No. 14-940

In the Supreme Court of the United States

Sue Evenwel, et al.,
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

BRIEF OF THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@mac.com

Ilya Shapiro
Counsel of Record
Julio Colomba
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
jcolomba@cato.org

March 5, 2015

QUESTION PRESENTED

Whether the Fourteenth Amendment's "one-person, one-vote" principle creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. SECTION 2 AND THE FOURTEENTH AMENDMENT ARE AT A "BLOODY CROSSROADS" 4

A. One-Person, One-Vote Is Part of the Equal Protection of Voting Rights 4

B. Recent Section 2 Interpretations Have Undermined One-Person, One-Vote 7

II. THE DIVERGENCE BETWEEN TOTAL POPULATION AND CVAP CREATED THE CONFLICT BETWEEN SECTION 2 AND THE FOURTEENTH AMENDMENT 10

III. THIS COURT ALONE HAS THE DUTY TO ANSWER THE QUESTION PRESENTED AND UPHOLD THE CONSTITUTIONAL PRINCIPLE OF VOTER EQUALITY 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Avery v. Midland County,
390 U.S. 474 (1968) 6

Baker v. Carr,
369 U.S. 186 (1962) 18

Bartlett v. Strickland,
556 U.S. 1 (2009) 8

Bd. of Estimate of City of New York v. Morris,
489 U.S. 688 (1989) 6, 7, 16

Benavidez v. City of Irving,
638 F. Supp. 2d 709 (N.D. Tex. 2009) 8

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 5

Brown v. Thomson,
462 U.S. 835 (1983) 12

Burns v. Richardson,
384 U.S. 73 (1966) 6, 10-11

Chapman v. Meier,
420 U.S. 1 (1975) 6

Chen v. City of Houston,
532 U.S. 1046 (2001) 3, 15

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 3, 9

City of Boerne v. Flores,
521 U.S. 507 (1997) 8-9, 17-18

Colegrove v. Green,
328 U.S. 549 (1946) 5

Connor v. Finch,
421 U.S. 407, 416 (1977) 15

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996)..... 3, 9

Gaffney v. Cummings,
412 U.S. 735 (1973) 6, 11

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1991).....*passim*

Georgia v. Ashcroft,
539 U.S. 461 (2003) 7

Gomillion v. Lightfoot,
364 U.S. 339, 347 (1960) 18

Gray v. Sanders,
372 U.S. 368 (1963) 4-5, 7, 8, 10

Hadley v. Junior Coll. Dist. of Metro. Kansas City,
397 U.S. 50 (1970) 6

Lepak v. City of Irving,
453 Fed. Appx. 522 (5th Cir. 2011)..... 3

Lockport v. Citizens for Cmty. Action,
430 U.S. 259 (1977) 6

Mahan v. Howell,
410 U.S. 315 (1973) 13

Marbury v. Madison,
5 U.S. (Cranch 1) 137 (1803)..... 17

Perry v. Perez,
132 S. Ct. 934 (2012) 4, 8

Reynolds v. Sims,
377 U.S. 533 (1964) .....*passim*

Shelby County v. Holder,
133 S. Ct. 2612 (2013) 8

South v. Peters,
339 U.S. 276 (1950) 5

Thornburg v. Gingles,
478 U.S. 30 (1986) 7, 8

Wesberry v. Sanders,
376 U.S. 1 (1964) 6, 7, 16

Statutes and Constitutional Provisions

Voting Rights Act of 1965,
42 U.S.C. § 1973 *et seq*. ..... *passim*

U.S. Const. amend. XIV..... *passim*

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Reason Foundation is a nonpartisan public policy think tank founded in 1978. Its mission is to advance a free society by developing and promoting libertarian principles and policies. Reason supports market-based solutions that encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further its commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

Amici's main concern here is resolving the conflict between Section 2 of the Voting Rights Act (VRA) and the Fourteenth Amendment's "one-person, one-vote" principle (OPOV). Section 2's goal of preventing racial discrimination in voting is unquestionably just (and constitutional), but courts shouldn't be permitted to interpret this provision in a way that violates the basic constitutional guarantee of voter equality.

---

[1] Rule 37 statement: All parties were given timely notice of intent to file and written communications from Appellants' and Appellees' counsel consenting to this filing have been submitted to the Clerk. Further, *amici* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

Once again this Court finds itself at the intersection of the VRA and the Fourteenth Amendment.[2] The parties here are caught in the inevitable trap of (1) maintaining majority-minority districts under complex, overlapping standards and (2) administering electoral schemes that do little to advance racial equality while doing much to violate *voter* equality—the idea that each eligible voter's vote should count equally. In the background of this conflict, there lurks a cacophony of precedent and oft-conflicting court-administered standards that have arisen from Section 2 cases. Basic constitutional guarantees of equal protection inherent in the Fourteenth Amendment—such as OPOV—are getting lost in this thicket.

Avoiding racial discrimination under these circumstances is particularly difficult in jurisdictions where "total population" and "citizens of voting age population" (CVAP)—standard metrics for evaluating whether a district violates OPOV—diverge due to varied concentration of non-citizens. As with the tensions *amicus* Cato has described before, jurisdictions navigating between the VRA's Scylla and the Constitution's Charybdis are bound to wreck individual rights—here, voter equality—on judicial shoals.

Over the years the Court has repeatedly recognized the potential for devaluing individual votes by drawing majority-minority districts in a manner that

---

[2] A*micus* Cato has argued that courts face a "bloody crossroads" when interpreting Sections 2 and 5 of the VRA. *See*, *e.g.*, Brief of Cato Inst. as *Amicus Curiae* at 20-28, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); Brief of Cato Inst. as *Amicus Curiae* at 29-32, *Perry v. Perez*, 132 S. Ct. 934 (2012). Now we see that Section 2 is also in tension with the Fourteenth Amendment.

accords greater weight to minority votes in protected districts and diminishes the relative weight of voters elsewhere. Even the Fifth Circuit recognized this danger while ultimately ruling the other way. *Chen v. City of Houston,* 206 F.3d 502, 528 (5th Cir. 2000) ("[T]he propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question."). Nevertheless, here the special district court panel adhered to that flawed lower-court precedent—tepidly refusing to acknowledge CVAP as integral to OPOV and thus a requisite element of constitutional equal protection. At least one member of this Court has already recognized the urgency of the problem: "Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined." *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from the denial of cert.).

Section 2 and the Fourteenth Amendment have thus reached an impasse that has been highlighted by a conflict among lower courts' application of OPOV. *See Chen,* 206 F.3d 502; *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1991). This Court has clearly left pending a substantial question regarding the continued viability of OPOV and voter equality under the Fourteenth Amendment. Accordingly, the Court should take up this case and resolve that conflict once and for all—by explaining the proper use of different population metrics and saving OPOV from the judicial morass the VRA has become.

ARGUMENT

I. SECTION 2 AND THE FOURTEENTH AMENDMENT ARE AT A "BLOODY CROSSROADS"

The judiciary has reached a new "bloody crossroads" at the intersection of the Voting Rights Act and the Constitution. It is from this judicial conflict that the instant appeal arises. Section 2 was designed to reinforce the Fourteenth Amendment's equal protection guarantees, including OPOV. Courts tasked with policing Section 2 racial-discrimination claims must therefore ensure that new electoral maps comply with the Fourteenth Amendment. *Perry v. Perez*, 132 S. Ct. 934, 941-42 (2012). The district court panel here, however—adhering to Fifth Circuit precedent counseling deference to the political judgment of elected officials trying to comply with Sections 2 and 5—ratified a redistricting plan that violates OPOV.[3] *Amici* urge the Court to end this conflict by recommitting to OPOV and the voter-equality protections inherent in the Fourteenth Amendment.

A. One-Person, One-Vote Is Part of the Equal Protection of Voting Rights

This Court derived OPOV from "the conception of political equality [in] the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments," and declared that these principles "can mean only one thing—one person one vote." *Gray v. Sanders*,

---

[3] Expounding on the broader dimensions of OPOV, the Court in *Gray v. Sanders* held that "the Fifteenth Amendment [also] prohibit[s] a state from overweighting or diluting votes on the basis of race." 372 U.S. 368, 380 (1963).

372 U.S. 368, 381 (1963). In *Reynolds v. Sims*, the Court found that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964). As the Court explained, "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." *Id.* at 563. The Court was so emphatic about the fundamentality of OPOV that it held that "diluting the weight of votes . . . impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." *Reynolds*, 377 U.S. at 566 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

Even before *Reynolds*, this Court had viewed the right to vote as more than just "the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth . . . . It also includes the right to have the vote counted at full value without dilution or discount." *South v. Peters*, 339 U.S. 276, 279 (1950). As early as 1950, the Court had expressly ruled that a "federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [while] groups not in favor have their votes discounted." *Id. See also Colegrove v. Green*, 328 U.S. 549, 569-571 (1946) (Black, J., dissenting) ("No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote . . . . The Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.").

The "one-person, one-vote" principle has come to be seen as this Court's resolute declaration that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." *Garza v. County of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1991) (Kozinski, J., concurring in part, dissenting in part) (citation omitted). Over the years, the Court's position has been clear: it is unconstitutional to devalue individual votes by drawing majority-minority districts that strengthen the power of one constituency while weakening the power of another. *See*, *e.g.*, *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 701 (1989) (noting that the "relevant inquiry" in redistricting cases "is whether the vote of any citizen is approximately equal in weight to that of any other citizen."); *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970) (Fourteenth Amendment requires district apportionment "in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter [in the district]."); *see also generally Lockport v. Citizens for Cmty. Action*, 430 U.S. 259 (1977); *Chapman v. Meier*, 420 U.S. 1 (1975); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Burns v. Richardson*, 384 U.S. 73 (1966); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

Today, OPOV is firmly ensconced in this Court's jurisprudence. It guarantees an individual's right to an equal vote—"the right of equal participation by all voters"—and that representatives will be elected from districts containing substantially equal voting populations. *Reynolds*, 377 U.S. at 566, 577. *See also Avery v. Midland County*, 390 U.S. 474, 485-86 (1968) (applying OPOV to local government representatives);

Wesberry, 376 U.S. at 18 (applying OPOV to congressional representatives). Distilling the OPOV rulings to their essence, a citizen is deprived of his equal right to vote "if he may vote for only one representative and the voters in another district half the size are also [unduly granted the power to elect] one representative." *Bd. of Estimate*, 489 U.S. at 698.

B. Recent Section 2 Interpretations Have Undermined One-Person, One-Vote

Congress originally devised Section 2 to enforce the Fourteenth Amendment. The provision prohibited "any state or political subdivision" from imposing any electoral practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. §1973(a). It also enabled private litigants to invalidate laws that create racial inequality in electing representatives of their choice. 42 U.S.C. § 1973(b). "[T]he 'essence' of a Section 2 vote dilution claim is that 'a certain electoral law, practice, or structure … cause[s] an inequality in the opportunities enjoyed by minorities to elect their preferred representatives.'" *Georgia v. Ashcroft*, 539 U.S. at 478 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

This Court's jurisprudence further requires that new districts drawn as a remedy for a Section 2 violation must conform to the Fourteenth Amendment. *Perry*, 132 S. Ct. at 941-42. "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race . . . and wherever their home may be in that geographical unit." *Gray*, 372 U.S. at 379. Despite that established

precedent, however, lower courts have run roughshod over this fundamental constitutional principle.

Indeed, in bending over backwards to strictly interpret Section 2, many courts have simply ignored (or been unable to reconcile) the demands of OPOV. For example, in *Benevidez v. City of Irving*, a case similar to this one, a district court relied on CVAP data showing that a Hispanic minority group could comprise a majority if a city's at-large voting scheme were abolished and thus concluded that the electoral plan violated Section 2. 638 F. Supp. 2d 709 (N.D. Tex. 2009). Yet CVAP statistics later revealed that the majority-minority districts drawn by the City of Irving after *Benavidez* violated OPOV.

This inconsistent application of CVAP data betrays the Court's rulings in *Perry* and *Gray* that districts drawn to remedy Section 2 violations must comply with the Fourteenth Amendment. Although Section 2 was created under Congress's constitutional authority to enforce voting rights, this case illustrates how the selective disregard for CVAP evidence allows courts and litigants to use Section 2 to contravene the Fourteenth Amendment. Whereas Section 2 was designed to remedy racial inequality, interpreting it without regard to CVAP evidence undermines the aims and principles of the VRA itself. Meanwhile, states' tolerance of racial inequalities and imbalances across majority-minority districts is symptomatic of the balkanization that became associated with Section 5 cases. *See*, *e.g.*, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). One ultimately wonders whether this transmogrified version of Section 2 strains the universal requirement of "congruence and proportionality between the injury to be prevented or remedied

and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

The Fifth Circuit recognized in 2001 that it had stumbled into this tension between Section 2 and the Fourteenth Amendment. *Chen*, 206 F.3d at 525. Instead of resolving the conflict, however, it declined to exercise its judgment. While it correctly reasoned that Section 2 litigants could use CVAP statistics to force jurisdictions to redraw majority-minority districts, *id*. at 514, the court simply deferred to the legislature's political judgment that using total population to draw districts adequately protected citizens' voting rights under OPOV, *id*. at 528. Courts have thus adopted a rule allowing litigants to use CVAP data to justify majority-minority districts but later use total-population data to shield those districts from constitutional challenge. This selective disregard for CVAP eviscerates OPOV and voter equality, principles which have become an intrinsic part of this Court's jurisprudence. Unfortunately, this result is not unique to the Fifth Circuit. The Fourth Circuit also counsels deference to the political process, *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996), while the Ninth Circuit precludes use of CVAP altogether, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1991).

But whether judicial deference or bizarre conclusions about representational equality, such rulings illustrate the substantial, unresolved conflict between Section 2 and OPOV. Courts have excused themselves from the dirty business of inquiring beyond total population when determining whether districts comply with both the Equal Protection Clause and Section 2. The divergence between total population and CVAP is the real crux of this conflict.

II. THE DIVERGENCE BETWEEN TOTAL POPULATION AND CVAP CREATED THE CONFLICT BETWEEN SECTION 2 AND THE FOURTEENTH AMENDMENT

In *Reynolds*, this Court described the core principle to guide future OPOV assessments: "The overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. at 579. The *Reynolds* Court also highlighted *Gray*'s observations about the equality of *qualified* voters:

> The concept of "we the people" under the Constitution visualizes no preferred class of voters but *equality among those who meet the basic qualifications*. 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.

Id. at 557 (citing *Gray*, 372 U.S. at 379-380) (emphasis added).

When this Court decided *Reynolds* in 1964 it was likely unnecessary to make an explicit distinction between total-population count and CVAP count. They were essentially homologous and the implications of divergent metrics were not yet fully appreciated. Nevertheless, in this Court's only case that involved OPOV and a large population of residents ineligible to vote—military personnel and other transients who were counted in the census but not registered to vote—the Court recognized that raw population figures did not adequately measure whether the voting strength of each citizen was truly equal. *Burns v.*

Richardson, 384 U.S. 73, 96-97 (1966). Consequently, the Court held that total population is, at least in some circumstances, an insufficient metric for assessing whether a deprivation of OPOV has occurred. *Id*.

In the decade that followed, the Court recognized how changing American demographics—including the addition of resident non-voters—could definitively impact how population metrics account for voter equality under OPOV. The Court reasoned that "substantial differentials in population growth rates are striking and well-known phenomena. So, too, if it is the weight of a person's vote that matters, total population . . . may not actually reflect that body of voters whose votes must be counted and weighted for the purposes of reapportionment, because census persons are not voters." *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973). Thus, the Court recognized that total population might be an inaccurate metric when voters are not "distributed homogenously throughout the population." *Garza*, 918 F.2d at 783 (Kozinski, J., concurring in part and dissenting in part). Both *Burns* and *Gaffney* convey that the Court implicitly understood OPOV as a guarantee of voter equality and that the proper metric must reflect that concern.

Indeed, America's demographics changed substantially. Dramatic shifts in immigration patterns have heightened the population divergence in jurisdictions across the nation. Thus, as non-citizen populations spread outside traditional destinations, such as metropolitan areas in the Fifth and Ninth Circuits, it is increasingly likely that more states and localities will begin to confront the same districting problems.

Total population statistics, though imperfect and imprecise, were once a good proxy for equalizing eligible voters' voting strength because eligible voters were distributed homogenously. Given immigration trends in the half-century since the Court first articulated OPOV, however, total population is an increasingly unreliable measure of voter equality. CVAP is now easily the most precise metric courts can employ to evaluate voter equality consistent with *Reynolds*.

This case exemplifies how CVAP and total population are discordant metrics, manipulated in a fashion to undermine OPOV and deprive individual voters of their Fourteenth Amendment rights. While creating the illusion of voter equality out of numerical equality, the use of total-population counts in districts with concentrations of non-citizen residents grants voters in those districts disproportionate power.

The Texas state senate redistricting plan quickly reveals gross malapportionment. Although the 31 districts are roughly equal in terms of total population, districts like 1 and 4, where Appellants reside, deviate from the CVAP ideal by over 30% (depending on which metrics are used). Juris. Statement at 9-10. A vote cast in such a district, where there are a greater concentration of eligible voters, has much less voting power than one cast in a district with a greater concentration of non-eligible residents. Put another way, to win in District 1 or 4, a candidate must get almost twice the votes of a candidate in a district with high concentrations of voting-ineligible residents.

The CVAP deviations between Texas's senate districts plainly violate OPOV. As this Court has said, a deviation "of 10% or more is *prima facie* evidence of a OPOV violation", and requires the state to provide a

"compelling justification for the deviation." *Brown v. Thomson*, 462 U.S. 835, 852 (1983). Moreover, when population disparities exceed a certain threshold, an electoral plan becomes *per se* unconstitutional. For example, this Court concluded that a 16.4% discrepancy "may well approach tolerable limits" of what the Court might condone regardless of whether the state provided a compelling justification, establishing a baseline for what is *per se* unconstitutional." *Mahan v. Howell*, 410 U.S. 315, 329 (1973). The CVAP deviations at issue here—in the range of 30% and higher—are thus unambiguously unconstitutional.

As with the unconstitutional scheme in *Reynolds*, the Appellants' right to vote, "is simply not the same right to vote as that of those living" in districts inflated by high concentrations of non-eligible residents: "Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of those votes of those living there . . . . Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor." *Reynolds*, 377 U.S. at 563. Here, a relatively small constituency of eligible Hispanic voters in other districts have their votes "over-weighted" and "over-valuated", effectively diluting the votes of eligible voters in districts like 1 and 4. Consequently, the electoral power of voters in districts inflated by non-eligible populations is disproportionately greater than that of their neighbors in surrounding districts.

In short, the inclusion of non-citizen residents in the representational metric violates the equal protection of the laws by diluting citizen residents' relative voting power. Meanwhile, the residents in the districts with a disproportionately smaller CVAP obtain

a disproportionately greater share of representation in clear contravention of the OPOV principle.

III. THIS COURT ALONE HAS THE DUTY TO ANSWER THE QUESTION PRESENTED AND UPHOLD THE CONSTITUTIONAL PRINCIPLE OF VOTER EQUALITY

To resolve the conflict between Section 2 and the Fourteenth Amendment, the Court must move beyond the tangled web of "verbal formulations . . . to distill the theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the Fourteenth Amendment." *Garza*, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part).

Although the Court never expressly stated, "what measure of the population should be used for determining whether the population is equally distributed among the districts," *Chen*, 532 U.S. at 1047 (Thomas, J., dissenting from denial of cert.), the Court's substantive insight on the meaning of OPOV parallels the principle of voter (or electoral) equality. As Judge Kozinski explained in dissenting from the Ninth Circuit's ruling on the issue that adopted a theory of "representational" equality:

> The principle of *electoral* equality assures that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location.

Garza, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part) (emphasis added).

Although the substantive distinction between total population and CVAP might not have been explicit in *Reynolds*, administering Section 2 in harmony with the Fourteenth Amendment requires an understanding of OPOV commensurate with the same principles of voter equality that have been consistently enunciated by this Court. Those principles resonate all too clearly with the equal protection theory that "lies at the core of OPOV." *Id.* So much of this Court's jurisprudence makes clear that the essence of OPOV is voter (or electoral) equality.

To wit, in *Burns*, the Court rejected the use of total-population counts that failed to provide accurate assessments of the relative voting strength of eligible voters. *See id.* at 784 ("*Burns* can only be explained as an application of the principle of electoral equality."). The main point of *Reynolds* bears repeating: "The overriding objective must be *substantial equality* of population among the various districts, so that the *vote of any citizen* is approximately equal in weight to that of any other *citizen* in the state." 377 U.S. at 579 (emphasis added); *see also Connor v. Finch*, 421 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population so that each person's vote may be given equal weigh in the election of representatives.").

Summarizing the themes he observed in this Court's jurisprudence, Judge Kozinski remarked that "a careful reading of the Court's opinions suggests that equalizing total population is not an end in itself but a means of achieving electoral equality." *Garza*, 918 F.2d at 783 (Kozinski, J., concurring in part and

dissenting in part). In other words, "total population . . . [was] only a proxy for equalizing the voting strength of eligible voters." *Id.* Even the Court's use of the term OPOV "is an important clue that [its] primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five, or ten . . . or one-half." *Id.* at 782 (citing *Reynolds*, 377 U.S. at 562). Electoral equality is thus the ultimate end: the guarantee that citizens will not have their votes diluted. When districts are drawn using total population counts that diverge from CVAP, citizens are denied electoral equality.

As *amici* noted in Part II, *supra*, CVAP and total population are incongruous standards. The use of total-population data in districts with high concentrations of voting-ineligible residents has an insidious effect. Although it creates an illusion of voter equality, it distorts the power of certain constituencies to the detriment of others—a dynamic this Court has disapproved: "We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government." *Wesberry v. Sanders*, 367 U.S. 1, 8 (1964) (also quoted in *Reynolds*, 377 U.S. at 563-564). Voter equality protects people like the Appellants, who are "shortchanged if [they] may vote for only one representative when citizens in a neighboring district, of equal population, vote for two." *Bd. of Estimate*, 489 U.S. at 698.

Instead of grappling with the challenges of determining voter equality, the Fourth and Fifth Circuits contend that courts should simply defer to the judgment of legislatures. Yet it is emphatically the province of the judiciary to say what the Constitution means. *Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 177 (1803). Whether the standards formulated by states and policed by courts are constitutionally sound under the Fourteenth Amendment is a question clearly reserved to this Court.

That is, Section 5 of the Fourteenth Amendment grants Congress the power to enforce its provisions with "appropriate" legislation. Under the VRA's Section 2, states and courts may redraw districts as long as they are consistent with the Fourteenth Amendment and OPOV. When Section 2 authority is invoked to redistribute populations and redraw districts that violate OPOV, that enforcement exceeds the auspices of Section 2 and what might be deemed "congruent and proportional" under the relevant precedent. *City of Boerne*, 521 U.S. at 520.

Contrary to the Fifth Circuit's view, Congress can't define the substantive rights guaranteed by the Fourteenth Amendment. *Id.* at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."). Legislation that alters the meaning of the Equal Protection Clause can't be said to be enforcing that same provision. Nor can the Texas legislature purport to say whether total-population statistics are an adequate guarantee of a principle inherent in the U.S. Constitution. *Cf. id.* ("Congress does not enforce a constitutional right by

changing what that right is. It has been given the power to enforce, not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of the Fourteenth Amendment.'"). Manipulating Section 2 to dilute voting power is inconsistent with the Fourteenth Amendment and therefore not an appropriate application of the *City of Boerne* enforcement power.

Judicial deference here also conflicts with *Baker v. Carr*, 369 U.S. 186 (1962). That case involved essentially a vote-dilution claim under the Equal Protection Clause. The Court found that a "citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as secured by the Constitution." *Id*. at 208.

Even in *Reynolds*, the Court plainly rejected the idea that the meaning of OPOV—an inherent Fourteenth Amendment principle—is a political question: "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 of us." *Reynolds*, 377 U.S. at 567. *See also Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (deference to state power unwarranted when its exercise is a pretext for circumventing a federally protected right).

The Appellants face a quintessentially constitutional problem—the denial of equal protection—not a political one. It is unfortunate that lower courts have relegated basic constitutional rights to the realm of

political judgments. Voter equality is protected under the Fourteenth Amendment, and therefore lies squarely within the province of this Court to address.

CONCLUSION

Section 2 of the Voting Rights Act provides a constitutionally appropriate means for ensuring that any state practice that "results in a denial or abridgment of voting rights," 42 USC § 1973a, can be effectively remedied. By granting minorities the power to remedy threats to the voting franchise, Section 2—if employed properly—helps enforce the Fourteenth Amendment's promise of equal protection of the laws.

Being a creature of the Constitution, however, Section 2 can't exceed its strictures. Yet several lower courts have ratified electoral districts that violate OPOV. The ruling below, if allowed to stand, would promote a pernicious deference that abrogates voter equality.

Amici urge the Court to note probable jurisdiction and end the conflict between Section 2 and the Fourteenth Amendment by recognizing Appellants' judicially enforceable right to an equal vote and reaffirming the principle of "one-person, one vote."

Respectfully submitted,

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@mac.com

Ilya Shapiro
Counsel of Record
Julio Colomba
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
jcolomba@cato.org

March 5, 2015