

No. 18-1214

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In The  
Supreme Court of the United States

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WILBUR L. ROSS, SECRETARY OF COMMERCE, *et al.*,  
*Petitioners,*

v.

CALIFORNIA, *et al.*,  
*Respondents.*

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

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**MOTION FOR LEAVE TO FILE AMICUS BRIEF  
AND AMICUS BRIEF OF THE FAIR LINES  
AMERICA FOUNDATION  
IN SUPPORT OF PETITIONERS**

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Dated: March 21, 2019

**MOTION FOR LEAVE TO FILE BRIEF OF  
AMICUS CURIAE FAIR LINES AMERICA  
FOUNDATION IN SUPPORT OF PETITIONER**

The Fair Lines America Foundation respectfully moves for leave of Court to file the accompanying amicus brief in support of Petitioner's request, asking the Court either to: (a) hold the California petition and address the Enumeration Clause claim in its disposition of the pending *U.S. Dep't. of Commerce v. New York* case (No. 18-966, oral argument scheduled for April 23, 2019) ; or (b) grant the government's petition in this California case and consolidate Case No. 18-966 with this case for oral argument and decision.

In support of its motion, Amicus Curiae asserts that the status of whether a question about citizenship may appear on the 2020 decennial federal census questionnaire cannot be fully resolved before the Census Bureau's deadline of June 2019 unless this Court expeditiously consolidates and considers the issue. Moreover, Amicus Curiae asserts the ruling is erroneous because it will deprive mapdrawers of the best data through which to create constitutional political districts.

Accordingly, Amicus Curiae asserts the ruling creates exigent circumstances that warrant being permitted to be heard at the petition stage and request that its motion to file the attached amicus brief be granted.

No party has consented to or objected to the filing of this Amicus Brief.

Respectfully submitted on this 21st day of  
March, 2019.

/s/ Charles H. Bell, Jr.

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**AMICUS BRIEF OF THE FAIR LINES  
AMERICA FOUNDATION IN  
SUPPORT OF PETITIONER**

**STATEMENT OF INTEREST OF THE  
AMICUS CURIAE**

*Amicus Curiae* is Fair Lines America Foundation, Inc.<sup>1</sup> Fair Lines America Foundation is a nonprofit, nonpartisan organization that educates the public on fair and legal redistricting through comprehensive data gathering, processing, and deployment; dissemination of relevant news and information; and strategic investments in academic research and litigation.

Fair Lines America Foundation's interest in this case focuses on the importance of courts using correct data when making determinations about districts. There are huge legal and compliance challenges when creating redistricting plans and Fair Lines America Foundation helps educate jurisdictions about proper approaches to such planning. Ensuring that courts are clear about proper data usage is a critical issue, especially given the reliance of the District Court on improper data in this case.

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<sup>1</sup> Fair Lines America Foundation affirms that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. No party has consented to or objected to the filing of this Amicus Brief.

## ARGUMENT

On March 6, 2019 the District Court for the Northern District of California found that the Secretary of Commerce's decision to include such a question violates the Enumeration Clause of U.S. Constitution, Art. I, §2, Cl. 3. *See California v. Ross*, 2019 WL 1052434, U.S. Dist. LEXIS 36230 at \*10 (N.D. Cal. March 6, 2018). The status of whether the 2020 decennial federal census questionnaire may include a question about citizenship cannot be fully resolved before the Census Bureau's June 2019 deadline to finalize the census questionnaire without this Court consolidating and considering the Enumeration Clause issue.

The implications of not including a citizenship question in the full count 2020 federal census questionnaire involve censorship of information that is essential to the 2020 redistricting process. The only method of currently obtaining citizenship information is the American Community Survey (ACS), which has been demonstrated to lack accuracy at the census block level, the most basic level required for redistricting purposes. Not including the citizenship question in the full count census questionnaire will affect, among other things, the availability of accurate data for redistricting of congressional and legislative districts for the entirety of the 2020's. Prohibiting the most efficient, practicable means of acquiring accurate data would most certainly frustrate the achievement of the ideal of political equality as enunciated in the "one person, one vote" standard set forth in *Wesbury v. Sanders*, 376 U.S. 1 (1964) and *Reynolds v. Sims*, 377 U.S. 533

(1964). This Court’s recent decisions—focusing on the modification of representative districts—make clear that including the citizenship question in the full count is vital. There are two main areas in which citizenship data can play a role: (1) enforcement of Section 2 of the Voting Rights Act, *see Bartlett v. Strickland*, 556 U.S. 1, 19 (2009); and (2) the assessment of electoral equality, *see Evenwel v. Abbott*, 136 S. Ct. 1120 (2018); *Burns v. Richardson*, 384 U.S. 73 (1966); and *Benisek v. Lamone*, No. 17-333 (oral argument scheduled for March 2019).

### I. The “One Person, One Vote” Political Equality Standard

The term “one person, one vote” – which has become an iconic statement of the ideal of political equality, officially entered the legal lexicon in *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing— one person, one vote.”). Not more than one year later, *Wesberry v. Sanders*, 376 U.S. 1 (1964), considered the apportionment process of congressional districts:

If the Federal Constitution intends that when qualified voters elect members of Congress *each vote be given as much weight as any other vote*, then this statute cannot stand. We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen “by the



People of the several States” means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.

*Id.* at 7 (emphasis added). The *Wesberry* Court continued by addressing electoral equality using the *weight* of a vote:

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected “by the People,” a principle tenaciously fought for and established at the Constitutional Convention.

*Id.* at 8. As such, mere *access* to the data necessary for the states to “apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government” ought to be as uncontroversial as it is necessary. *Evenwel*, 136 S. Ct. at 1133 (Alito, J. concurring).

## **II. The Importance of Assuring “Equal Voting Weight” to Achieve “One Person, One Vote” In the Most Efficient Way**

A few months after the decision in *Wesberry*, the Court viewed the issue from a different angle by applying electoral equality to legislative districts.

*Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court extended its reasoning in *Wesberry* to the Fourteenth Amendment:

And the right of suffrage can be denied by a debasement or dilution of *the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise.

*Id.* at 555. The Court went on to explain:

Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, *so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.*

*Id.* at 579 (emphasis added).

To achieve this ideal of electoral equality, *Wesbury* and *Reynolds* make clear that the “weight” of each citizen’s vote is the touchstone. Whenever representative districts are created, methods should be used to ensure that the “weight” of each person’s vote is equalized to the greatest extent practicable; *i.e.*, districts should be created using a basis that represents this electoral equality in the most effective and efficient way. To date, the only basis for achieving this has traditionally been to use census information.

### III. Voter Data from California’s 2010 Redistricting Demonstrates How Unavailability of Accurate Citizenship Information Frustrates the “One Person, One Vote” Political Equality Standard

The data provided below, *infra* at 8-9, demonstrates that citizenship information that can be obtained from the inclusion of the citizenship question on the census questionnaire is essential to ensuring the achievement of political equality. Amicus Curiae submits to the Court data with respect to congressional districts drawn by a citizens’ independent redistricting commission (the “commission”) in California after the 2010 federal census. The commission utilized information from the applicable ACS surveys, which is only accurate to the census *tract* level. Because of this fact, the commission had to make estimates at the critical census *block* level—a smaller unit of geography—used for redistricting purposes.<sup>2</sup> The data show that that the “one person, one vote” principle is not advanced in the most effective way by use of the ACS. One person, one vote depends substantially on the use of the most accurate census information possible. Using a citizenship question on the 2020 census, and the corresponding weight of an individual’s vote (*i.e.* “Vote Weight”) is distorted by unavailability of complete and precise census data.

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<sup>2</sup> The ACS has additional sampling flaws since is not distributed to every household like the decennial census.

“Vote weight” is simply the votes for the single member district with the largest number of votes (“maximum district”) divided by the votes for the district with the smallest number of votes (“minimum district”). For example, if the total votes cast in the maximum district is 200,000 and the total votes cast in the minimum district is 100,000, the Vote Weight value, for the state, is 2.00. This means that a voter in the district with the smallest number of votes has twice (2.00) the weight of a voter in the district with the largest number of votes because each district elects one member. A district that would be *over*-populated in the sense of having more total votes than the average would be *under*-weighted in vote weight and vice-versa.

In order to assess the degree to which Vote Weight is distorted, even with districts that start with an equal number of persons, one can review other population factors that are available for each district. As not all census persons are eligible voters, other factors that relate closer to voting are used. These include: (a) the voting age population, available from the full count census; (b) an estimate of citizen voting age population, now available from the annual American Community Survey (ACS); (c) registration statistics, from the state; and (d) total turnout, if available, or total votes cast for a statewide race.<sup>3</sup>

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<sup>3</sup> The advantages of using an election for a statewide office is that by presenting the same choice to every voter in the state, most of the district-specific factors can be minimized and the degree to which factors other than total population can be isolated. Such factors include: (a) actually or virtually uncontested elections; (b) elections in which one candidate is much more organized than the others; (c) elections in which one

The accompanying tables<sup>4</sup> illustrate the interaction of some of these factors with respect to electoral inequality in California congressional districts based on 2010 census data. Each chart displays some of the factors from the table for each of the 53 congressional districts.

- 1) *Chart 1. Total Population with Total Voting Age* illustrates that even with districts that commence the decade with totally equal population, a degree of malapportionment already exists due to the presence of persons who are ineligible to vote, notably persons under the voting age and non-citizens.
- 2) *Chart 2. Total Voting Age with Total Votes* illustrates that comparing the voting age with the total votes only explains part of the variable nature of the lower line on the chart.
- 3) *Chart 3. Turnout as % of Voting Age with Non-Citizen %* illustrates that more of the variable when the rate of overall turnout, based up voting age population, (the top line) is compared to the rate of non-citizens (the bottom line) for each district. Note the intersection of the lines for the districts that have the lowest turnout rate and how these correspond with districts with the highest rates of non-citizens.

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candidate has far more resources than the others; (d) candidate-specific issues such as scandals or missteps that might develop during the campaign; and (e) local issues.

<sup>4</sup> The tables were prepared by Polidata which has provided reference tools for demographic and political researchers since 1974.

- 4) *Chart 4. Non-Citizen % with Total Votes* illustrates the general correlation between districts that have the lowest number of votes cast and districts with the highest rates of non-citizens. The votes for the most under-weighted, CD 33, and the most over-weighted, CD 21, are annotated on this chart.

See Appendices 1 and 2.

A review of the numbers provides the following summary of how the increased presence of non-citizens affects the overall numbers of votes in each district for the 2012 election for President of the United States.

The high vote for a California congressional district was 346,504 in CD 33, far above the average for the state Congressional districts of 245,656, and the low vote was 119,299 in CD 21, far below the state average. These two vote totals translate into a vote weight of 2.90 for the state. The non-citizen rate for CD 33 was 10.1%, somewhat below the value for the state of 14.9%, while the non-citizen rate for CD 21 was 29.4%, almost twice the state value.

As can be seen in the table, other districts that have high vote weights also have high rates of non-citizens. The five districts with the lowest total number of votes (21, 40, 16, 34, and 46) have an average of 144,500 votes cast and an average non-citizen rate of 31%. The five districts with the largest total number of votes (33, 4, 2, 12, and 18) have an average of 331,787 votes cast and an average non-citizen rate of 10%. Yet, each district still elects one member to the U.S. House but the vote of those who live in the most over-weighted districts, on average,

are worth 2.4 times more than a vote of those who live in the most under-weighted districts.

Put another way, there is a significant statistical correlation between CVAP and votes cast. Voters in districts with low CVAP have a smaller number of people electing a single member of Congress, while people living in districts with higher CVAP also elect a single member of Congress.

This data also has broad implications for states as they seek to comply with the “competing demands” of the Voting Rights Act (“VRA”) and the Fourteenth Amendment. *See Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) States are generally given the freedom to reapportion in a manner in which they deem most appropriate. *See Burns*, 384 U.S. 73 (holding that a state may use voter registration data to reapportion); *Evenwel*, 136 S. Ct. at 1123 (holding that a state cannot be compelled to reapportion based on eligible or voter registration data). The restrictions imposed by the VRA itself present challenges that only citizenship data may serve to fix.

### CONCLUSION

Electoral inequality clearly has a discriminatory effect from one district in comparison to another. More importantly, it infuses malapportionment into the districting process whereby a majority of the congressional delegation is unlikely to be elected by a majority of eligible voters let alone actual voters.

If the citizenship question is not included, this will preclude among other things, the *availability* of

the most accurate, efficient, practicable data for redistricting of congressional and legislative districts for the entire decade of the 2020s, in a way that would frustrate the achievement of the ideal of political equality as enunciated in the “one person, one vote” standard set forth in *Wesbury v. Sanders*, 376 U.S. 1 (1964) and *Reynolds v. Sims*, 377 U.S. 533 (1964), for those states that wish to use it. By *de facto* censoring the access to the most efficient and effective means of acquiring accurate data the district court’s decision will have a profound impact of on a state’s ability to reapportion in the manner they choose. *See generally* U.S. Const. art. I, § IV.

The Court should consolidate and consider the issue decided by the federal district court in *California v. Ross*, 2019 WL 1052434—whether the Secretary of Commerce’s decision to include such a question violates the Enumeration Clause of U.S. Constitution, Art. I, §2, Cl. 3 – in order to fully resolve this case and assure that the most accurate census data is not withheld from the redistricting process in the 2020 decade.

Respectfully Submitted,

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**APPENDIX**

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Dated: March 21, 2019

Table 1. Summary of Demographics, Registration, and Turnout for President, 2012, by Congressional Districts for California

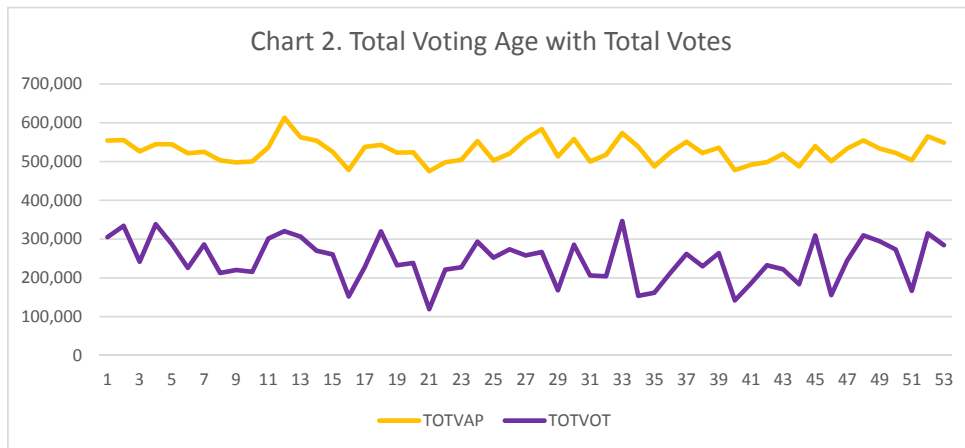
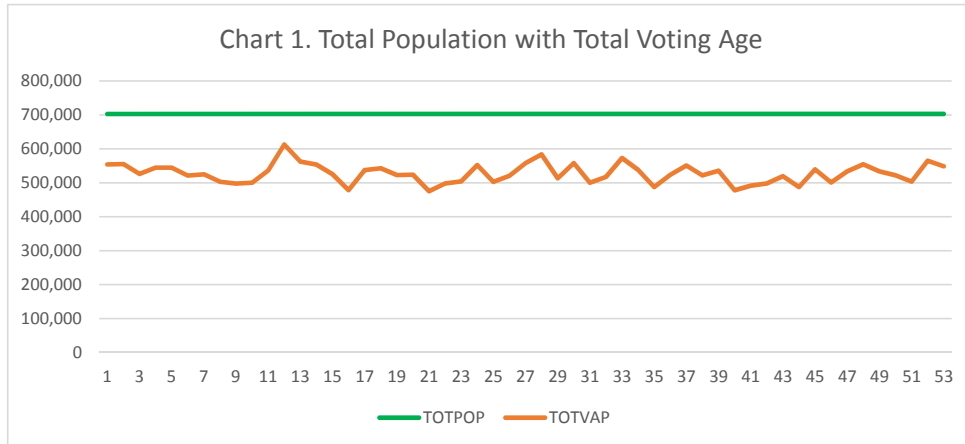


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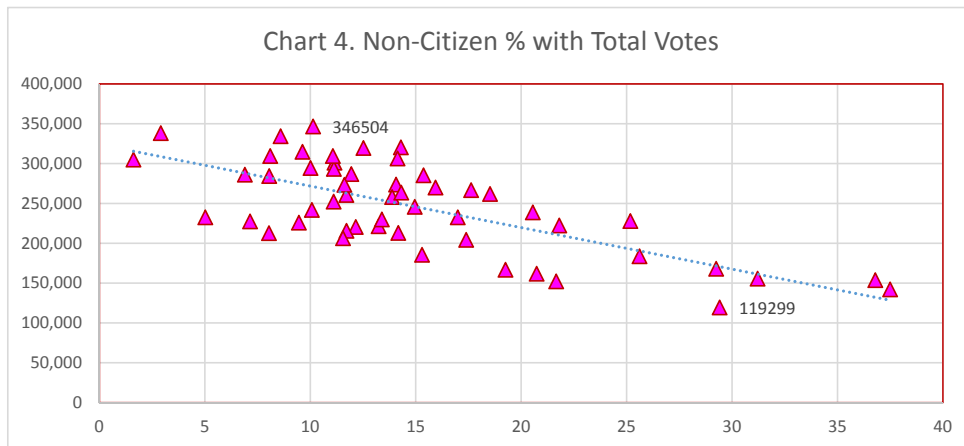
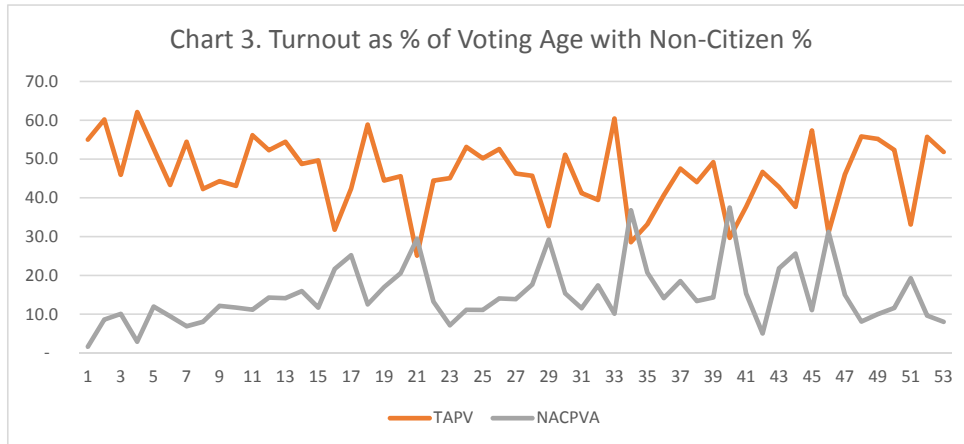


Table 1. Summary of Demographics, Registration, and Turnout for President, 2012, by Congressional Districts for California

[A] Dst	[B] Total Population	[C] Total Voting Age	[D] Citizen Population	[E] Citizen Voting Age	[F] Total Registration	[G] Total Votes	[H] Reg as % Voting Age	[I] Votes as % VotingAge	[J] NonCit as % Voting Age	[K] Vote Weight
<i>ED</i>	<i>TOTPOP</i>	<i>TOTVAP</i>	<i>CITPOP</i>	<i>CITVAP</i>	<i>TOTREG</i>	<i>TOTVOT</i>	<i>RAPV</i>	<i>TAPV</i>	<i>NACPVA</i>	<i>WGTVOT</i>
1	702,905	554,136	691,631	545,171	397,970	304,939	71.8	55.0	1.6	1.14
2	702,905	555,305	649,420	507,575	415,320	334,238	74.8	60.2	8.6	1.04
3	702,906	526,206	645,521	473,183	336,269	241,805	63.9	46.0	10.1	1.43
4	702,906	544,601	676,059	528,761	420,016	338,193	77.1	62.1	2.9	1.02
5	702,905	544,581	627,408	479,512	366,204	286,773	67.2	52.7	11.9	1.21
6	702,905	521,275	637,974	471,951	321,827	225,831	61.7	43.3	9.5	1.53
7	702,904	525,190	662,910	488,976	373,566	286,000	71.1	54.5	6.9	1.21
8	702,905	503,201	656,607	462,727	302,732	212,678	60.2	42.3	8.0	1.63
9	702,904	497,569	638,042	437,073	313,105	220,312	62.9	44.3	12.2	1.57
10	702,905	500,233	632,411	441,628	314,690	215,524	62.9	43.1	11.7	1.61
11	702,906	536,433	638,478	476,622	378,473	301,134	70.6	56.1	11.1	1.15
12	702,905	612,806	611,959	525,205	442,659	320,387	72.2	52.3	14.3	1.08
13	702,906	562,583	620,671	483,058	409,206	306,314	72.7	54.4	14.1	1.13
14	702,905	553,819	607,781	465,545	351,333	269,882	63.4	48.7	15.9	1.28
15	702,904	525,207	634,669	463,700	356,012	260,611	67.8	49.6	11.7	1.33
16	702,904	478,367	586,654	374,748	260,456	152,089	54.4	31.8	21.7	2.28
17	702,904	537,484	560,370	402,144	301,842	227,806	56.2	42.4	25.2	1.52
18	702,906	542,924	634,709	474,959	390,470	319,615	71.9	58.9	12.5	1.08
19	702,904	522,778	597,782	433,931	306,615	232,442	58.7	44.5	17.0	1.49
20	702,906	523,748	588,336	416,092	321,627	238,619	61.4	45.6	20.6	1.45
<b>21</b>	<b>702,904</b>	<b>475,172</b>	<b>548,906</b>	<b>335,411</b>	<b>203,071</b>	<b>119,299</b>	<b>42.7</b>	<b>25.1</b>	<b>29.4</b>	<b>2.90</b>
22	702,905	498,009	637,953	432,076	318,144	221,278	63.9	44.4	13.2	1.57
23	702,904	504,348	659,020	468,313	320,216	227,297	63.5	45.1	7.1	1.52
24	702,904	552,445	635,279	491,025	368,498	293,331	66.7	53.1	11.1	1.18
25	702,904	502,838	644,952	446,992	352,586	252,249	70.1	50.2	11.1	1.37
26	702,905	520,503	616,934	447,274	358,551	273,647	68.9	52.6	14.1	1.27
27	702,905	557,804	608,684	480,368	375,246	257,970	67.3	46.2	13.9	1.34
28	702,904	583,658	601,329	480,780	388,995	266,628	66.6	45.7	17.6	1.30
29	702,905	513,305	541,561	363,172	262,794	167,889	51.2	32.7	29.2	2.06
30	702,904	558,009	624,188	472,236	399,653	285,226	71.6	51.1	15.4	1.21

Table 1. Summary of Demographics, Registration, and Turnout for President, 2012, by Congressional Districts for California

[A] Dst	[B] Total Population	[C] Total Voting Age	[D] Citizen Population	[E] Citizen Voting Age	[F] Total Registration	[G] Total Votes	[H] Reg as % Voting Age	[I] Votes as % VotingAge	[J] NonCit as % Voting Age	[K] Vote Weight
<i>ED</i>	<i>TOTPOP</i>	<i>TOTVAP</i>	<i>CITPOP</i>	<i>CITVAP</i>	<i>TOTREG</i>	<i>TOTVOT</i>	<i>RAPV</i>	<i>TAPV</i>	<i>NACPVA</i>	<i>WGTVOT</i>
31	702,905	500,159	643,285	442,379	307,575	206,242	61.5	41.2	11.6	1.68
32	702,905	517,437	596,266	427,432	317,663	204,169	61.4	39.5	17.4	1.70
<b>33</b>	<b>702,904</b>	<b>573,186</b>	<b>636,761</b>	<b>515,105</b>	<b>466,076</b>	<b>346,504</b>	<b>81.3</b>	<b>60.5</b>	<b>10.1</b>	<b>1.00</b>
34	702,904	538,000	483,331	340,047	250,395	153,699	46.5	28.6	36.8	2.25
35	702,905	487,557	579,694	386,463	253,136	161,732	51.9	33.2	20.7	2.14
36	702,905	523,662	621,021	449,451	292,936	212,939	55.9	40.7	14.2	1.63
37	702,904	551,006	586,476	448,954	380,495	261,858	69.1	47.5	18.5	1.32
38	702,905	521,736	618,953	451,844	352,694	229,875	67.6	44.1	13.4	1.51
39	702,905	535,665	609,636	458,979	392,497	263,530	73.3	49.2	14.3	1.31
40	702,904	477,900	499,181	298,718	236,397	141,918	49.5	29.7	37.5	2.44
41	702,904	491,667	615,094	416,434	295,154	185,429	60.0	37.7	15.3	1.87
42	702,906	498,150	680,015	473,121	317,130	232,520	63.7	46.7	5.0	1.49
43	702,904	519,520	571,138	406,224	334,968	222,219	64.5	42.8	21.8	1.56
44	702,904	487,384	571,088	362,555	303,081	183,586	62.2	37.7	25.6	1.89
45	702,906	539,594	639,976	479,850	436,450	309,399	80.9	57.3	11.1	1.12
46	702,906	500,972	528,423	344,605	275,309	155,493	55.0	31.0	31.2	2.23
47	702,905	533,611	617,494	453,832	383,066	245,624	71.8	46.0	15.0	1.41
48	702,906	554,357	651,371	509,460	455,429	309,496	82.2	55.8	8.1	1.12
49	702,906	533,629	642,939	480,193	380,336	294,468	71.3	55.2	10.0	1.18
50	702,905	522,239	640,556	461,554	352,288	273,289	67.5	52.3	11.6	1.27
51	702,906	503,465	599,255	406,529	257,613	166,716	51.2	33.1	19.3	2.08
52	702,904	564,937	636,560	510,536	398,623	314,748	70.6	55.7	9.6	1.10
53	702,904	548,546	653,569	504,384	378,513	284,333	69.0	51.8	8.1	1.22
<i>Sum</i>	<i>37,253,956</i>	<i>27,958,916</i>	<i>32,640,280</i>	<i>23,798,857</i>	<i>18,245,970</i>	<i>13,019,792</i>	<i>65.3</i>	<i>46.6</i>	<i>14.9</i>	<i>n/a</i>
<i>Max</i>	<i>702,906</i>	<i>612,806</i>	<i>691,631</i>	<i>545,171</i>	<i>466,076</i>	<i>346,504</i>	<i>82.2</i>	<i>62.1</i>	<i>37.5</i>	<i>2.90</i>
<i>Min</i>	<i>702,904</i>	<i>475,172</i>	<i>483,331</i>	<i>298,718</i>	<i>203,071</i>	<i>119,299</i>	<i>42.7</i>	<i>25.1</i>	<i>1.6</i>	<i>1.00</i>
<i>Rng</i>	<i>2</i>	<i>137,634</i>	<i>208,300</i>	<i>246,453</i>	<i>263,005</i>	<i>227,205</i>	<i>39.4</i>	<i>37.0</i>	<i>35.9</i>	<i>1.90</i>
<i>Avg</i>	<i>702,905</i>	<i>527,527</i>	<i>615,854</i>	<i>449,035</i>	<i>344,264</i>	<i>245,656</i>	<i>65.0</i>	<i>46.2</i>	<i>15.0</i>	<i>1.50</i>

## Notes:

1. Columns B and C: 2010 Census; D and E: ACS 2012 1-year release; F and G: CA Supplement to the Statement of Vote.
2. Column H: column F as a percentage of column C; I: G as a percentage of C; J: (C-E) as a % of C
3. Abbreviations in italics at top of the table identify factors illustrated in accompanying charts.
4. Vote Weight: calculated by dividing the votes of the district with the largest number of votes by the votes for each district.