No. 98-1987

In the Supreme Court of the United States

ROBERT VALDESPINO, ET AL., PETITIONERS

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a racial or language minority plaintiff challenging an at-large voting system under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, may not make out a claim of vote dilution unless the plaintiff can show that the minority could constitute a majority in a single-member district.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. This case is a challenge under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to the system used to elect the Board of Trustees of the Alamo Heights (Texas) Independent School District (AHISD). The seven members of the Board of Trustees of AHISD are all elected from the entire school district at-large, by place, by majority vote, and for staggered terms;

single-shot voting is not permitted. AHISD uses only one polling place for all elections. See Pet. 2.

Petitioners, Hispanic residents and citizens eligible to vote in AHISD elections, alleged that AHISD's election system dilutes the voting strength of Hispanics in violation of Section 2. At trial, petitioners presented several versions of a "demonstration district" (District 1), designed to show that a single-member district could be drawn in AHISD that would permit Hispanics to elect representatives of their choice, in compliance with Section 2. According to demographic information drawn from the 1990 decennial census, Hispanics would constitute a majority of the voting age population (VAP) and a majority of the citizen voting age population (CVAP) in each of the demonstration districts presented by petitioners. Pet. App. 24a.

Petitioners also submitted evidence to the effect that Hispanic voters in a comparison single-member district, District 3 of the North East Independent School District (NEISD), had successfully elected a representative of their choice. District 3 of NEISD borders directly on petitioners' proposed District 1, see 9/18/97 Tr. 639-640, and according to evidence at trial, the Hispanic population of NEISD District 3 and petitioners' proposed District 1 actually constitutes one Hispanic community, albeit split between the two school districts, see 9/16/97 Tr. 403; 9/18/97 Tr. 448. Elections in NEISD were originally held at-large, but after a Section 2 suit was brought by minority residents, NEISD was divided into single-member districts. See Pet. Exh. 59. Hispanics make up only 47% of the CVAP of NEISD District 3, but a Hispanic representative has been elected from that district. 9/18/97 Tr. 636, 639-640.

Respondents maintained at trial that, because of demographic changes since the 1990 census, the census

data did not accurately reflect the makeup of the population of AHISD as of 1997, and that the district court should rely instead on a report prepared by respondents' expert demographer, Bill Rives. The Rives report concluded that, since the 1990 census, the total population of AHISD had increased, but that both the total population and the Hispanic CVAP in petitioners' demonstration districts had decreased. See Pet. App. 25a. The Rives report further indicated that, in light of those demographic changes, petitioners' demonstration districts either deviated from the ideal population of a single-member district in AHISD by more than 10%, or no longer contained a Hispanic majority CVAP. See *id.* at 26a. For those conclusions, Rives relied on the fact that an apartment complex heavily tenanted by Hispanics at the time of the 1990 census had been closed, renovated, and replaced by a different complex with a lower occupancy rate and a smaller percentage of Hispanic tenants. See *id.* at 5a, 31a. Rives also relied on 1990 census data (which he assumed to be still accurate) showing that 89% of the voting-age Hispanics in the demonstration district are citizens eligible to vote. See Pet. Exh. 63, at 8-9 & Exh. 3; Pet. App. 24a.

The district court ruled that respondents had established that 1990 census data do not accurately reflect current demographics within AHISD, Pet. App. 25a, and that the Rives report "is thoroughly documented, has a high degree of accuracy, and is clear, cogent, and convincing," *id.* at 27a-28a. The district court also found that the Rives report's "numbers reflect the demographic reality of Alamo Heights." *Id.* at 26a. The district court therefore decided to use the "adjustments made by the [Rives] Report to the 1990 Census figures." *Id.* at 28a.

Based on the Rives report, the district court held that petitioners had failed as a matter of law to establish a violation of Section 2. The court noted (Pet. App. 20a-21a) that, in *Thornburg* v. *Gingles*, 478 U.S. 30, 47-48 (1986), this Court stated that plaintiffs in a Section 2 vote-dilution case must make three showings, including, "[f]irst that the group is sufficiently large and geographically compact to constitute a majority in a single-member district." With regard to that "first *Gingles* factor," the district court also stated that "it is the burden of the [petitioners] to establish that it is possible to create a districting plan such that at least one district has a majority of minority voting age citizens." Pet. App. 21a. But according to the Rives report, two of the demonstration districts proposed by petitioners "contain[] insufficient population" to meet the constitutional requirement of equal apportionment, and the other demonstration district "does not contain a majority of Hispanics among [the] citizen-age [*sic*] voting population." *Id.* at 28a. Therefore, the court held, petitioners "have not established by a preponderance of the evidence that they can draw a district that satisfies the first requirement of *Gingles*," and "their claim under Section 2 of the Voting Rights Act must fail." *Ibid.*

2. The court of appeals affirmed. Pet. App. 1a-18a. The court stressed that it "has interpreted the *Gingles* factors as a bright line test" and that "failure to establish any one of these threshold requirements is fatal" to a Section 2 claim. *Id.* at 8a. In addition, with respect to the first *Gingles* factor, the court stated (*id.* at 9a) that it "has required vote dilution claimants to prove that their minority group exceeds 50% of the relevant population in the demonstration district," and observed that, in *Gingles*, this Court referred to a

requirement that Section 2 plaintiffs demonstrate "a majority" (*ibid.*). The court accordingly rejected petitioners' argument that, to establish that a particular election system deprives minority voters of the opportunity to elect representatives of their choice, minority voters should be able to show that they would be able to elect such representatives in a single-member district under a different system, even if they would not actually constitute a majority of the CVAP in that district: "[Petitioners] still must meet their burden of proving that Hispanics constitute more than 50% of the relevant population in their demonstration district." *Ibid.* The court also made clear that "the relevant population" consists of the *citizens* of voting age in the demonstration district (*id.* at 9a-10a). Thus, according to the court of appeals, as an absolute precondition to making out a Section 2 violation, minority plaintiffs must show that they would constitute a majority of the CVAP in a single-member district.

The court of appeals also upheld the district court's decision to rely on demographic information in the Rives report rather than the 1990 census. Pet. App. 10a-12a. The court rejected petitioners' contentions that the Rives report was flawed and based on incorrect assumptions, stating that petitioners' "challenges are generally misdirected" (*id.* at 11a). The court ruled that, whatever the report's possible errors, its conclusion that petitioners could not identify a majority-minority district of Hispanic voting age citizens remained valid (*ibid.*).

DISCUSSION

The court of appeals ruled in this case that, as an absolute precondition to establishing a violation of Section 2 of the Voting Rights Act, a minority plaintiff making a vote dilution challenge to an at-large election system must show that the minority could constitute a majority of the citizen voting age population in a single-member district. The court of appeals concluded that that threshold showing is required by this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). In our view, Section 2 and *Gingles* do not impose an absolute requirement that a minority be shown to constitute a majority in a single-member district. Rather, because a Section 2 plaintiff must show that the challenged system impairs the minority community's ability to elect representatives of its choice, such a plaintiff may rely on evidence showing that, under a different election system, the minority community would be able to elect representatives of its choice, even if it would not constitute an absolute majority of the population (by any particular measure) in a single-member district.[1] The court of appeals' contrary decision is therefore incorrect. Further, because that decision raises issues of recurring significance in the administration and enforcement of Section 2—issues that will be of particular importance in the next round of redistricting following the upcoming decennial census—this Court should grant review to determine whether Section 2

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[1] The United States has taken that position in Section 2 litigation in the lower courts. See U.S. Amicus Br. at 12-17, *Campos* v. *City of Houston*, 113 F.3d 544 (5th Cir. 1997); U.S. Br. at 52-56, *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

imposes the absolute 50% rule applied by the lower courts in this case.

Depending on how the Court answers that question, it may be necessary for the Court to consider as well another aspect of the court of appeals' decision—namely, that to satisfy the first threshold requirement of *Gingles*, a vote dilution plaintiff must show that the minority would constitute the majority of the citizen voting age population (CVAP), rather than the voting age population (VAP), of a single-member district. If the Court agrees with our submission that a vote dilution claim does not require that the minority constitute an absolute numerical majority of a single-member district, then the difference between CVAP and VAP may have no significance in this particular case. But if the Court concludes that an absolute numerical majority is required, then it may be necessary to decide whether that majority must be determined by reference to the single-member district's CVAP, or whether there are circumstances in which the parties' evidence of the CVAP of a proposed demonstration district, even if drawn from census data, may not accurately reflect a minority's potential to elect a representative of its choice from that district. One such possible concern may arise in this case from the district court's reliance on changes in the actual population of petitioners' demonstration district after the 1990 census while also using unadjusted data about the citizenship ratio of Hispanics from the 1990 census.

1. Section 2(a) of the Voting Rights Act of 1965, 42 U.S.C. 1973(a), provides that no voting practice may be enforced "in a manner 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" or membership in a language minority group. Under Section 2(b)

of the Act, a violation is established "if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to participation by members of a [protected minority] class of citizens * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

The text of Section 2 does not itself require that a member of a minority group claiming a violation such as vote dilution establish that the minority could constitute a majority in a single-member district. In *Gingles* and later cases, however, this Court established a framework for determining whether a challenged electoral practice (there, multimember districts) results in vote dilution in violation of Section 2. Stressing that "[m]inority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates," 478 U.S. at 48, the Court in *Gingles* identified three "necessary preconditions" (*id.* at 50) for a showing that multimember districts operate in such a way:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multimember form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politi-

> cally cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Id. at 50-51 (citations, footnotes, and emphasis omitted). If those preconditions are met, the court must then determine whether, under the "totality of circumstances," the minority group has been denied an equal opportunity to participate in the political processes and to elect candidates of their choice. See *Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1012 (1994).

Although the Court in *Gingles* stated that vote dilution plaintiffs must show that the minority would constitute "a majority in a single-member district," 478 U.S. at 50, that statement must be understood in its context, namely, as explaining how vote dilution plaintiffs could claim to be injured by a multimember districting system. As the Court explained, "[t]he reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. Thus, the Court's

focus in *Gingles* was on the minority group's potential to elect representatives of its choice in the context of racially polarized and bloc voting. Where a white majority usually votes to defeat the preferred representative of the minority community, a majority-minority district would give the minority at least the potential to elect the representative of its choice.

The Court did not state in *Gingles*, however, that minority voters could have the potential to elect representatives of their choice *only* when they constitute the majority of an election district. This Court has not decided whether or how the *Gingles* analysis, or some variation on that framework, should be applied in cases in which the minority population would constitute slightly less than 50% of a single-member district, but minority voters nonetheless would have the potential to elect representatives of their choice with the assistance of limited crossover voting from the majority or other racial or language minorities, and minority plaintiffs can prove that that potential to elect is diluted by an election system. In fact, the Court has noted on several occasions that it has reserved that question. See *Gingles*, 478 U.S. at 46 n.12; *id.* at 89 n.1 (O'Connor, J., concurring in the judgment); see also *De Grandy*, 512 U.S. at 1008-1009; *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993); *Growe* v. *Emison*, 507 U.S. 25, 41 n.5 (1993).[2]

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[2] The Court has occasionally referred to such a claim as alleging a dilution of the minority's potential to "influence" elections. See, *e.g.*, *Gingles*, 478 U.S. at 47 n.12; see also *De Grandy*, 512 U.S. at 1009 ("influence district"); *Voinovich*, 507 U.S. at 154 (same). Lower courts, however, have not used that term with a consistent meaning, and the term is best avoided in a case like this, where the claim is that, although racially polarized bloc voting does exist, a minimal amount of crossover voting (or other fact patterns such as a disproportionately large turnout by the minority) would

In our view, the flat 50% rule applied by the court of appeals is inappropriate, for a variety of circumstances may give a minority voting population that is compact, politically cohesive, and substantial in size yet just short of a majority the potential to elect a representative of its choice. Most importantly, even if voting in a particular jurisdiction is generally polarized by race, nonetheless there may be a small amount of consistent crossover voting from the majority (or from a different racial or language minority in the district) that would give the minority voters the potential to elect their representative of choice. Indeed, a rule invariably requiring that minority voters be able to make up the majority in a single-member district could only be justified on the assumption that a Section 2 claim also requires that voting be *totally* polarized by race, *i.e.*, that no white voter will ever vote for the candidate preferred by the minority. But in our experience, that is almost never the case; although racially polarized voting does in some places reach extreme degrees, it is rarely if ever total. And indeed, in *Gingles*, the Court observed that, "in general, a white bloc vote that normally will defeat the combined strength of minority support *plus white 'crossover'*

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enable minority voters to elect representatives of their choice. That fact pattern must be distinguished from one in which racial or language minority voters would constitute substantially less than a majority in a single-member district, but through coalition politics would have the opportunity to influence the election of a representative, although not necessarily elect the representatives of their own choice. See, *e.g.*, *Uno* v. *City of Holyoke*, 72 F.3d 973, 990-991 (1st Cir. 1995) (using "influence district" to refer to district with approximately 28% minority voters who could affect the selection of candidates, but not elect their candidate of choice).

votes rises to the level of legally significant white bloc voting." 478 U.S. at 56 (emphasis added).[3]

The 50% rule applied by the court of appeals is also difficult to square with this Court's admonition that the *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim." *De Grandy*, 512 U.S. at 1007; *Voinovich*, 507 U.S. at 158; see also *Gingles*, 478 U.S. at 45 (Section 2 requires a "searching practical evaluation of the past and present reality" based on "a functional view of the political process") (internal quotation marks omitted); *White* v. *Regester*,

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[3] At some point, of course, the amount of crossover voting may be sufficiently substantial that it would not be possible to sustain a finding that voting is racially polarized or that the majority votes as a bloc to defeat the candidate preferred by minority voters. Lower courts reviewing Section 2 claims have generally concluded, however, that a small but consistent amount of crossover voting does not defeat a finding of racially polarized or bloc voting. See, *e.g.*, *Sanchez* v. *Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996) (observing that *Gingles* "doesn't require an absolute monolith in the Anglo or Hispanic bloc vote and recognizes the existence and role of white crossover voting"), cert. denied, 520 U.S. 1229 (1997); *Teague* v. *Attala County*, 92 F.3d 283, 289 (5th Cir. 1996) (finding bloc voting even though 15% of whites had voted for black candidate), cert. denied, 522 U.S. 807 (1997); *NAACP* v. *City of Niagara Falls*, 65 F.3d 1002, 1009-1010 (2d Cir. 1995) (finding bloc voting even though 9-26% of whites had voted for black candidates); *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1242 (4th Cir. 1989) (bloc voting even though black candidate had received 14% of white vote), cert. denied, 498 U.S. 938 (1990). Moreover, the lower courts have accumulated considerable experience in making judgments about racially polarized and bloc voting and are able to distinguish between fact patterns in which racially polarized, bloc voting exists and those in which it does not exist. Thus, there is no danger that permitting minority voters to pass the first *Gingles* threshold even if they could not constitute 50% of the population of a single-member district will undermine *Gingles*' other requirement of bloc voting.

412 U.S. 755, 769-770 (1973) ("blend of history and an intensely local appraisal of the design and impact of [an electoral system] in the light of past and present reality, political and otherwise"). The other *Gingles* preconditions to establishing a vote dilution claim—the requirements that a minority population be compact, that the minority be politically cohesive, and that the white majority usually vote as a bloc to defeat the minority's candidate (see 478 U.S. at 50-51)—do not lend themselves to strict numerical cutoffs but rather require the application of judgment to the facts of each case, informed by evidence about voting patterns in the jurisdiction at issue.[4] There is no reason why a similar approach cannot be followed with respect to the requirement that a minority population be sufficiently substantial in size to have the potential to elect a representative.

Accordingly, the lower courts should not have dismissed petitioners' Section 2 claim based on a finding that Hispanics could constitute only 48% of the CVAP of petitioners' single-member district that satisfied the equal apportionment requirement, but should have considered more generally whether Hispanics in that proposed single-member district could have the potential to elect a representative. In making that judgment, the court should have considered petitioners' evidence that, in a similar neighboring district where Hispanics make up slightly less than a majority of the CVAP of the district, Hispanic voters had succeeded in

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[4] See, *e.g.*, *Clark* v. *Calhoun County*, 21 F.3d 92, 95 (5th Cir. 1994) (observing that "[t]he first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the black population be sufficiently compact to constitute a majority in a single-member district"); see also cases cited note 3, *supra* (addressing showing necessary to establish bloc voting).

electing their candidate of choice. Election results from a closely similar neighboring jurisdiction or another existing jurisdiction within the boundaries of the plaintiffs' proposed district are relevant to determining whether minority voters in a proposed district could have the potential to elect their candidates of choice.

The application of the 50% rule by the court of appeals, moreover, raises a recurring issue of considerable importance to the administration of Section 2. The question whether Section 2 plaintiffs claiming vote dilution must invariably show that the minority would constitute a majority of a single-member district has been raised, and continues to be raised, in numerous cases and should be definitively resolved by this Court.[5] It is particularly important, moreover, that the question be resolved before the round of redistricting following the next decennial census, so that jurisdictions

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[5] In addition to the decision below and *Perez* v. *Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999), petition for cert. pending, No. 98-1747, see *Negron* v. *City of Miami Beach*, 113 F.3d 1563, 1567-1568 (11th Cir. 1997) (holding that Hispanics could not make out Section 2 claim because they could not constitute majority of CVAP in single-member district); *Romero* v. *City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989) (stating that "a section 2 claim will fail unless the plaintiff can establish that the minority group constitutes an effective voting majority in a single-member district"; affirming district court dismissal on Section 2 claim because blacks and Hispanics had not made that showing); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 942-945 (7th Cir. 1988) (rejecting Section 2 claim brought by black voters to at-large voting system because "[b]lacks comprising less than a majority in a district would not necessarily have the requisite potential to elect their candidates of choice"), cert. denied, 490 U.S. 1031 (1989); cf. *Sanchez*, 97 F.3d at 1314-1315 (finding Section 2 violation and potential for "majority-Hispanic district" as remedy where pre-existing district had 48.82% Hispanic population).

understand the extent of their obligations under Section 2.

2. It may also be necessary to decide in this case whether the court of appeals erred in ruling that petitioners' ability to draw a single-member district from which a representative of the Hispanic community could be elected must be evaluated only with respect to the CVAP of such a district. That issue is of particular importance with respect to vote dilution claims made by certain language minorities, such as Hispanics, in those circumstances where there is reason to believe that there is a significant disparity between the citizenship rates of the VAP of that minority and that of other ethnic groups, including the majority, in the demonstration district. This Court has not decided whether there is only one appropriate population to assess all vote dilution claims, *i.e.*, whether a court must assess dilution based on the minority's proportion of the general population, VAP, CVAP, or some other measure of population. See *De Grandy*, 512 U.S. at 1008-1009.[6]

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[6] There appears to be some difference of views between the Fifth and Eleventh Circuits as to whether CVAP must always be used to evaluate vote dilution claims. In this case, the Fifth Circuit appears to have ruled that CVAP data must always be used for vote dilution analysis. Pet. App. 10a. The Eleventh Circuit, however, has only required use of citizenship percentages (in conjunction with VAP data) when there is "reliable information indicating a significant difference in citizenship rates between the majority and minority populations." *Negron*, 113 F.3d at 1569 (approximately 88% v. 50% citizenship rates for non-Hispanic and Hispanic residents, respectively). "[S]uch a disparity is unlikely except in areas where the population includes a substantial number of immigrants." *Ibid.*; cf. *Barnett* v. *City of Chicago*, 141 F.3d 699, 704-705 (7th Cir.) (CVAP data appropriate to evaluate proportionality in Section 2 challenge to single-member district, parti-

That issue will be significant in this case if this Court rules, contrary to our submission, that a vote dilution claim necessarily depends on a showing that a racial or language minority could constitute an absolute numerical majority in a single-member district. If this Court were to agree with the court of appeals on that point, then the question would necessarily arise as to how plaintiffs may show that the minority could constitute the "majority"—*i.e.*, whether the minority must make up the majority of the total population, VAP, or CVAP of such a district.[7]

As a general matter, we agree with one premise of the court of appeals' decision, namely, that it is the right of citizens to vote that is pertinent to the concept of vote dilution under Section 2. Section 2(a) prohibits any practice that results in the denial or abridgment of

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cularly when noncitizens are a significant part of the population in issue), cert. denied, 118 S. Ct. 2372 (1998).

[7] That question is less likely to be significant in this particular case if this Court holds that a Section 2 vote dilution claim does not require the minority to be an absolute numerical majority in a single-member district. Petitioners have shown that Hispanics would be very close to a majority of the CVAP of their demonstration district, and have also submitted evidence to show that Hispanics in a comparison district with a similar Hispanic percentage of CVAP have elected a representative of their choice. Even if the Court agrees with us that the court of appeals' 50% rule is unwarranted, however, the question whether a court hearing a Section 2 vote dilution claim should look to CVAP or VAP may nonetheless have significance in some cases. To establish a vote dilution claim, the plaintiff must show that the minority would be "sufficiently large" in a single-member district. *Gingles*, 478 U.S. at 50. At some point the minority population may simply be too small in any single-member district to elect its representative of choice, and the question whether a court should look to CVAP or VAP to make that determination may be important in some cases.

"the right of any citizen of the United States" to vote on account of race or language-minority status. 42 U.S.C. 1973(a). Section 2(b) further provides that a violation of Section 2(a) is established if the political process is not equally open to participation "by members of a class of citizens" constituting a racial or language minority. 42 U.S.C. 1973(b).

There are, however, some significant practical difficulties with a rule that would require courts in all circumstances to rely on CVAP data from the census to determine whether a minority group could elect a representative of its choice from a single-member district. In the first place, as petitioners have pointed out (Pet. 6), citizenship data from the decennial census necessary to determine the CVAP of a demonstration district is generally not available until after most postcensus redistricting is completed.[8] Thus, a requirement that vote dilution always be evaluated by reference to CVAP could make it difficult, and perhaps impossible, for certain minority groups, including Hispanics, to show that a newly adopted redistricting plan would result in dilution of their vote until at least one election under the assertedly dilutive, and therefore illegal, plan had taken place. In addition, as petitioners have also pointed out (Pet. 7), CVAP census information is less refined than VAP census information, because the CVAP is drawn from census block group data whereas VAP is drawn from the more detailed census block data. In some cases, therefore, CVAP census data may mask the possibility that members of the minority

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[8] Citizenship rates are drawn, not from the short-form census questionnaires distributed to every household, but from data taken from the long-form questionnaires distributed to a statistical sample of the population. See 9/16/97 Tr. 258.

group who are citizens are concentrated in one part of the census block group. That information, if it were available, might show that it would be possible to draw a demonstration district in which the minority constituted a majority of the CVAP.

This case presents an additional concern about a rule requiring exclusive reliance on CVAP to determine whether petitioners could draw a single-member district as a remedy for a Section 2 violation. As noted above (pp. 2-3, *supra*), the district court relied on changes in population in petitioners' demostration district between 1990 and 1997, as reported by respondents' expert demographer, to justify setting aside the census results. Respondents' demographer and the district court assumed, however, that the 89% citizenship figure for Hispanics in the demonstration district, drawn from the 1990 census, remained valid. See Pet. Exh. 63, at 8-9 & Exh. 3; Pet. App. 24a. Respondents and the district court therefore appear to have overlooked the possibility that the citizenship rate of Hispanics of voting age in that district might have increased since 1990. Thus, the figures for the CVAP of petitioners' demonstration district may have been understated, and in single-member districts as small as those involved in this case, even a very small error in the citizenship rate might have improperly prevented petitioners from establishing that Hispanics consituted the majority of the CVAP of their demonstration district. This case may therefore present a circumstance in which the CVAP data used by the district court did not give the court a fully accurate understanding of whether it is possible to draw a single-member district in which a minority could elect a representative of its choice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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