COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

JAMES V. LACY; MICHAEL DENNY; UNITED STATES JUSTICE FOUNDATION; AND CALIFORNIA PUBLIC POLICY FOUNDATION, Plaintiffs/Respondents, vs. CITY AND COUNTY OF SAN FRANCISCO; AND JOHN ARNTZ, Defendants/Appellants.	Case No. A165899 San Francisco County Superior Court No. CPF-22-517714

APPELLANTS' RESPONSE TO *AMICUS CURIAE* BRIEFS OF IMMIGRATION REFORM LAW INSTITUTE AND J. KENNETH BLACKWELL

The Honorable Richard B. Ulmer Jr.

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INTRODUCTION

This case is about the ability of San Francisco voters to extend the voting franchise to allow noncitizen adults who live in San Francisco to vote in local school board elections, if they have school-age children who also live in San Francisco. Such adults have a direct, meaningful and wholly legitimate interest in the management and operations of the San Francisco Unified School District ("SFUSD"). They are numerous: an estimated one out of every three children enrolled in SFUSD schools has at least one immigrant parent. As Appellants have shown, neither the California Constitution – which states only that United States citizens "may" vote, but is silent as to noncitizens – nor state statutes bar a city, particularly a charter city such as San Francisco, from allowing noncitizen resident parents to vote in school board elections, as San Francisco has done for five elections without incident. This Court should reverse the trial court's judgment, order that judgment be entered in Appellants' favor, and allow San Francisco voters' determination to extend the franchise in SFUSD school board elections to noncitizen parents of school-age children to remain in force.

Amici Immigration Reform Law Institute ("IRLI") and J. Kenneth Blackwell ("Blackwell") offer no coherent or persuasive argument for any different outcome. IRLI asserts that San Francisco's noncitizen voting program violates the equal protection guarantees of the federal and California Constitutions, but IRLI ignores the fact that noncitizen voting in state and local elections has a venerable history in the United States and has

repeatedly been noted by our nation's high court without any hint of disapproval. IRLI asks this Court to review San Francisco's program under strict scrutiny, but it offers no case authority for the Court to do so. Indeed, one of IRLI's own authorities explains that "the vast majority of courts" impose only deferential rational basis review upon local voting procedures that expand the franchise. San Francisco's program easily withstands such scrutiny, as it extends the franchise only to a category of persons whose stake in SFUSD is clear and obvious. Blackwell, meanwhile, offers only ungrounded speculation about how San Francisco's program might affect the voting power of Black San Francisco voters, without any evidence to suggest that voting patterns in San Francisco are racially polarized or that the City's noncitizen voting program has resulted, or is likely to result, in any diminution of such Black voters' ability to elect a school board candidate of their choice.

This Court should reject Amici's arguments, and reverse the judgment of the court below.

ARGUMENT

I. Allowing Noncitizen Parents of School-Age Children To Vote In School Board Elections Does Not Violate Equal Protection.

Amicus IRLI contends that San Francisco's noncitizen voting program – under which noncitizen San Francisco residents of legal voting age may vote in elections for the Board of Education of the San Francisco Unified School District, so long as they are parents, legal guardians, or legally recognized caregivers of children under the age of 19 living in San Francisco – violates

the equal protection clauses contained in the United States and California Constitutions. This is so, IRLI argues, because "[b]y expanding the right to vote to noncitizens," San Francisco's program "necessarily dilutes the votes of every U.S. citizen school board voter in San Francisco," in violation of the federal and state Constitutions' guarantees of equal protection. (IRLI Br. at p. 7.) IRLI acknowledges that "the vast majority of courts" apply the deferential rational-basis standard of review to laws that expand the right to vote and thus cause vote dilution – as standard that, as IRLI implicitly admits, is readily satisfied here. (*Id*. at p. 8.) But IRLI asserts that San Francisco's program should be subject to strict scrutiny, because it purportedly it "dilutes the votes of US citizens," who IRLI claims are "a protected class," and because it allegedly "abridges citizens' fundamental right to self-government." (IRLI Br. at p. 8.)

For several reasons, IRLI's claims that San Francisco's noncitizen voting program violates equal protection guarantees are wholly untenable. Those claims provide no sound basis to affirm the judgment of the court below, and this Court should reject them.

A. Our Nation's History of Noncitizen Voting, As Repeatedly Noted By The United States Supreme Court, Undermines Any Claim That The Practice Is Unconstitutional.

Most obviously, IRLI wholly ignores the fact that, as Appellants explained in their reply brief, the United States Supreme Court has expressly and repeatedly held that states and localities are permitted to extend the franchise to noncitizens in

elections for state or local office. In *Pope v. Williams* (1904) 193 U.S. 621, our nation's high court held that a "state might provide that persons of foreign birth could vote without being naturalized …" (*Id*., 193 U.S. at p. 632.) Similarly, in *Minor v. Happersett* (1874) 88 U.S. 162 the Court explained that "citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage." (*Id.,* 88 U.S. at p. 177.) As the *Minor* Court explained,

> Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

(*Id*.) The state constitutional provisions that the high court referred to in *Pope* and *Minor* had precisely the same effect on the voting power of U.S. citizens in those jurisdictions as IRLI asserts that San Francisco's noncitizen voting program does in San Francisco, yet the Court in those cases noted the practice with seeming approval, and did not suggest that those states' voting laws were in any way inconsistent with Constitutional requirements, including equal protection mandates. This Court should reject IRLI's claim that a voting practice with such deep roots in our nation's historical tradition is nonetheless impermissible under our federal and state constitutional charters.

B. IRLI's Own Authorities Concerning Vote Dilution By Expansion Of The Franchise Show That Any Such Expansion Need Only Be Rational, Which San Francisco's Program Clearly Is.

IRLI asserts that San Francisco's noncitizen voting program is unconstitutional because it "necessarily dilutes the votes of every U.S. citizen school board voter in San Francisco." (IRLI Br. at p. 7.) As one of the authorities IRLI cites explains, "vote dilution is a term of art. Merely expanding the voters rolls is, standing alone, insufficient to make out a claim of vote dilution." (*Duncan v. Coffee County, Tenn.* (6th Cir. 1995) 69 F.3d 88, 94.) Because "any time voters are added to the rolls … those already on the rolls have their votes diluted," "mere expansion of the class of persons eligible to vote does not, *per se*, imply unconstitutional vote dilution." (*Id.*, 69 F.3d at p. 94, fn. 3.)

As IRLI notes, "[c]laims of vote dilution made by those whose votes have been weakened by an expansion of the franchise … are analyzed under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution." (IRLI Br. at p. 8.)[1]

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[1] IRLI cites *Juaregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 799-800 for the proposition that "[t]ypically challenges to state *restrictions on voting* and the like have been brought under the federal equal protection clause." (IRLI Br. at p. 7 [emphasis added].) But this case does not involve a "restriction on voting," but rather an expansion of the franchise. *Juaregui* is wholly different from this case, as the court there upheld a preliminary injunction against a city's practice of conducting at-large city council elections, on the ground that such elections violated the California Voting Rights Act (Elec.Code §§ 14025-14032.) (*Id.*, 226 Cal.App.4th at p. 788.) The type of "vote dilution" at issue in *Juaregui* thus arose from the city's failure to create electoral districts, not from an expansion of the voter rolls. "[T]he decisions dictate that overinclusiveness is less

As literally *every decision IRLI cites* that involves expansion of the franchise agrees, equal protection challenges claiming vote dilution arising from expansion of the franchise are analyzed under the deferential rational basis test. Indeed, as one of IRLI's own authorities acknowledges, "where a law expands the right to vote causing voting dilution, the rational basis test has been applied by *the vast majority of courts*." (*May v. Town of Mountain Village* (D.Colo. 1996) 944 F.Supp. 821, 824 [emphasis added] [citing, *inter alia, Clark v. Town of Greenburgh* (2d Cir. 1971) 436 F.2d 770, 771–72; *Creel v. Freeman* (5th Cir.1976) 531 F.2d 286, 288; *Duncan, supra*, 69 F.3d at p. 94; *Cantwell v. Hudnut* (7th Cir.1977) 566 F.2d 30, 37–38 and n. 15].) As the Sixth Circuit held in *Duncan*, after surveying decisions from Fourth, Fifth, and Eleventh Circuits, "[w]e find persuasive their conclusion that the benchmark for determining whether" an extension of the franchise "unconstitutionally dilutes those votes is whether the decision is irrational." (*Duncan, supra*, 69 F.3d at p. 94.)

Applying the rational basis test to a "vote dilution" claim that arises from a law or voting practice that extends the franchise, courts uphold that law or practice as rational so long as the additional persons who are now able to participate in the election "have a substantial interest" in that election. (*Duncan, supra*, 69 F.3d at p. 94; *see May, supra*, 944 F.Supp at pp. 822, 825 [holding that town "had a rational basis" to "extend the right

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of a constitutional evil than underinclusiveness." (*Duncan, supra*, 69 F.3d at p. 98.)

to vote in its municipal elections to people located throughout the United States and possibly abroad who own property in the Town but who do not reside in the Town," noting that such nonresident property owners pay a significant share of local property taxes and providing "nonresident landowners the right to vote gives them a voice in the Town's future].)

Notably, another of IRLI's cited decisions, *Day v. Robinhood West Community Improvement Dist.* (E.D.Mo. 2010) 693 F.Supp.2d 996, applied rational basis review to a "vote dilution" equal protection claim in which registered voters residing within a "Community Improvement District" challenged a law allowing property owners who did not reside within those District to vote in elections for the Districts' Board of Directors. The court found that the law withstood rational basis review, even though it allowed nonresident property owners *who were not United States citizens* to vote in such elections. As the court explained:

> [T]he Missouri legislature presumably decided to extend CID board election voting rights to nonresidents due to the effect on property owners of local taxation for public improvements – one of the principal purposes of CID creation. Under this rationale, it is perfectly logical for the legislature to grant voting rights to <u>all nonresident property owners</u> in a CID, <u>not only those nonresidents who reside in Missouri and are U.S. citizens</u>.

(*Id*., 693 F.Supp. 2d at p. 1007 [emphasis added].)

San Francisco's noncitizen voting program easily withstands rational basis scrutiny. The category of persons to whom San Francisco has extended the franchise consists of

noncitizens who (1) reside in San Francisco, (2) are of lawful voting age, and (3) are the parents, guardians, or caregivers of children under the age of 19, who (4) live in San Francisco. The program thus extends the vote only to adults who have children who attend or may enroll in SFUSD public schools – adults who, for that reason, have a substantial and direct interest in SFUSD governance. San Francisco voters' decision to extend the franchise in school board elections to those adults is entirely rational.

C. IRLI Offers No Relevant Authority Or Persuasive Justification To Subject San Francisco's Program To Strict Scrutiny.

Implicitly acknowledging that San Francisco's program is entirely rational and readily survives rational basis review, IRLI argues that this Court should instead apply strict scrutiny to analyze the program's compliance with equal protection mandates. Strict scrutiny is appropriate, IRLI contends, because San Francisco's program "dilutes the votes of U.S. citizens – a protected class," and because it "abridges citizens' fundamental right to self-government." (IRLI Br. at p. 8.) Neither reason is persuasive.

First, IRLI offers no justification or authority to treat United States citizens as a "protected class" under equal protection jurisprudence. IRLI notes that noncitizens are generally treated as a "protected class," and argues that it therefore "stands to reason that those *with* United States citizenship should also form a protected class. Otherwise, paradoxically, the United States citizens who established our

Constitution would have given lesser protection to themselves as a group, than to citizens of other countries." (IRLI Br. at p. 9.) But IRLI entirely misunderstands the nature of the courts' equal protection jurisprudence and the justifications for the identification of so-called "protected classes."

As the United States Supreme Court has explained, jurisprudence concerning "protected classes" – or, more accurately, concerning legislative classifications based on grounds suspected of being invidious or discriminatory – was not fashioned by the framers of the Constitution, but rather has been developed by the courts. This jurisprudence serves to balance the need for judicial deference to elected legislative bodies with the need to protect civil rights by ferreting out invidious prejudice. The Fourteenth Amendment's Equal Protection Clause

> is essentially a direction that all persons similarly situated should be treated alike. Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

(*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439-440 [cites, quotes omitted].) But "[t]he general rule gives way, however, when a statute classifies by race, alienage, or

national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." (*Id.*, 473 U.S. at p. 440.)

Thus, our high court's decisions "have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (*Graham v. Richardson* (1971) 403 U.S. 365, 372 [citing *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152—153, fn. 4].)

IRLI's assertion that the Founding Fathers "who established our Constitution would [not] have given lesser protection to themselves as a group, than to citizens of other countries" (IRLI Br. at p. 9) entirely ignores that suspect classifications have been developed by the judiciary, rather than being set forth in the Constitution itself.[2] Moreover, the judiciary

[2] IRLI finds it unlikely that legislators would identify a minority group as a "protected class" without extending the same status to the majority. However, the California Voting Rights Act, which was at issue in *Juaregui* (cited by IRLI), was "adopted to prevent an at-large electoral system from diluting minority voting power and thereby impairing a protected from influencing the outcome of an election." (*Juaregui, supra*, 226 Cal.App.4th at

has done so in recognition of the fact that certain "discrete and insular minorities," including aliens, warrant heightened judicial solicitude, because discrimination against them is less likely to be "soon rectified by legislative means."

In contrast, U.S. citizens are hardly a "discrete and insular minority." Any legislative classification which disadvantages U.S. citizens – and, of course, San Francisco's noncitizen voting program imposes no such classification in any event[3] – is less likely to be the product of invidious discrimination, and is more likely to be rectified through the normal legislative process. U.S. citizens thus do not share the need for "heightened judicial solicitude" that underlies the courts' identification of suspect classifications for purposes of equal protection analysis. For those reasons, this Court should decline IRLI's invitation to apparently be the first to identify United States citizens as a "protected class."

Second, IRLI also asks this Court to subject San Francisco's program to strict scrutiny on the ground that it allegedly "abridges citizens' fundamental right to self-government." (IRLI Br. at p. 8.) But this argument, too, lacks merit. IRLI cites

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p. 789.) To that end, Elections Code § 14026(d) defines the Act's term "protected class" to mean "a class of voters who are members of a race, color or language *minority* group …" (*Juaregui, supra*, 226 Cal.App.4th at p. 793 [quoting Elec. Code §14026(d)] [emphasis added].)

[3] San Francisco's noncitizen voting program does not classify voters by alienage. To the contrary, its very purpose is to ensure that, within the parameters of the program, one's citizenship or noncitizenship ceases to define one's ability to vote in school board elections. Far from classifying on the basis of alienage, therefore, San Francisco – within the scope of its noncitizen voting program – treats noncitizens and citizens alike.

Cabell v. Chavez-Salido (1982) 454 U.S. 432, 439-440 for the proposition that "[t]he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a *necessary consequence* of the community's process of political self-definition" (IRLI Br. at p. 9 [emphasis original]), but IRLI vastly overreads *Cabell*. That case did not concern or even discuss voting. Instead, *Cabell* involved California statutes that required all peace officers to be United States citizens. The Supreme Court held that that requirement did not violate the 14th Amendment's Equal Protection Clause, explaining that past high court decisions had "made clear that a State may limit the exercise of the sovereign's coercive police powers over the members of the community to citizens," and that "[t]he California statutes at issue here are an attempt to do just that." (*Id.*, 454 U.S. at p. 444.) That rationale, of course, has no bearing on whether noncitizens may be allowed to vote in local school board elections. *Cabell* does not support IRLI's claim that allowing non-citizens to vote in school board elections violates "the community's process of political self-definition," or that such purported violation would amount to the violation of any individual's constitutional rights.

IRLI's claim that San Francisco's program violates a "fundamental right" of "citizen self-government" (IRLI Br. at p. 9) also fails because the historical fact that for much of our nation's history, numerous states allowed their noncitizen residents to vote (and multiple local communities continue to do so today), as recognized by multiple decisions of our nation's high court. (*Pope,*

supra, 193 U.S. at p. 632 [a "state might provide that persons of foreign birth could vote without being naturalized"]; *Minor, supra,* 88 U.S. at p. 177.) Far from violating any fundamental right of self-government that is of Constitutional dimension, noncitizen voting in state or local elections is wholly compatible with our nation's history of self-government.[4] For this reason, too, this Court should decline IRLI's invitation to subject San Francisco's noncitizen voting program to strict scrutiny.

San Francisco's program does not violate the equal protection clauses of the United States or California Constitutions. Appellants respectfully request that this Court reverse the judgment of the court below.

II. Amicus Blackwell Offers No Persuasive Or Well-Supported Reason To Affirm The Judgment Below.

Amicus Blackwell makes a number of related assertions expressing his evident concern that San Francisco's noncitizen voting program could have the consequence of diluting the voting strength of Black San Francisco voters. None, however, are supported by any evidence in the record before this Court, and none provide a well-reasoned basis to affirm the trial court's judgment.

First, Blackwell notes that the press has reported on political conflicts between Black and Latino communities in Los

[4] IRLI also points to "a State's historical power to exclude aliens from participation in its democratic political institutions," observing that "a State may deny aliens the right to vote …." (IRLI Br. p. 9.) Appellants do not contest that a State may do so. However, San Francisco's noncitizen program is lawful because the State of California has not prohibited noncitizen voting in local school board elections, particularly in a charter city such as San Francisco.

Angeles, focusing on the drawing of district lines for Los Angeles City Council elections. (Blackwell Br. at pp. 8-10.) But Blackwell frames this concern almost entirely in political, not legal, terms. Such accounts, while unfortunate, have no bearing on the legal question of whether San Francisco's noncitizen voting program complies with the California Constitution and California law.

Second, Blackwell recounts the history of anti-Black discrimination in our nation's voting laws and practices, and states that "Black citizens have been the racial minority that has suffered and struggled for over one hundred fifty (150) years to attain and preserve the right to vote." (Blackwell Br. at pp. 10-12.) Appellants agree that Black Americans have historically faced great obstacles in exercising their constitutional voting franchise. However, Blackwell offers no evidence to suggest that San Francisco's noncitizen voting program affects, much less threatens, the ability of Black San Francisco residents to vote.

Third, Blackwell states that the most recent U.S. Census found that San Francisco "is home to approximately 105,820 adult Hispanic residents, of which only 79,110 are United States Citizens." According to Blackwell, "[t]he equates to an additional 26,710 foreign nationals who are now eligible to vote pursuant to San Francisco's noncitizen voter Program."[5] Meanwhile, Blackwell states, San Francisco's Black population "is the only ethnic minority group in the city to have decreased in

[5] Blackwell evidently assumes, but does not show, that each Latino resident of San Francisco who is not a U.S. citizen is a parent or guardian of a school-age child living in San Francisco.

population." (Blackwell Br. at p. 13.) San Francisco's Black population is limited in size, and "the addition of tens of thousands of Latino voters to San Francisco's eligible school board electorate could well end any chance the Black community has to elect Black representatives to the school board." (*Id.* at p. 14.) But Blackwell's concerns are purely speculative. He offers no evidence, and the record before this Court contains none, that San Francisco school board elections are characterized by racial bloc voting, including that Black San Francisco voters will vote meaningfully differently from other voters in the City. Equally absent is any evidence that Black San Francisco voters have historically been unable to elect school board candidates of their choice, or that such candidates would not receive votes from San Francisco voters of other ethnicities. Blackwell's speculative arguments provide no well-reasoned ground for this Court to affirm the judgment of the trial court.

CONCLUSION

Appellants respectfully request that this Court reverse the judgment of the court below, and direct that judgment be entered in Appellants' favor.

Dated: April 20, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13-point Century Schoolbook typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 3,864 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 20, 2023.

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PROOF OF SERVICE

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed April 20, 2023, at San Francisco, California.

Pamela Cheeseborough