

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 5

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

APPLICATION TO FILE BRIEF *AMICUS CURIAE* AND
BRIEF *AMICUS CURIAE* OF J. KENNETH BLACKWELL IN SUPPORT
OF PLAINTIFFS/RESPONDENTS

The Honorable Richard B. Ulmer Jr.

J. Christian Adams*
Public Interest Legal Foundation
107 S West St Suite #700
Alexandria, VA 22314
Telephone: (703) 745-5870
E-Mail: adams@publicinterestlegal.org
**Pro hac vice motion to be filed.*

Alexander Haberbush, Esq.
LEX REX INSTITUTE
444 West Ocean Boulevard, Suite 1403
Long Beach, CA 90802
Telephone No. (562) 435-9062
E-Mail: AHaberbush@LexRex.org

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

Respectfully Submitted,

March 7, 2023

/s/ Alexander H. Haberbush
Alexander H. Haberbush, Esq.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS2

TABLE OF AUTHORITIES4

APPLICATION TO FILE *AMICUS CURIAE* BRIEF5

IDENTITY AND INTEREST OF PROPOSED *AMICUS CURIAE*5

BRIEF *AMICUS CURIAE* OF J. KENNETH BLACKWELL IN
SUPPORT OF PLAINTIFFS/RESPONDENTS7

 I. Introduction7

 II. California’s Use of Noncitizen Latino Population in
 Redistricting Historically Dilutes Black Citizens’ Voting
 Strength.....8

 III. Black Americans Fought for Voting Rights for Over a
 Century; Foreign Nationals Have Not..... 10

 IV. The Non-Citizen Voter Program May Further Erode Black
 Citizen Voting Strength in San Francisco..... 13

CONCLUSION..... 14

CERTIFICATE OF COMPLIANCE..... 15

PROOF OF SERVICE 16

TABLE OF AUTHORITIES

Cases

<i>Coachman, et al. v. The City of New York</i> , No. 1:22-cv-05123 (filed August 29, 2022)	12
<i>Garza v. County of Los Angeles</i> , 756 F. Supp. 1298 (9th Cir. 1990)	8
<i>Reynolds v. Simms</i> , 377 US 533 (1964)	9
<i>Shelby Cty. v. Holder</i> , 570 U.S. 529 (2013).....	11
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966).....	11

Constitutions

U.S. Const. amend. XV, § 1	10
California Const. Article II, § 2.....	7

Other Authorities

Bill Keveney, <i>LA City Council racism scandal shows ugly side of creating political maps. Can redistricting reform help?</i> , USA Today, Oct. 18, 2022	8
Ryan Carter, <i>With deadline Wednesday, LA County’s citizen redistricting commission poised to formalize final map</i> , Los Angeles Daily News, Dec. 15, 2021	9-10
<i>Column: Nury Martinez’s racism feeds into Black Angelenos’ worst fear. It’s us versus them</i> , L.A. Times (Oct. 9, 2022)	9
David Mamaril Horowitz and Will Jarret, <i>2020 Census: As San Francisco grew, the ethnic makeup of its neighborhoods changed. Here's how</i> , Mission Local (Sept. 27, 2021)	13
San Francisco Department of Elections, November 8, 2022 Final Election Results Summary.....	13
Transcript of the Minutes of the Committee on Governmental Operations (Sept. 20, 2021)	12

APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rules of Court, rule 8.200(c), J. Kenneth Blackwell respectfully submits this application to file the accompanying *amicus curiae* brief in support of Plaintiffs and Respondents James v. Lacy, Michael Denny, United States Justice Foundation, and California Public Policy Foundation. Pursuant to California Rules of Court, rule 8.200(c)(3), *amicus* states that no one, other than *amicus* and his counsel, authored the accompanying brief in whole or in part nor did any person, other than *amicus*, make a monetary contribution intended to fund the preparation or submission of the accompanying brief.

IDENTITY AND INTEREST OF PROPOSED *AMICUS CURIAE*

Amicus Curiae J. Kenneth Blackwell has served the public for many years. He was mayor of Cincinnati, Treasurer and Secretary of State for Ohio, undersecretary at the U.S. Department of Housing and Urban Development, and U.S. Ambassador to the United Nations Human Rights Commission. He currently is the Senior Fellow for Human Rights and Constitutional Governance at the Family Research Council. Mr. Blackwell is also a national bestselling author of three books: *Rebuilding America: A Prescription For Creating Strong Families*, *Building The Wealth Of Working People, And Ending Welfare*; *The Blueprint: Obama's Plan to Subvert the Constitution and Build an Imperial Presidency*; and *Resurgent: How*

Constitutional Conservatism Can Save America. His commentaries have been published in major newspapers and websites across the nation.

Mr. Blackwell submits this brief to inform the Court of important concerns presented by San Francisco's noncitizen voter program as it relates to historically disenfranchised Black citizens.

Counsel for Plaintiffs/Respondents consent to the filing of this brief. Counsel for Defendants/Appellants stated that they take no position on the filing of this brief.

Respectfully Submitted,

March 7, 2023

/s/ Alexander H. Haberbusch
Alexander H. Haberbusch, Esq.

**BRIEF *AMICUS CURIAE* OF J. KENNETH BLACKWELL IN
SUPPORT OF PLAINTIFFS/RESPONDENTS**

I. Introduction.

The right to vote is a fundamental right that has been traditionally afforded to citizens of the United States, an understanding enshrined in Article II, § 2 of the California Constitution.¹ However, San Francisco, through its noncitizen voter program (the “Program”), has extended this privilege to individuals who are not citizens of the United States. This program not only undermines the very notion of what citizenship means but it also compromises the voting strength of minority groups who have fought for over a century and a half to secure the right to vote.

Simply, extending voting rights to foreign nationals in San Francisco could dilute the political strength of Black citizens and exacerbate the erosion of the political effectiveness of Black citizen voting strength. Extending the right to vote to foreign nationals in San Francisco could accelerate the process whereby Black citizen lose voting strength and political effectiveness because of the extension of the franchise to foreign nationals in a fashion similar to the conflicts in other parts of California as it relates to the allocation of local legislative seats.

¹ “A United States citizen 18 years of age and resident of this State may vote.”

II. California's Use of Noncitizen Latino Population in Redistricting Historically Dilutes Black Citizens' Voting Strength.

This political conflict between Black citizens and Latinos who are foreign nationals in California is not theoretical; it has been happening in the City of Los Angeles for decades. *See Garza v. County of Los Angeles*, 756 F. Supp. 1298 (9th Cir. 1990). In recent years, an issue arose regarding the allocation of seats on the Los Angeles City Council (“L.A. Council”) coupled with statements by Latino councilmembers evidencing an intent to dilute the opportunity of Black voters to elect candidates of choice. *See Bill Keveney, LA City Council racism scandal shows ugly side of creating political maps. Can redistricting reform help?*, USA Today, Oct. 18, 2022, available at <https://www.usatoday.com/story/news/nation/2022/10/18/la-city-council-racist-recording-spurs-redistricting-reform-debate/10490880002/>.

Records of Los Angeles City Council meetings have captured fallout from these conflicts over the shift of political power from Black citizens to Latino noncitizens. The recent news of disparaging remarks directed toward Black citizen voters made by some Latino Councilmembers, who benefit from the counting of foreign nationals for the drawing of district lines have been directed toward Black citizen voters. For some this highlighted the effort of Latino City Councilmembers efforts to dilute the voting power of the Black community:

Councilman Marqueece Harris-Dawson was shocked at the intensity of the anti-Black sentiment. “Politicians trying to get the most favorable set of voters is understandable,” he said. “A sort of a concerted effort to dilute the strength of Black voters is something I expected from Republicans in the South and in the Midwest. I did not expect that level of Black voter suppression in Los Angeles.”

Column: Nury Martinez’s racism feeds into Black Angelenos’ worst fear.

It’s us versus them, L.A. Times (Oct. 9, 2022), available at <https://www.latimes.com/california/story/2022-10-09/latino-la-city-council-racism-fears-black-angelenos>.

This dispute goes back decades in Los Angeles. Although Los Angeles has not extended the right to vote to foreign nationals, it has used the noncitizen population to count in the drawing of district lines to satisfy the equal population requirements of *Reynolds v. Simms*, 377 US 533, 583 (1964) (Legislative districts must contain as practicable as possible, equal population.) Los Angeles, in drawing both county and city districts using foreign nationals to achieve equal population necessarily dilutes the voting strength of nearby Black citizens. All districts must have essentially equal population and because of the reliance on noncitizen Latino population, more Latino majority districts are created. The inclusion of noncitizen Latino populations in redistricting has increased the number of Latino majority districts. In the most recent L.A. County Supervisor redistricting plan, there is no

majority Black district. See Ryan Carter, *With deadline Wednesday, LA County's citizen redistricting commission poised to formalize final map*, Los Angeles Daily News, Dec. 15, 2021, available at <https://www.dailynews.com/2021/12/14/with-deadline-wednesday-la-countys-citizen-redistricting-commission-poised-to-formalize-final-map/>.

III. Black Americans Fought for Voting Rights for Over a Century; Foreign Nationals Have Not.

The Fifteenth Amendment to the United States Constitution guarantees that the right to “vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. Const. amend. XV, § 1. Yet the ratification of the Amendment was not the end but only the beginning of the fight by Black Americans for access to the ballot box. From the 1860s until the 1960s, Black Americans were the victims of pervasive and insidious discrimination in voting.

In the late 1800s, states enacted various tests designed to curtail voting rights of Black Americans. Lengthy litigation ensued to strike down these laws. According to the Supreme Court’s ruling,

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in *Guinn v. United*

States, 238 U.S. 347, and *Myers v. Anderson*, 238 U.S. 368. Procedural hurdles were struck down in *Lane v. Wilson*, 307 U.S. 268. The white primary was outlawed in *Smith v. Allwright*, 321 U.S. 649, and *Terry v. Adams*, 345 U.S. 461. Improper challenges were nullified in *United States v. Thomas*, 362 U.S. 58. Racial gerrymandering was forbidden by *Gomillion v. Lightfoot*, 364 U.S. 339. Finally, discriminatory application of voting tests was condemned in *Schnell v. Davis*, 336 U.S. 933; *Alabama v. United States*, 371 U.S. 37; and *Louisiana v. United States*, 380 U.S. 145.

South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966). Even still, discrimination against Black Americans continued.

Finally, Congress passed the Voting Rights Act of 1965 (the “Act”). The Supreme Court called the Act “strong medicine” that Congress deemed necessary “to address entrenched racial discrimination in voting, ‘an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.’” *Shelby Cty. v. Holder*, 570 U.S. 529, 535 (2013) (quoting *South Carolina v. Katzenbach*, 383 U.S. at 309). In 2013, the Court determined that “voting discrimination still exists[,]” although it found that some of the Act’s measures were no longer justified by current needs.

Put another way, 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. The political ramifications of granting voting rights to foreign nationals will fall first and heaviest on Black citizens in California, particularly in democratic primary elections.

Just last year, the New York City Council passed a bill that alters requirements for who may vote in New York City elections, allowing the registration of noncitizens to vote. Local Law No. 11 of 2022, *available at* <https://legistar.council.nyc.gov/>

[LegislationDetail.aspx?ID=4313327&GUID=DF600BDA-B675-41D8-A8BD-282C38DC4C62](https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4313327&GUID=DF600BDA-B675-41D8-A8BD-282C38DC4C62). In discussing this change, members of the Council spoke in racial terms. A primary sponsor of the bill, for example, stated:

[I]n the Bronx, in Brooklyn, mainly effect people effect people of color in many of those communities. Some people, they don't have a voice to elect their Mayor. To elect the Public Advocate. To elect the Council Member. Yet because we as a city have decided that this city has changed the color of the skin of people coming to this city, then we change it who will be voting in this city.

See Transcript of the Minutes of the Committee on Governmental Operations (Sept. 20, 2021), *available at* <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4313327&GUID=DF600BDA-B675-41D8-A8BD-282C38DC4C62&Options=&Search=>. Four Black citizens have challenged this new provision in a lawsuit pursuant to the Fifteenth Amendment and the Voting Rights Act, which they filed in the United States District Court for the Eastern District of New York. *See Coachman, et al. v. The City of New York*, No. 1:22-cv-05123 (filed August 29, 2022). That lawsuit is pending.

IV. The Non-Citizen Voter Program May Further Erode Black Citizen Voting Strength in San Francisco.

Recent election results in San Francisco evidence the effect that the addition of noncitizen voters will have on the ability of Black voters to elect candidates to the San Francisco City School Board. According to the most recent U.S. Census Survey, the City of San Francisco is home to approximately 105,820 adult Hispanic residents, of which only 79,110 are United States Citizens. That equates to an additional 26,710 foreign nationals who are now eligible to vote pursuant to San Francisco's noncitizen voter Program. Furthermore, the Black population is the only ethnic minority group in the city to have decreased in population, according to the 2020 United States Census Survey. David Mamaril Horowitz and Will Jarret, *2020 Census: As San Francisco grew, the ethnic makeup of its neighborhoods changed. Here's how*, Mission Local (Sept. 27, 2021), available at <https://missionlocal.org/2021/09/census-2020-as-san-francisco-grew-the-ethnic-makeup-of-its-neighborhoods-changed-heres-how>. These changes matter as is evidenced by the most recent School Board Election, where a mere 4,000 vote difference separated the 3rd place and 4th place candidates. See San Francisco Department of Elections, November 8, 2022 Final Election Results Summary, available at <https://sfelections.sfgov.org/november-8-2022-election-results-summary>.

Black voters only make up 5.2% of San Francisco's population. The ability of Black citizens to elect candidates of their choice was limited, even prior to this recent change. The addition of tens of thousands of non-citizen 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.

CONCLUSION

For these reasons, along with those presented in Respondents' brief, the lower court's decision should be upheld.

Respectfully Submitted,

March 7, 2023

/s/ Alexander H. Haberbusch
Alexander H. Haberbusch, Esq.

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 1585 words.

Respectfully Submitted,

March 7, 2023

/s/ Alexander H. Haberbush
Alexander H. Haberbush, Esq.

PROOF OF SERVICE

I am over the age of 18 and not a party to this proceeding. My business address is 444 West Ocean Boulevard, Suite 1403, Long Beach, CA 90802

I hereby certify that I caused the foregoing document to be served via the following methods.

[x] By email or electronic delivery:

- Alexander Tomescu
(ae_tomescu@yahoo.com)
- Alexander Haberbush
(ahaberbush@lexrex.org)
- Chad Morgan
(chad@chadmorgan.com)
- Holly Chin
(holly.chin@sfcityatty.org)
- James Emery
(jim.emery@sfcityatty.org)
- Pamela Cheeseborough
(pamela.cheeseborough@sfcityatty.org)
- Wayne Snodgrass
(wayne.snodgrass@sfcityatty.org)
- Yvonne Mere
(yvonne.mere@sfcityatty.org)

[x] By First Class Mail:

Richard Ulmer, JUDGE
Civic Center Courthouse
400 McAllister St.
Room 302
San Francisco, CA 94102-4514

March 7, 2023

/s/ Alexander H. Haberbush
Alexander H. Haberbush, Esq.