No. 19-687

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,

Petitioners,

v.

EDWARDS AQUIFER AUTHORITY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), this Court held that the Equal Protection Clause's guarantee of one-person, one-vote does not apply to elections for members of a "special-purpose" body that does not exercise general governmental authority. Instead, rational basis review applies to bodies with differently weighted voting districts. The question presented is:

Whether the Edwards Aquifer Authority, which is narrowly focused on conserving the water in the Edwards Aquifer in south Texas, is a special-purpose district subject to the *Salyer*/*Ball* exception.

RULE 29.6 STATEMENT

Respondents are various governmental entities. No respondent is owned by a parent corporation or is publicly traded.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

LULAC v. Edwards Aquifer Auth., No. 12-CA-620 (June 18, 2019) (order on summary judgment)

United States Court of Appeals (5th Cir.):

LULAC v. Edwards Aquifer Auth., No. 18-50655 (Aug. 28, 2019)

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STATEMENT OF THE CASE

1. This case involves the application of the Equal Protection Clause's one-person, one-vote guarantee to a local special-purpose district. As a general rule, legislative districts must "be apportioned on a population basis," such that each district comprises substantially the same number of residents. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *see Wesberry v. Sanders*, 376 U.S. 1, 8-9 (1964). This Court has applied that requirement to certain local governmental "units with general governmental powers over an entire geographic area." *Avery v. Midland County*, 390 U.S. 474, 485-486 (1968) (Midland County Commissioners Court); *see Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 53-54 (1970) (junior college trustees). In so doing, however, the Court has noted that the one-person, one-vote requirement may not apply to "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents." *Avery*, 390 U.S. at 483-484; *see Hadley*, 397 U.S. at 56.

The Court confronted such a special-purpose district in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), and again in *Ball v. James*, 451 U.S. 355 (1981).

In *Salyer*, the Court considered the Tulare Lake Basin Water Storage District, the primary purpose of which was to "provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin" in California. 410 U.S. at 728. The district had authority to "fix tolls and charges for the use of water and collect them from all persons receiving the benefit of the water and other services in proportion to the services rendered." *Id.* at 724. And "[t]he costs of the

projects [we]re assessed against district land in accordance with the benefits accruing to each tract held in separate ownership." *Ibid.* Otherwise, the district "ha[d] relatively limited authority" and "provide[d] no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." *Id.* at 728-729. The water district was governed by an elected board of directors. *Id.* at 724. Only landowners in the district were permitted to vote for the directors, and votes were "apportioned according to the assessed valuation of the land." *Id.* at 725.

The Court rejected an equal protection challenge by residents of the district who did not own land and therefore could not vote. The Court held that the "water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group" was not bound by the one-person, one-vote rule established in *Reynolds*. *Salyer*, 410 U.S. at 728. Explaining that "there is no way that the economic burdens of district operations can fall on residents qua residents" and that "the operations of the district[] primarily affect the land within [its] boundaries," *id.* at 729, the Court upheld the voting system under rational basis review, *id.* at 731-734.

Eight years later, the Court reached a similar conclusion in *Ball*, holding that the one-person, one-vote requirement did not apply to the Salt River Project Agricultural Improvement and Power District, which limited the franchise to landowners and apportioned votes according to the amount of land a voter owned. 451 U.S. at 357. The district at issue supplied electric power to hundreds of thousands of people in Arizona, but its primary purposes were storage, delivery, and

conservation of water. *Ibid.* The district had authority "to raise money through an acreage-proportionate taxing power," to issue bonds, and to condemn land. *Id.* at 359-360. Residents of the district who owned little or no land challenged the franchise restriction, arguing in part that the district's actions had "a substantial effect on all people who live" in the district because the district sold "electricity to virtually half the population of Arizona" and "exercise[d] significant influence on flood control and environmental management within its boundaries." *Id.* at 360.

This Court rejected the challenge, holding that the one-person, one-vote requirement did not apply to the district. 451 U.S. at 363-372. The Court acknowledged that the district at issue in *Ball* had greater authority and influence than the district at issue in *Salyer*. *Id.* at 365-366. But the Court held that those differences did "not amount to a constitutional difference" because the Salt River District did "not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*." *Id.* at 366. The Court explained that the district could not "impose ad valorem property taxes or sales taxes," could not "enact any laws governing the conduct of citizens," and did not "administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services." *Ibid.* The Court acknowledged that "as much as 40% of the water delivered by the District goes for nonagricultural purposes," but explained that "the distinction between agricultural and urban land is of no special constitutional significance in this context." *Id.* at 367. The Court explained that water districts such as the Salt River District "remain essentially business enter-

prises, created by and chiefly benefitting a specific group of landowners." *Id.* at 368. Emphasizing that "the voting scheme for a public entity like a water district may constitutionally reflect the narrow primary purpose for which the district is created," *id.* at 369, the Court held that "[t]he functions of the Salt River District are therefore of the narrow, special sort which justifies a departure from the popular-election requirement of the *Reynolds* case," *id.* at 370. The Court thus upheld the statutory voting scheme under rational basis review. *Id.* at 371.

2. a. This case involves another challenge to a water district. The Edwards Aquifer Authority (EAA) is a special-purpose conservation and reclamation district that was "established to regulate the groundwater of the Edwards Aquifer for the benefit of dependent users and species." Pet. App. 2a. "The Edwards Aquifer 'is a unique underground system of water-bearing'" geologic formations located in south-central Texas. *Ibid.* (quoting *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996)). Water enters the Aquifer through the ground as surface water and rainfall; it leaves through well withdrawals and spring discharges. *Ibid.* The Aquifer is "the primary source of water for south central Texas." *Ibid.* (quoting *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 394 (Tex. 2009)).

Flow from Aquifer springs are vital for the survival of certain threatened or endangered species. Pet. App. 49a. In the 1980s, over-drafting of the Aquifer put those species at risk. *Id.* at 3a, 49a-50a. In 1993, in response to a federal court order requiring that measures be taken to protect those species, the Texas Legislature enacted the Edwards Aquifer Authority

Act (Act), which created the EAA. *Ibid.*; *see id.* at 72a-215a; Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350. The Act grants limited powers to the EAA, authorizing it to protect the quantity and quality of water in the Edwards Aquifer within its boundaries for the benefit of dependent users and species. Pet. App. 4a, 50a, 79a, 87a-107a. The statute expressly grants to the EAA "all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." *Id.* at 3a-4a (quoting Act § 1.08(a)). The EAA has authority to adopt, implement, and enforce rules to exercise its limited authority. *Id.* at 53a. It can also, *inter alia*, hire employees; enter contracts; finance, construct, and operate dams and reservoirs; exercise the power of eminent domain; and issue grants or loans for water conservation and reuse. *Id.* at 4a. The EAA has no authority to impose ad valorem property taxes or sales taxes; nor does it provide general public services like schools; housing; public sanitation, health, or welfare services; construction or maintenance of roads; public utilities; or transportation. *Id.* at 6a, 54a.

The EAA's central function is to regulate the withdrawal of water from the Aquifer. To that end, the Act prohibits the withdrawal of water without a permit issued by the EAA. Pet. App. 4a; *see id.* at 144a, 154a-155a, 189a. Fewer than 2,000 individuals and entities have withdrawal permits. *Id.* at 4a. Whether a person is entitled to a permit is governed by the Act, which provides that preference is given to users who can establish that they withdrew and beneficially used water from the Aquifer on or before June 1, 1993. *Ibid.* The

Act establishes an annual cap on the aggregate amount of withdrawals allowed by permit and allows the EAA to issue additional permits if existing users' needs are met before the aggregate withdrawals exceed the cap. *Ibid.* Permit holders are required to meter their water use, avoid waste, and implement conservation measures approved by the EAA. *Id.* at 5a. Permit holders must adhere to the terms and conditions of their permits and may not use water from the Aquifer outside the boundaries of the EAA. *Ibid.*

"[I]ncidental to its primary task of administering the permit process" "to preserve the quantity of aquifer water," the EAA also assists the Texas Commission on Environmental Quality (TCEQ) in protecting the Aquifer from pollutants. Pet. App. 18a-19a. To that end, the EAA regulates the construction, operation, and maintenance of wells that draw from or are drilled through the Aquifer. *Id.* at 5a. Within certain regions—known as the "recharge zone" and the "contributing zone"—that are particularly susceptible to introducing pollutants to the Aquifer, the EAA requires reporting of noxious spills and regulates facilities housing toxic substances for commercial use. *Ibid.* At all times, however, the TCEQ has primary jurisdiction over the prevention of pollution to all groundwater in the State. Tex. Water Code Ann. §§ 5.013(a), 26.011; Pet. App. 18a-20a; *see also* 30 Tex. Admin. Code ch. 213 (2018) (TCEQ rules on the Edwards Aquifer).

b. In 1995, with approval from the Department of Justice pursuant to Section 5 of the Voting Rights Act of 1965, the Texas Legislature adopted the election scheme at issue here. Pet. App. 7a. The EAA's jurisdiction spans all or part of eight counties, representing three distinct regions: (1) the western agricultural

counties of Atascosa, Medina, and Uvalde, with an aggregate population of 117,000; (2) the eastern spring-flow counties of Caldwell, Comal, Guadalupe, and Hays, with an aggregate population of 435,000; and (3) the urban county of Bexar, with a population exceeding 1.7 million, *id.* at 6a, and which includes the City of San Antonio. Voters from those districts elect fifteen members of the EAA's board of directors; two additional nonvoting members are appointed. *Id.* at 7a. The fifteen voting directors are elected from single-member districts throughout the EAA's jurisdiction. *Id.* at 57a. Four of the single-member districts are located in the western (agricultural) counties (one in Medina, two in Uvalde, and one in Medina and Atascosa combined); another four are located in the eastern (spring-flow) counties (one in Comal, one in Comal and Guadalupe combined, one in Hays, and one in Hays and Caldwell combined); the remaining seven are in Bexar County. *Id.* at 7a, 57a. All citizen residents of legal voting age are permitted to vote in the elections. *Id.* at 59a.

3. In 2012, petitioners filed this action against respondent EAA and various parties intervened, as plaintiff and as defendants. Pet. App. 33a-34a. Petitioners allege that the EAA's electoral districts violate the Equal Protection Clause's guarantee of one-person, one-vote because voters in the less populous eastern and western counties elect more directors per capita than the voters in Bexar County. *Id.* at 7a, 34a.[1]

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[1] Petitioners also alleged that the electoral scheme violates Section 2 of the Voting Rights Act of 1965, because it dilutes the voting strength of minority voters. Pet. App. 34a. Petitioners agreed to stay—and later dismissed—that claim, and it is not at issue here. *Ibid.*

a. The district court granted summary judgment to the EAA. Pet. App. 31a-64a. After reviewing the powers invested by state law in the EAA, the court concluded that "the EAA's power and authority is limited to carrying out its narrowly defined statutory purpose to manage, protect, preserve, and conserve the water in the aquifer." *Id.* at 52a. The court explained that, "[l]ike the special purpose districts in *Salyer* and *Ball*, the EAA has the power to adopt and implement rules to exercise its authority, and the power to enforce those rules." *Id.* at 53a (internal citations omitted). And the court noted that each action the EAA is authorized to take is tied to and limited by "its legislative mandate to conserve water from the aquifer." *Id.* at 55a; *see id.* at 55a-57a. Because "[t]he Texas Legislature established the EAA to fulfill the Act's limited purpose and scope, not a broader governmental purpose," the court held, "[t]he EAA is clearly a special purpose district that falls within the *Salyer*/*Ball* exception to the one person, one vote requirement." *Id.* at 57a.

The district court therefore reviewed the EAA's electoral scheme under a rational basis standard. The court determined that the EAA's apportionment scheme "is carefully balanced to reflect the different water interests in the subregions that are disproportionately impacted by the EAA." Pet. App. 59a. The court explained, for example, that "[t]wo-thirds of the recharge occurs in the Western counties," that "the average person in the agricultural counties uses approximately nine to eleven times as much water as the average person in Bexar County," and that "[n]early all of the pumping for agriculture takes place in Uvalde and Medina counties." *Id.* at 60a. The court noted that

the Texas Legislature took a "balanced approach, which took urban, agricultural, and spring flow interests into account in terms of voting power on the board." *Id.* at 61a. Explaining that "apportionment by population rather than apportionment by subregional water interests" "would defeat the purpose of the EAA and destroy the careful balance of interests upon which it was formed," the court held that "[t]he EAA single member district apportionment plan is carefully balanced to reflect the different water interests in the subregions that are disproportionately impacted by the EAA and thus meets the more relaxed rational basis review under *Salyer*/*Ball*." *Id.* at 63a.

b. The Fifth Circuit affirmed. Pet. App. 1a-30a.

Relying on this Court's cases, the court of appeals first rejected petitioners' argument that the exception to one-person, one-vote set out in *Salyer* and *Ball* is limited to districts that restrict the franchise to, *e.g.*, landowners. Pet. App. 12a-15a. Rather, the court held that whether the *Salyer*/*Ball* exception applies depends on whether the governmental entity at issue is a special-purpose unit or is instead "an entity of general governmental power." *Id.* at 14a. The court explained that other courts of appeals have similarly held that the *Salyer*/*Ball* exception applies to special-purpose entities with an open franchise. *Id.* at 14a-15a (citing *Pittman v. Chi. Bd. of Educ.*, 64 F.3d 1098, 1101-1103 (7th Cir. 1995); *Educ./Instruccion, Inc. v. Moore*, 503 F.2d 1187, 1188 (2d Cir. 1974) (per curiam)).

Turning next to the question of "whether the EAA serves a 'special limited purpose,'" Pet. App. 15a-16a (quoting *Salyer*, 410 U.S. at 728), the court of appeals examined the scope of and limitations on the EAA's

authority, *id.* at 16a-19a. The court explained that the EAA's "powers are expressly tailored to protecting the quantity and quality of groundwater in the Edwards Aquifer and do not extend to any surface water or other aquifers located within its jurisdiction"; that the EAA "cannot levy *ad valorem* property or sales taxes or oversee such public functions as schools, housing, zoning, transportation, roads, or health and welfare services"; and that even "the EAA's discretion to grant a permit is quite limited." *Id.* at 16a.

The court of appeals went on to determine that "[t]he EAA's functions have a lopsided effect" on the eastern and western counties that have greater voting power. Pet. App. 22a. The court explained that "per capita usage is significantly higher in those counties than in urban Bexar County," meaning "that residents of the agricultural and spring-flow counties are more dependent upon the aquifer and thus are disproportionately affected by the EAA's regulation thereof." *Id.* at 22a-23a. The court also noted that landowners in Texas enjoy a property interest in the groundwater under their land and that "property owners in the agricultural and spring-flow counties collectively possess seventy-six percent of the land overlying the Edwards Aquifer"; that "the EAA's regulation of water quality has little bearing on residents of Bexar County"; and that "[a] disproportionate number" of the endangered species at the heart of the EAA's creation "reside in the eastern counties." *Id.* at 23a-24a.

Because the EAA's "authority is circumscribed to attain its narrowly defined purpose to conserve aquifer water," and because its "activities disproportionately impact the western agricultural and eastern spring-flow counties, whose residents are most empowered by

its elections," Pet. App. 22a, the court of appeals held that the EAA "qualifies as a special-purpose district," *id.* at 26a. The court therefore applied rational basis review to the electoral scheme, concluding that the "scheme is rationally related to the legitimate goal of protecting the aquifer because it equitably balances the rival interests of the agricultural, spring-flow, and urban counties to ensure that no one region can dominate the aquifer's management." *Id.* at 27a. Noting that "the apportionment scheme was likely necessary to ensure the creation of the EAA," the court relied on this Court's decisions holding "that a special-purpose district passes constitutional muster where its electoral scheme was reasonably necessary to the formation of the district." *Id.* at 28a (citing *Ball*, 451 U.S. at 371; *Salyer*, 410 at 731).

Judge Higginbotham filed a concurring opinion emphasizing the importance of the EAA in "protecting an extraordinary asset of the state—one that can be depleted and lost to contamination and misallocation." Pet. App. 29a. He "emphasi[zed] that this governance [of the EAA] comes with no disenfranchisement of voters—only a dilution of voter strength essential to the very structure of the special purpose entity, a dilution essential to its core purpose." *Ibid.*

Petitioners did not seek rehearing.

THE PETITION SHOULD BE DENIED

Petitioners purport (Pet. i-ii) to present three distinct questions. But each question is a different version of the same question: whether the court of appeals erred in determining that the EAA is a special-purpose district that is exempt from the one-person, one-vote requirement under this Court's decisions in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981). Review of that fact-bound question is not warranted because the Fifth Circuit correctly held that it is, and its decision does not conflict with any decision of this Court or of any other court of appeals.

I. The Decision Below Does Not Conflict With Any Decision Of Any Other Court Of Appeals.

After initially asserting (Pet. 13-14) that the decision below "conflict[s] with" decisions of "other circuits[]" such that different courts have "reach[ed] opposite conclusions based on substantially similar facts," petitioners never follow up with an example of an actual conflict. Instead, they contend that this Court's intervention is necessary to alleviate "tensions between circuit rulings," Pet. 14 (capitalization altered), and to "resolve dissonant decisions" among circuit courts, Pet. 15. That is not surprising because there is no conflict among the circuits on when and how the *Salyer*/*Ball* exception applies. Nor is there any tension or dissonance. This Court's review is manifestly unwarranted.

A. Petitioners first contend (Pet. 21-26) that the decision below conflicts with decisions from the Second, Fourth, and Tenth Circuits. Curiously,

petitioners argue that the conflict arises from the fact that none of the districts at issue in those courts' decisions involved the type of open-franchise election at issue here. Indeed, petitioners *concede* that "no other case" has analyzed whether the *Salyer*/*Ball* exception applies "to a local jurisdiction whose district representatives are chosen under such a straightforward and conventional open-franchise popular election framework." Pet. 32. It is thus difficult to understand how there could be any conflict. And, in fact, there is no conflict in the circuits about when and how to apply the *Salyer*/*Ball* exception.

1. The Second Circuit has twice had occasion to determine whether the *Salyer*/*Ball* exception applies. In *Education*/*Instruccion, Inc. v. Moore*, that court held that the exception did apply to Connecticut's "regional councils of government." 503 F.2d 1187, 1187-1189 (2d Cir. 1974). The court explained that, although the one-person, one-vote requirement ordinarily applies to elected governmental bodies, the requirement does not apply to bodies like the councils that "do not exercise general governmental powers" nor "perform governmental functions." *Id.* at 1189. The councils at issue in that case did "not have even the minimal governmental powers insufficient to invoke the one man, one vote principle" in *Salyer* because "[t]he powers and functions of the councils [we]re essentially to acquire information, to advise, to comment and to propose." *Ibid.* Petitioners do not contend *either* that the Second Circuit applied a different legal standard than the Fifth Circuit *or* that the Second Circuit's holding that the councils were special-purpose districts conflicts with the Fifth Circuit's holding that the

EAA is also a special-purpose district. Thus, there is no conflict.

The Second Circuit's decision in *Baker v. Regional High School District No. 5*, 520 F.2d 799 (2d Cir. 1975), also does not conflict with the Fifth Circuit's decision in this case. The court in that case considered the electoral scheme of regional school boards in Connecticut, under which different districts had different voting strength. *Id.* at 799-800. Recognizing that "[t]he critical question" was "whether the[] school boards [we]re elective bodies performing regulatory functions of a kind that can be characterized as governmental," *id.* at 801, the court examined the nature of the duties and powers of the boards, *id.* at 801-802. The court concluded that "the regulatory and supervisory powers possessed by the regional boards here at issue"—which included powers amounting to "general manage[ment of] all of the schools within the[] districts"—were "sufficiently broad to be classified as governmental activity." *Id.* at 802. The Second Circuit thus held that the *Salyer*/*Ball* exception did not apply. But petitioners do not contend that the court applied a different *legal standard* than the standard applied below. The fact that application of a common standard to disparate facts yields disparate results does not mean there is a conflict.

2. The Fourth Circuit similarly found that the *Salyer*/*Ball* exception did not apply to the body at issue in *Vander Linden v. Hodges*, 193 F.3d 268, 277-278 (4th Cir. 1999). And it too applied legal principles identical to those the Fifth Circuit applied, examining whether South Carolina's "county legislative delegations" "exercise governmental functions." *Id.* at 275; *see id.* at 275-278 & n.5. Explaining that the State had

stipulated that the delegations "perform numerous and various general county governmental functions," the Fourth Circuit enumerated many of those functions, including, *inter alia*, "the power to directly appoint numerous governmental officials, including state board of education members, transportation committee members, and trustees of public hospitals"; to "approv[e] local school district budgets"; to "alter[] or divid[e] county school districts"; "to direct the levy of taxes for the benefit of county hospitals"; "to approve the issuance of general obligation bonds"; and "to create county and regional housing authorities." *Id.* at 276-277 & n.5. The court thus concluded that, "[g]iven the array of state statutes empowering the delegations to perform fiscal, regulatory, and appointive functions and the parties' stipulation that the delegations do 'perform' such functions," "the legislative delegations exercise 'governmental functions' and so fall within the scope of the one person, one vote mandate." *Id.* at 277-278. That decision does not conflict with the decision below because the scope of the EAA's duties is miniscule in comparison.

Petitioners contend (Pet. 25) that the Fourth Circuit rejected an analysis that requires assessing the *extent* of governmental functions a body performs in favor of asking only whether a body performs any governmental functions at all. That claim has no basis in the Fourth Circuit's decision. To the contrary, the court held that it "must consider the powers" actually "*exercised* by the delegations," noting that those powers were "numerous." 193 F.3d at 276. Nothing in the opinion suggests that the number or extent of governmental functions exercised by the delegations was

irrelevant to determining whether the *Salyer*/*Ball* exception applied.

3. Petitioners similarly err in arguing (Pet. 23-25) that the Tenth Circuit's decision in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994), conflicts with the decision below. At issue in *Hellebust* was the Kansas State Board of Agriculture, which had twelve members elected by Kansas agricultural organizations. *Id.* at 1332. The court held that election of the board members was subject to one-person, one-vote "because the Board, a state governmental agency, exercises broad authority affecting arguably all Kansans and is not limited solely to agriculture or agribusiness interests." *Ibid.* The board enforced "approximately eighty laws," had the power to inspect all gas stations, was entrusted with "[a]ll meat and dairy inspection," "regulate[d] the use of pesticides," and controlled not only agricultural uses of water but also water rights of cities, utilities, and individuals. *Id* at 1332-1333. Because the Board had "broad regulatory powers [that] affect[ed] all residents of Kansas daily," the Tenth Circuit held that its electoral scheme must comply with the mandate of one-person, one-vote. *Id.* at 1333 (citation omitted); *see id.* at 1333-1335.

Petitioners cherry-pick a small subsection of the Kansas state board's authority and compare it to the entirety of the EAA's authority, arguing that the two entities should be treated the same. *See* Pet. 24. But that is not the way the *Salyer*/*Ball* analysis works—and no court of appeals in the country has held otherwise. A court must look at a body's functions as a whole to determine whether it is a special-purpose district. That is what the Tenth Circuit did in *Hellebust*,

and that is what the Fifth Circuit did in this case. The two decisions do not conflict.

B. Petitioners further err in arguing (Pet. 27-29) that the Fifth Circuit's *application* of rational basis review conflicts with this Court's summary affirmance of a district court decision.

At issue in *Larios v. Cox* was the reapportionment of Georgia's state legislature and congressional districts. 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (per curiam), *aff'd*, 542 U.S. 947 (2004). The district court held (in a decision summarily affirmed by this Court on direct appeal) that Georgia had violated the principle of one-person, one-vote by intentionally malapportioning its districts to favor incumbents of one party in regions of Georgia with decreasing population. *Id.* at 1342, 1345-1347. That holding does not conflict with the decision below because there was not even a whisper in that case that the voters with disproportionately greater voting strength in the state legislature were disproportionately affected by the actions of the state legislature. The Georgia Legislature is a statewide body with powers that affect the entire population in equal measure. That is not true of the EAA, as the lower courts found.[2]

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[2] Petitioners also suggest (Pet. 27) that the decision below conflicts with the Fourth Circuit's decision in *Raleigh Wake Citizens Ass'n v. Wake County Board of Elections*, 827 F.3d 333 (4th Cir. 2016), which petitioners contend held that North Carolina's reapportionment of school boards and boards of county commissioners violated one-person, one-vote because they were apportioned in order to reflect regional favoritism. The Fourth Circuit expressly declined to decide that question, *id.* at 351, and there is no suggestion in that case that the elected bodies had a disproportionate effect on a subset of voters.

C. Notably, petitioners do not argue (Pet. 21-22) that the decision below conflicts with the Seventh Circuit's decision in *Pittman v. Chicago Board of Education*, which held that Chicago's local school councils were special-purpose districts subject to the *Salyer/Ball* exception. 64 F.3d 1098, 1101-1103 (7th Cir. 1995). The court explained that the councils had no "power to tax" either directly or indirectly "through the sale of bonds or [by] increas[ing] the total spending on the schools"; that *different* elected bodies served as the governing bodies of Chicago public schools; and that the councils did not control public education in the schools. *Id.* at 1103. Significantly, all residents were allowed to vote in elections for members of the councils. *Id.* at 1100. But the open-franchise nature of that election did not stop the Seventh Circuit from applying the *Salyer/Ball* exception any more than it stopped the Fifth Circuit from doing so in this case. Petitioners argue (Pet. 21) that *Pittman* "is distinguishable" because the nature of the weighted electoral scheme in that case was different from the scheme in this case. But that is an irrelevant distinction when determining *whether* the *Salyer/Ball* exception applies. As the Seventh Circuit noted, whether the nature of the electoral scheme passes constitutional muster is a distinct question from whether rational basis review or the strict one-person, one-vote standard applies. *See* 64 F.3d at 1103.

Because all courts of appeals agree on the legal standard for determining whether the *Salyer/Ball* exception applies—and because all courts of appeals have applied that standard in the same way to the different types of governmental bodies at issue in

different cases—no conflict exists. Further review is therefore unwarranted.

II. The Decision Below Does Not Warrant Review.

Review of the Fifth Circuit's fact-bound decision is unwarranted not only because it does not conflict with any decision of another court of appeals, but also because the question petitioners would have this Court address does not arise with any frequency and was correctly decided below.

A. Petitioners concede (Pet. 32) that *no* other court has addressed the application of the *Salyer*/*Ball* exception to a governmental district that is exactly like the EAA.[3] And the absence of any amicus briefs in support of the petition underscores the infrequency with which this particular set of facts arises. What petitioners seek is this Court's review of a fact-bound issue that has never before arisen and may never arise again. This Court ordinarily does not intervene to review the lower courts' application of settled legal principles to the facts of a particular case. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). There is no reason to deviate from that settled practice in this case.

B. In any event, the decision below was correctly decided.

1. The Fifth Circuit's decision is based on a straightforward application of the principles set out in

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[3] As explained at pp. 17-18, *supra*, the Seventh Circuit applied the exception to a special-purpose district with an open franchise in *Pittman*.

Salyer and in *Ball*. Indeed, all three cases involved special-purpose districts created to address vital water-related needs. *Salyer*, 410 U.S. at 728-729; *Ball*, 451 U.S. at 357-359; Pet. App. 2a-7a. This Court has explained the importance of allowing States in the "western third of the Nation" to create water-management units of government to address "[t]he peculiar problems of adequate water supplies" in that region. *Salyer*, 410 U.S. at 721. Without such special-purpose districts, the Court explained, water-related "projects [that] would benefit a more restricted geographic area" would be impossible to implement. *Id.* at 722. The EAA, like the districts at issue in *Salyer* and *Ball*, is exactly the type of body that is necessary "to provide a local response to water problems." *Ibid.*

The EAA has the same purpose, engages in substantially same activities, and is subject to the same limitations as the districts at issue in *Salyer* and *Ball*. Like those districts, the EAA does not provide "general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." *Salyer*, 410 U.S. at 728-729; *see Ball*, 451 U.S. at 366 (noting that the district did not "administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services"); Pet. App. 54a (explaining that the EAA does not "provide general public services such as the operation of schools, housing, transportation, public utilities, road building and maintenance, public sanitation, health, welfare services or anything else of the type ordinarily financed by a municipal body). Like the districts in *Salyer* and *Ball*, the EAA's authority is narrowly focused on preserving and managing the water

supply of a specific geographic area. And, like the district at issue in *Ball*, the EAA cannot "impose ad valorem property taxes or sales taxes." 451 U.S. at 366; Pet. App. 6a, 54a. In some ways, the EAA's powers are materially more limited than those of the Salt River District at issue in *Ball*, which was "one of the largest suppliers" of electric power in Arizona. 451 U.S. at 365. Finally, as in *Salyer* and *Ball*, the EAA's activities disproportionately affect the voters with greater voting strength. *Salyer*, 410 U.S. at 728; *Ball*, 451 U.S. at 370; Pet. App. 22a-24a, 59a-60a. The Fifth Circuit thus correctly decided that the EAA is precisely the type of special-purpose district that falls within the *Salyer*/*Ball* exception.

2. Petitioners contend (Pet. 14-20) that the Fifth Circuit's decision conflicts with decisions of this Court that purportedly suggest that the *Salyer*/*Ball* exception cannot apply to a body "that grants the right to vote to all eligible voters," regardless of the nature of the body and its statutory functions. That is wrong. The decisions in *Salyer* and *Ball* make clear that it is the nature of the *elected body*, not the nature of the body's electoral scheme that determines whether it falls within the *Salyer*/*Ball* exception. *Salyer*, 410 U.S. at 728; *Ball*, 451 U.S. at 371; *see Associated Enters., Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 744 (1973) (per curiam). If an examination of the structure, function, and authority of the body reveals that it is a special-purpose district rather than a general governing body, it is subject to the *Salyer*/*Ball* exception; otherwise, it must comply with one-person, one-vote. Only *after* determining whether a body falls within the *Salyer*/*Ball* exception does the nature of its electoral scheme become relevant. At that point, the

scheme is reviewed under rational basis if the jurisdiction is a special-purpose district or under the one-person, one-vote standard if it is a general governing body.

The decisions petitioners rely on (Pet. 15-20) did not involve special-purpose districts. Rather, they involved general governing bodies such as Georgia's state legislature, a county commission, a junior college district's board of trustees, and the New York City Board of Estimate. *Gray v. Sanders*, 372 U.S. 368, 370-371 (1963); *Avery v. Midland County*, 390 U.S. 474, 475-476 (1968); *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 51-52 (1970); *Bd. of Estimate of N.Y.C. v. Morris*, 489 U.S. 688, 690 (1989). In each case, the Court determined that the one-person, one-vote requirement applied based on the nature of the body at issue, not because the body did or did not have an open franchise.

Petitioners' emphasis (Pet. 18-19) on *Morris* is misplaced. Petitioners suggest that the Court applied the one-person, one-vote requirement in that case because "all eight officials on the board ultimately are selected by popular vote." Pet. 19 (quoting *Morris*, 489 U.S. at 691 (characterizing court of appeals decision)). Not so. The Court in *Morris* held that one-person, one-vote applied to the Board of Estimate because the Board exercised "a significant range of functions common to municipal governments" and "share[d] legislative functions with the city council with respect to modifying and approving the city's capital and expense budgets." 489 U.S. at 694-696 & n.4. In other words, the Court held that the Board was not a special-purpose district.

At bottom, petitioners merely argue that this Court has not yet applied the *Salyer*/*Ball* exception to

a special-purpose district that has an open franchise. But that does not mean that it would not do so. As discussed, courts of appeals have now done so without trouble. It would make little sense, moreover, to adopt petitioners' preferred rule. Petitioners do not contest that if the EAA is properly viewed as a special-purpose district, it could restrict the franchise to permit holders or landowners. But they fail to explain why the Equal Protection Clause would frown on a special-purpose district that is *more* inclusive than constitutionally required by opening the franchise to everyone. The court of appeals correctly held that the EAA's electoral scheme—which gives greater weight to the votes of people who are more directly affected by the EAA's actions—easily survives rational basis review.

3. Finally, there is no merit to petitioners' argument (Pet. 26, 29-31) that the Fifth Circuit's decision conflicts with Texas state law's view of what qualifies as a "governmental activity."

First, nothing in *Salyer*, *Ball*, or any decision from any court of appeals applying those cases suggests that the proper scope of general governmental activity (as contrasted with the limited scope of special-purpose-district activity) is a question of *state* law that should vary among jurisdictions. In this context, whether an activity is a traditional governmental activity is relevant only to determining what standard of review applies under the Equal Protection Clause of the United States Constitution. That question is therefore one of *federal* law. The Equal Protection Clause does not apply in different ways in different States—and a State is not permitted to alter application of the Clause to its governmental bodies by defining terms like "governmental activity."

Second, even the two cases petitioners rely on do not support their view. Those cases merely describe activities performed by governmental entities as "governmental functions," *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 776 (Tex. 2006), or rely on a state statute that does the same for purposes of defining the scope of government tort liability, *Tex. Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 388 & n.4 (Tex. App. 2008). There is no question that the EAA's activities can be described in lay terms as governmental functions. But that was equally true of the districts at issue in *Salyer* and *Ball*. The constitutional rule announced in those cases requires a court to look beyond that superficial concept of governmental activities. The question is not whether a district performs "governmental functions" full stop; the question is whether those functions are "the sort of governmental powers that invoke the strict demands of *Reynolds*." *Ball*, 451 U.S. at 366. The Fifth Circuit correctly determined that the EAA's functions are not, and review of that fact-bound decision is unwarranted.

CONCLUSION

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

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