONE-VOTE PRECEDENTS PROTECT THE RIGHT OF VOTERS TO AN EQUAL VOTE, CONTRARY TO THE COURT BELOW.

While this Court has never definitively resolved what population the principle of one-person, one-vote applies to, the precedents of this Court make clear that the doctrine protects the right of every voter to an equal vote.

This Court announced in *Reynolds v. Sims*, 377 U.S. at 577-78 (1964), that "all who participate in [an] 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…."

This Court added in *Hadley* that the Equal Protection Clause "requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U.S. at 56. Consequently, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will ensure, as far as is practicable, that equal numbers of voters can vote proportionally for equal numbers of officials." *Hadley*, 397 U.S. at 56; *Reynolds*, 377 U.S. at 568.

As *Reynolds* explained, the Equal Protection Clause protects "the right of all qualified citizens to vote." 377 U.S. at 554. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Saunders*, 376 U.S. 1, 17 (1964). A citizen, therefore, "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). As this Court noted further in *Greg v. Sanders*, 372 U.S. 368, 380 (1963), "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."

Reynolds, 377 U.S. at 565, further explained "[w]ith respect to the allocation of legislative

representation, all voters, as citizens of a state, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 557-58, adds, "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in [other] parts of the State." Kozinski summarizes, "References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity." *Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part).

Gaffney v. Cummings, 412 U.S. 735, 746 (1973) explained the principle in the way most relevant to the question at issue in this case, saying, "Total population…may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters."

III. THE U.S. JUSTICE DEPT. ITSELF, IN REDISTRICTING VOTING RIGHTS CASES, USES CITIZENSHIP DATA FOR DETERMINING EQUAL VOTING RIGHTS.

These precedents are the reason why redistricting and other suits brought by the U.S. Justice Department under Section 2 of the Voting Rights Act[3]

[3] All cases brought under Section 2 of the Voting Rights Act, with the complaints and other documents linked, are listed at the Justice Dept. website under Cases Raising Claims Under Section 2 of the Voting Rights Act.

have been based on Citizen Voting Age Population (CVAP), or otherwise focused on the rights of citizens who can vote, or on "voters."

For example, the Justice Dept. Complaint in *United States v. Town of Lake Park, FL*, (S.D. Fla. 2009), alleged "Plaintiff challenges the at-large method of electing the Town of Lake Park Commission on the grounds that it dilutes the voting strength of black *citizens* in violation of Section 2…." (emphasis added), and thus the first *Gingles* precondition was satisfied. See, *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986). To determine whether a minority group "is sufficiently large and geographically compact to constitute a majority in a single member district," the Justice Department explicitly turns to citizenship voting age population to satisfy the first *Gingles* precondition. *Id.*

Indeed, as the foundation for the remedy sought, the Complaint further alleged, "The black population of the Town is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Commission can be drawn in which black persons would constitute a majority of the total population, voting age population, and *citizen voting age population* in at least one district." (emphasis added).

The Cause of Action section of the Complaint alleged, "the at-large method of electing the

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http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php #osceola_school

Commission has the effect of diluting black voting strength, resulting in black *citizens* being denied an opportunity equal to that afforded to other members of the electorate," and "Unless enjoined by order of this Court, Defendants will continue to conduct elections for the Commission under the present method of election that denies black *citizens* the opportunity to participate equally with white *citizens*…." (emphasis added).

The Justice Department Complaint in *United States v. Euclid City School District Board of Education, OH,* (N.D. Ohio 2008) also reveals Justice policy on which population group should be used in Section 2 lawsuits involving legislative districts. The Complaint alleged, "The at-large method of electing the Euclid Board of Education dilutes the voting strength of African-American *citizens*, in violation of Section 2 of the Voting Rights Act…." (emphasis added). As the foundation for the remedy sought by the Complaint, the U.S. Justice Dept. alleged, "The African-American population of Euclid is sufficiently numerous and geographically compact that a properly apportioned five single-member district plan for electing Defendant Euclid City School District Board of Education can be drawn in which African-Americans would constitute a majority of the total population and *voting age population* in one district."

The Cause of Action section of the Complaint alleged, "the at-large election system for electing Defendant Euclid City School District Board of Education…result[s] in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate…." and "Unless

enjoined by order of this Court, Defendants will continue to conduct elections for the Euclid City School District Board of Education under the present method of election that denies African-American *citizens* the opportunity to participate equally with white citizens…." (emphasis added).

The Department of Justice policy of using only citizen population data was again manifested in the case of *United States v. The School Board of Osceola County*, (M.D. Fla. 2008). In that Complaint, the Justice Dept. alleged, "The Hispanic population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the School Board can be drawn in which Hispanic persons would constitute a majority of the *citizen voting-age population* in one out of five districts." (emphasis added).

Yet another Justice Department redistricting case revealed that citizenship data is the proper data set to be used in determining liability under the first *Gingles* precondition. In *United States v. Georgetown County School District, et. al.*, (D.S.C. 2008), the Justice Dept. Complaint alleged, "The African-American population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Board can be drawn in which black *citizens* would constitute a majority of the total population, and voting age population in three districts." (emphasis added). The Cause of Action section of the brief seeks relief against practices "resulting in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political

process and elect representatives of their choice…." (emphasis added).

In *United States v. City of Euclid, et al.*, (N.D. Ohio 2006), an earlier Justice Dept. Complaint seeking relief alleged that "the at-large/ward method of electing the Euclid City Council dilutes the voting strength of African-American *citizens*, in violation of Section 2 of the Voting Rights Act…." (emphasis added). The Complaint further alleged that "The African-American population of the City of Euclid is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant City Council can be drawn in which black *citizens* would constitute a majority of the total population, and voting age population in two districts." (emphasis added). The Cause of Action section of the Complaint seeks relief from practices "resulting in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice, in violation of Section 2 of the Voting Rights Act." (emphasis added).

In *United States v. City of Boston, MA*, (D. Mass. 2005), the Justice Dept. Complaint was based explicitly on "*citizen voting age population*." The Second Cause of Action alleges, "Under the totality of the circumstances that exist in Boston, Defendants' conduct has had the effect of denying limited English proficient Hispanic and Asian American *voters* an equal opportunity to participate in the political process and to elect candidates of their choice on an

equal basis with *other citizens* in violation of Section 2 of the Voting Rights Act." (emphasis added).

The Prayer for Relief section of the brief sought relief "to ensure that Spanish-speaking *citizens* are able to participate in all phases of the electoral process," and to prevent Boston "from implementing practices and procedures that deny or abridge the rights of limited English proficient Hispanic and Asian American *citizens* in violation of Section 2 of the Voting Rights Act." The Prayer for Relief also sought an injunction "requiring Defendants to devise and implement a remedial program that provides Boston's limited English proficient Hispanic and Asian American *citizens* the opportunity to fully participate in the political process consistent with Section 2 of the Voting Rights Act." (emphasis added).

An earlier Justice Dept. Complaint in *United States v. Osceola County*, (M.D. Fla 2005) alleged, "In conducting elections in Osceola County, Defendants have failed to ensure that all *Hispanic citizens* with limited-English proficiency have an equal opportunity to participate in the political process and to elect the representatives of their choice," and "The effects of discrimination on *Hispanic citizens* in Osceola County, including their markedly lower socioeconomic conditions relative to *white citizens*, continue to hinder the ability of *Hispanic citizens* to participate effectively in the political process in county elections." (emphasis added).

The Complaint further alleged, "Upon information and belief, a majority of Board members in 1994-96 recognized that the growth of the Hispanic population would result in Hispanic voters achieving the ability

to elect a candidate of their choice in one or more districts under the single-member district method of election," and "In 1996, a Hispanic candidate ran in Board of Commissioners District One, and was elected to the Board under the single-member district method of election."

The Complaint explained, "In 2001, the Board of Commissioners appointed a redistricting committee to redistrict the county's residency districts. Commissioners expressed concern about the possibility they would be forced to change their method of election in the future, and the residency district plan was adopted with this concern in mind." The Complaint added, "The residency districts adopted by the Board in 2001 split heavily Hispanic population concentrations." Consequently, the Complaint alleged, "Implemented in the totality of circumstances described in paragraphs 8 to 31, the current at-large method of electing the Board of Commissioners of Osceola County has the effect of diluting Hispanic voting strength, resulting in *Hispanic citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, in violation of Section 2." (emphasis added).

In *United States v. Alamosa County*, (D. Colo. 2001), the Justice Dept. Complaint alleged, "The current at-large method of electing the members of the Alamosa County Board of Commissioners violates Section 2 of the Voting Rights Act, because it results in *Hispanic citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice…." (emphasis added).

In *United States v. Crockett County*, (W.D. Tenn. 2001), the Complaint alleged, "The current districting plan for electing the members of the Crockett County Board of Commissioners violates Section 2 of the Voting Rights Act because it results in *black citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (Emphasis added). The Complaint further alleged, "The black population of Crockett County is sufficiently numerous and geographically compact that a properly apportioned multi-member district plan for electing the defendant Board of Commissioners can be drawn in which black voters would constitute an effective majority in two districts out of twelve."

In *United States v. Charleston County*, (D.S.C. 2001), the Justice Dept. Complaint alleged, "Under the totality of the circumstances, the at-large election system for electing the Charleston County Council has the effect of diluting black voting strength, resulting in *black citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice, in violation of Section 2 of the Voting Rights Act." The Complaint further alleged, "The black population of Charleston County is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant County Council can be drawn in which black citizens would constitute a majority of the total population, voting age population, and registered voters in three districts."

Thus, it is clear that the Justice Department, as the designated chief enforcer of the Voting Rights Act, concentrates on the numbers of eligible *citizen* voters when evaluating possible violations of the law and allegations of unequal treatment. The Department of Justice has plainly used citizenship data in redistricting case after redistricting case, voting case after voting case. This policy is plain on the face of the complaints in Lake Park, Euclid, Osceola, Georgetown, Boston, Alamosa, Crockett County, etc.

IV. THE DECISION BELOW FAILED TO PROTECT THE RIGHT OF VOTERS TO AN EQUAL VOTE, IN CONFLICT WITH THE PRECEDENTS OF THIS COURT.

The decision of the district court below declined to follow the above long line of precedents of this Court, and the practice of the Justice Dept. itself, protecting the right of voters to an equal vote. The court below said whether the doctrine of so-called one-person, one-vote protected the right of voters to an equal vote, or the right of total population to supposed equal chances to get on their representative's appointments calendar, was a political question that each state was free to decide on its own.

Reynolds itself seems to directly reject the reasoning of the district court below, saying,

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to

> political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less.

377 U.S. at 566.

Indeed, the doctrine of one-person, one-vote logically and morally grows directly out of the fundamental right to vote itself. The equal right of all to vote logically gives rise to the right of all to an equal vote. This Court in enforcing one-person, one-vote is just enforcing the equal right of all to vote.

This logic can be seen at the root of the rise of one-person, one-vote in *Baker v. Carr*, 369 U.S. 186 (1962). This Court in that landmark case effectively rejected the district court's political question doctrine in finding that the Plaintiffs in that case had standing as "*voters* of the state of Tennessee" and that "*voters* who allege facts showing disadvantage to themselves as individuals have standing to sue." 369 U.S. 186, 204, 206 (1962) (emphasis added). This Court consequently found that the apportionment challenge of the Tennessee voters was "justiciable, and if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id*. at 209-10. This ruling on this reasoning logically forecloses the political question abdication of the district court below.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that

this Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

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