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

REPLY TO BRIEF IN OPPOSITION

Allison J. Riggs
Counsel of Record
Mitchell D. Brown
Jeffrey Loperfido
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 West Highway 54, Suite 101
Durham, North Carolina 27707
(919) 323-3909
allisonriggs@southerncoaltion.org

Luis Vera
LULAC National General Counsel
THE LAW OFFICES OF LUIS ROBERTO VERA, JR., & ASSOCIATES
1325 Riverview Towers
111 Soledad
San Antonio, Texas 78205

Chad W. Dunn
BRAZIL & DUNN
3303 Northland Drive, Suite 205
Austin, Texas 78731

Counsel for Petitioners

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THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

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In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court articulated a bedrock constitutional rule that the equal protection guarantees of the Fourteenth Amendment require that voters be afforded equally weighted votes in electoral districts—that is, required that a one-person, one-vote ("OPOV") standard apply. In *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973) and *Ball v. James*, 451 U.S. 355, 366 (1981), this Court set forth a narrow exception for "special-purpose districts" where the franchise was limited to a subset of the population who would bear both the disproportionate burden and benefits of the special purpose jurisdiction's exercise of authority.

The Edwards Aquifer Authority ("EAA") regulates water, but the similarity to the districts considered in *Salyer* and *Ball* ends there. Those decisions created a OPOV exception premised on the limitations of highly specialized local government bodies elected by extremely limited electoral franchises. Forty years of jurisprudence have not loosened the narrowness of the rule established in those cases, but the passage of time has eroded the early clarity of the Court's OPOV jurisprudence, and nowhere is this more evident than in the doctrine's application to non-traditional elected local government bodies. This case presents the Court a timely and ideal opportunity to synthesize the OPOV requirements for the growing universe of elected local bodies established to handle modern demands of government in such critical policy areas as the environment, education, and health.

Contrary to Respondents' claims, Br. in Opp. at 12, Petitioners do not seek review of a lower court's "fact-bound" inquiry—the questions presented confirm this. There is no need for the Court to weigh facts to decide whether the Fifth Circuit applied OPOV principles correctly. The authority that the Texas Legislature assigned to the EAA to protect the economy of a wide swath of Central Texas is established by statute. All Petitioners seek is to ensure in a situation where the guiding legal standard is hopelessly muddled, that "fact-specific" red herrings do not leave the constitutional rule obscured and beyond comprehension. Granting certiorari would be a major step toward solving that problem, no more and no less.

I. Respondents' Brief Only Confirms the Need for the Court to Clarify that Open-Franchise Electoral Schemes Like That for the EAA Are Not Governed by *Salyer-Ball* and Should Instead Be Held to the *Avery-Hadley-Morris* Standard

Respondents' Brief in Opposition only buttresses the need for this Court's review of the questions identified in the Petition for Writ of Certiorari: lower courts and jurisdictions are unclear on how the *Salyer-Ball* exception applies in a case concerning open-franchise special purpose districts. The *Salyer* Court created an exception to the requirement that all districts be elected pursuant to OPOV, but did so focusing much of its analysis on the disproportionate effect that an elected entity's actions had on a limited subset of the population who had the right to vote. *See Salyer*, 410 U.S. at 729-30. Neither

Salyer, nor *Ball*, presented a scenario for the Court to contemplate open-franchise water management districts or, even more broadly, open-franchise special-purpose districts.

This Court, though, has addressed the equal population rules for open franchise elected bodies. In *Avery v. Midland County*, 390 U.S. 474, 484-85 (1968), *Hadley v. Junior College District*, 397 U.S. 50, 54 (1970) and *Board of Estimate v. Morris*, 489 U.S. 688, 696 (1989), the Court ordered compliance with equal population requirements in open-franchise local and special governmental jurisdictions. In *Avery*, of course, the Court hypothesized that there may be times when special purpose units "assigned the performance of [specific] functions" affecting "definable groups of constituents more than other constituents" might not be subject to OPOV, but at the same time re-emphasized the centrality of the guarantees of OPOV to smaller units of government. *Avery*, 390 U.S. at 483-84.

The EAA board is elected by the general franchise, the same body of voters eligible to vote for statewide executives, state legislators, and local city councils and school boards. But unlike the voters in the latter sets of jurisdictions, the votes of EAA voters are deliberately assigned grossly different weights based on geography. This Court has *never* authorized such disparate vote-weighting, and certainly did not do so in *Salyer* or *Ball*.

Furthermore, even assuming that the *Salyer-Ball* exception could ever apply to open franchise jurisdictions—and Petitioners make no such

concession—Respondents' brief crystallizes the ambiguity and conflict embedded in application of *Salyer-Ball*'s narrow exception. Respondents state that "[o]nly after determining whether a body falls within the *Salyer-Ball* exception does the nature of its electoral scheme become relevant." Br. in Opp. at 21. In fact, this inverts the correct legal inquiry—as *Hadley* and *Morris* show. Considering whether a limited electorate is implicated by the special purpose district (that is, the nature of the electoral scheme) is a threshold inquiry that must be undertaken before ascertaining whether a challenged plan disproportionately affects some subset of residents. Indeed, this Court has unambiguously stated that special-purpose units of government must affect "definable groups of constituents" in order to trigger an exception to the OPOV requirement. *Avery*, 390 U.S. at 483-84. Almost by definition, one cannot establish a definable group of constituents affected where everyone (through governmental regulation, regulatory impact, and participation in the franchise) is affected. *See*, *e.g.*, *Hayward v. Clay*, 573 F.2d 187, 190 (4th Cir. 1978)) ("The Supreme Court has distinguished elections of special interest from elections of general interest. Issues of special interest involve limited purposes which so disproportionately affect an identifiable group of voters that a state may restrict the franchise to them or give their votes special weight." (citing *Salyer*, 410 U.S. at 728)). This Court should act to clarify the ambiguity on this important point of federal constitutional law.

II. There is a Conflict Between Various Courts of Appeal Regarding the Extension of the *Salyer-Ball* Exception to Open-Franchise Electoral Schemes

The Second, Fourth, Seventh, and Tenth Circuits, and now the Fifth Circuit, have decided cases where they cite to the *Salyer-Ball* exception, but the governing standard's ambiguity is so deep as to create a conflict. In particular, there is no consensus as to whether assessment of the electoral scheme (open versus limited franchise) is a threshold question, or a question that only becomes applicable after an assessment of the governmental powers of the jurisdiction in question, as argued by Respondents. Br. in Opp. at 21. This presents a separate reason why the Court must grant certiorari and provide a clearly articulated rule as to whether the *Salyer-Ball* exception applies to open-franchise electoral schemes.

Respondents' framing of the conflicts in the lower courts of appeal misses the boat. Br. in Opp. at 12-19. The issue is not whether the cited lower court decisions support the Petitioners' arguments on the merits or not, but rather whether they express conflict or rank ambiguity among themselves. They do. The Tenth, Fourth, and Second Circuits have made clear that the first and threshold inquiry is whether the franchise is open or not, and the answer to that question circumscribes the later inquiry into the extent of the special purpose jurisdiction's governmental powers. *See Hellebust v. Brownback*, 42 F.3d 1331, 1335 (10th Cir. 1994) (holding that because the Kansas State Board of Agriculture's

mandates did not have a disproportionate effect on the delegates to the Board, but on Kansas residents writ large, they determined that OPOV had to apply to the electoral scheme for the Board); *Vander Linden v. Hodges*, 193 F.3d 268, 275, 278 (4th Cir. 1999) (rejecting that the extent of an entity's exercise of governmental power is relevant to the court's analysis of whether OPOV applies to a popularly elected body and stating that after determining that a body is popularly elected, the only question that remains is "do the delegations perform governmental functions[,]" not how vast are the governmental functions the entity performs); *Baker v. Reg'l High Sch. Dist.*, 520 F.2d 799, 803 (2d Cir. 1975) (determining that *Salyer* was not "relevant" to an open-franchise election because "[t]he regional school boards' impact is general and related to all voters of the towns. . . [in this case] [] we have school districts in which those towns which are paying the most for the districts' support have to accept a diluted vote in the running of the schools.").

In contrast, the Fifth and Seventh Circuits either conclude differently or simply blur the lines between the inquiries. *See Pittman v. Chicago Board of Education*, 64 F.3d 1098, 1102 (7th Cir. 1995) (citing the *Salyer-Ball* exception for the proposition that courts have "refused to apply the principle of 'one man, one vote' to . . . special-purpose governmental bodies" including some governmental bodies that are elected in a manner "no less truncated or bobtailed than the elections for local school councils in the Chicago public school system." (citations omitted)). The decision below rests heavily on *Pittman*, but only

adds to the persisting, discordant confusion that Petitioners seek to have resolved via this case.

Thus, over the years, different lower courts have come to apply *Salyer* and *Ball* differently to local governments elected by universal suffrage. The lower courts have been left adrift without principled guidance from this Court on how to measure local bodies such as the EAA against the OPOV standard, and this inconsistency must be resolved.

III. The Conflict-Creating Confusion Surrounding Open-Franchise Special Purpose Districts Is Only Likely to Increase in Upcoming Years

Respondents argue that cases concerning special-purpose units do not arise with any frequency, specifically with respect to whether the *Salyer-Ball* exception applies to open-franchise electoral schemes. They argue that the facts of this case are unique. Br. in Opp. at 19. However, as noted in the Petition for Writ of Certiorari, special-purpose governmental units are increasingly common. *See* Christopher B. Goodman and Suzanne M. Leland, *Do Cities and Counties Attempt to Circumvent Changes in their Autonomy by Creating Special Districts*, 49 THE AMERICAN REVIEW OF PUBLIC ADMINISTRATION 1, 2-3 (2017), *available at https://osf.io/download/5942cd6d6c613b022ba11c44/* (last visited March 30, 2020), ("The importance of special districts to the local public sector in the United States is often understated. As of 2012, special districts compose 42.5 percent of all local

governments, making this form of government the largest single type of local government.").

Moreover, *Hadley* notes, "the greater diversity of functions performed by local governmental units creates a greater need for flexibility in their structure [which leads to the creation of special-purpose units of government]." 397 U.S. at 66; *see also Pittman*, 64 F.3d at 1103 ("There is a nationwide movement toward the decentralization and privatization of governmental functions[.]"). As state legislatures continue down the current path of assigning crucial governmental powers to non-traditional districts—sometimes inappropriately labeled special-purpose governments—in order to effectively govern citizens, questions regarding the applicability of OPOV will continue to arise.

Finally, jurisdictions across the country will engage in redistricting starting mid-year 2021 to address population inequalities demonstrated in the decennial census data. These rapidly sprouting new types of governing units, and state legislatures creating them, would benefit from clarification from this Court rather than delay in issuing such guidance. The issue is ripe, the conflict created by the ambiguity is clear, and there is no need for jurisdictions to incur further expense and burden of litigating anticipated challenges to population inequality in special purpose districts.

IV. Conclusion

This Court should grant Petitioners' Writ of Certiorari in order to clarify whether and how the

Salyer-Ball exception applies to open-franchise elections, thus resolving the conflict between the circuit courts of appeal regarding its application to open-franchise elections. This is a case where all voters are affected by the decisions of a special purpose governing body. There is no definable subgroup, and while the effect of those decisions may fall differently on voters depending on where they live, the Constitution requires those affected by a decision-making body to have an equal say in who is elected. This case is not, as Respondents argue, "fact-bound." The EAA's sweeping regulatory authority—extending well beyond water itself into policing and punishment of people and businesses—is laid out in state legislation and expanded still further through expansive regulations adopted by the elected EAA board. This Court must ensure that the fact-finding role of lower courts, while necessary, does not abrogate the constitutional guarantee of OPOV. To do so, it must grant certiorari and consider the merits of this case.

Respectfully submitted,

Allison J. Riggs
Counsel of Record
Mitchell D. Brown
Jeffrey Loperfido
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Hwy 54, Suite 101
Durham, North Carolina 27707
(919) 323-3909
allisonriggs@southerncoalition.org

Luis Vera
LULAC National General Counsel
THE LAW OFFICES OF LUIS ROBERTO VERA, JR., & ASSOCIATES
1325 Riverview Towers
111 Soledad
San Antonio, Texas 78205

Chad W. Dunn
BRAZIL & DUNN
3303 Northland Drive, Suite 205
Austin, Texas 78731