NO. 11-10194

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KEITH A. LEPAK, MARVIN RANDLE, DAN CLEMENTS, DANA BAILEY, KENSLEY STEWART, CRYSTAL MAIN, DAVID TATE, VICKI TATE, MORGAN McCOMB, AND JACQUALEA COOLEY,
Appellants

v.

CITY OF IRVING, TEXAS,
Appellee

v.

ROBERT MOON, RACHEL TORREZ MOON, MICHAEL MOORE, GUILLERMO ORNELAZ, GILBERT ORNELAZ, AND AURORA LOPEZ,
Intervenor Defendants-Appellees

On Appeal from the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3:10-cv-277

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

While the issue raised in this case is an important one, it has previously been decided by this court through its decision in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). As the prior decision of this court controls the outcome of this appeal, the City of Irving does not believe oral argument is necessary. Of course, should the court believe that oral argument would be of assistance, the city would welcome the opportunity to participate.

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STATEMENT OF THE ISSUES

Does the Equal Protection Clause of the Fourteenth Amendment require a city to delete children and non-citizens from population totals when drawing city council districts?

STATEMENT OF THE CASE

Several citizens of Irving, Texas[1] brought this suit claiming that the city's council districts, while equal in terms of total population, did not contain relatively equal numbers of voting-age citizens and, thus, violated the one person-one vote guarantee of the Fourteenth Amendment. Rec. 149-154. A group of other citizens, including one person under the age of eighteen, intervened in support of the city. Rec. 38-66. The United States appeared as amicus curiae in opposition to the plaintiffs' position. Rec. 552-587, 804.

The plaintiffs, the city, and the intervenors all filed motions for summary judgment. The district court granted the city's motion, denied the plaintiffs' motion, and denied the intervenors' motion as moot, presumably because it sought the same relief as the city's motion. Rec. 1425-30. The district court entered a judgment declaring that the City of Irving's single-member district plan does not violate the Fourteenth Amendment, Rec. 1431, and the plaintiffs filed a timely notice of appeal. Rec. 1432.

[1] Although there are several plaintiffs, they will be referred to collectively in this brief by the name of Mr. Lepak, who is the first plaintiff in the style of the case.

STATEMENT OF FACTS

Although the city disagrees with the legal conclusions set out in the Statement of Facts in the Appellants Brief,[2] the factual statements are generally correct. The basic facts in the case are found in the population breakdown set out in the table found on page 7 of the Appellants' brief.

We would add reference to three facts found in the record:

1. The disparity in citizen-voting-age population among the districts is due to unequal distribution of both non-citizens and children. The difference in citizen-voting-age population between District 1 and Districts 5 and 6 is primarily due to the disparity between the number of children in those districts. The disparity in citizen-voting-age population between District 1 and Districts 3, 4, and 7 is primarily due to the imbalance in distribution of non-citizens. Rec. 429.

2. Total population is the standard used throughout Texas to balance districts. In 2001-2003, there were 340 redistricting submissions to the Department of Justice from the State of Texas and counties and municipalities in the state. All 340 used total population to balance the districts, although in 57 submissions the jurisdictions excluded prison population from the total population count. Rec. 573-74.

[2] *E.g.*, "the Plan substantially dilutes the votes of Irving's voters," Appellants' Brief at 9; "geographical arbitrariness." *Id.*

3. The record contains an affidavit and report from Steven H. Murdock, the immediate past director of the United States Bureau. Rec. 436, *et seq.* Dr. Murdock explained that going forward citizen-voting-age population data will come from the American Community Survey conducted by the Census Bureau. Rec. 438. Total population numbers, which is what the City of Irving used to draw its districts, come from the 100-percent-count items of the decennial census and are highly accurate. Rec. 441. The citizen-voting-age population numbers will need to come from the American Community Survey, which publishes summaries derived from averages of data collected over multiple years. The citizen-voting-age population numbers contain large sampling errors. Rec. 441. In Irving's City Council District 1, for example, the American Community Survey produces an estimate for citizens with a margin of error at the 90 percent confidence level that is 5,233 persons wide—*i.e.*, ranging from 17,698.5 to 22,931.5. Rec. 440, 465. Dr. Murdock concluded that the American Community Survey does "not produce the data with sufficient precision and for small enough geographic areas to be used for drawing districts." Rec. 441-42.

SUMMARY OF ARGUMENT

The basic issue in this suit is whether the Constitution mandates use of one theory of representation (electoral equality—*i.e.*, equal numbers of voters) over another theory (representational equality—*i.e.*, equal numbers of people). The plaintiffs argue that the city is constitutionally required to use districts drawn on the basis of electoral equality. The city, the intervenors, and the United States contend that the decision of which theory of representation to use is entrusted to the governmental entity and that it has the discretion to choose, just as virtually every governmental entity in the country has chosen, to draw districts based on equal numbers of people.

This court has previously resolved this issue, expressly holding that the Fourteenth Amendment does not mandate use of either theory, but rather leaves the "eminently political question" of whether to draw districts on the basis of representational equality or electoral equality "to the political process." *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000). Similarly, the Supreme Court has said that the decision relating to the nature of representation is one "with which we have been shown no constitutionally founded reason to interfere." *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

The framers of the Fourteenth Amendment expressly considered whether to adopt a representational equality or an electoral equality model in 1868 when the

Congress debated the issue and drafted the Amendment. In addition to the equal protection clause, due process clause, and similar features set out in section 1 of the Fourteenth Amendment, the Amendment's section 2 establishes the process for allocating congressional seats among the states. After considering apportionment schemes where congressional seats were allocated on the basis of the number of persons eligible to vote, the Congress decided instead to allocate seats based on total population. While that provision applies to congressional seats and does not apply to city council districts, it is inconsistent with any conclusion that electoral equality rather than representational equality is a fundamental precept of our democracy. Further, it belies the argument that the Equal Protection Clause guarantees electoral districts composed of equal numbers of voters. It is hardly conceivable that the framers used the noun "person" in section 1 of the Fourteenth Amendment to require districts to be drawn on the basis of persons eligible to vote when in section 2—indeed, in the very next sentence of the Fourteenth Amendment—they very carefully and deliberately used that same noun to avoid a construction that would allocate congressional seats on that basis. While the Constitution may be a flexible document, it is not so limber that its words dramatically change meaning in the course of two sentences.

Finally, any construction requiring districts to be drawn on the basis of citizen-voting-age population would be impossible to implement. The source for

such data is the American Community Survey, a continuous sample taken by the Census Bureau and reported in summary form for one-, three-, and five-year periods. Because it is sample information, it comes with a margin of error that increases as it is reported for the small geographic areas that must be used in drawing districts. Indeed, for Irving's City Council District 1, which is the primary source of contention in this suit, the margin of error at the 90 percent confidence level for the number of adult citizens in the district encompassed a range of more than 5,000 persons. Dr. Steven Murdock, the immediate past Director of the U.S. Census Bureau, testified in the case that the citizen-voting-age population data is not produced with sufficient precision and for small enough geographic areas to permit it to be used in drawing districts.

ARGUMENT

I. This case is reviewed under a *de novo* standard of review.

This is a case on cross motions for summary judgment. The facts are not in dispute and the issues are ones of law. This court reviews the district court's order granting the city's motion for summary judgment and denying Mr. Lepak's motion using a *de novo* standard.[3] *Keelan v. Majesco Software Co.,* 407 F.3d 332, 338 (5th Cir. 2005).

[3] The district court also denied the intervenors' motion for summary judgment as moot. Rec. 1430. The intervenors' motion was moot because it sought the same relief as the city's motion, which was granted.

II. There are basically two models of representation—representational equality and electoral equality.

The issue in this case is whether the City of Irving may choose, as did every jurisdiction in the State of Texas that drew districts following the 2000 census, to use total population as the basis for drawing equipopulous districts or, instead, must subtract children and non-citizens from the population before determining if the districts are in balance. Mr. Lepak and his co-plaintiffs contend that the Constitution requires that districts be drawn to be equal in terms of citizen-voting-age population rather than total population[4]—or, to pose their position from another perspective, that the Fourteenth Amendment prohibits including children and resident non-citizens in the apportionment base. Thus, this case requires the court to examine two competing models or theories of representation and to decide if one of those theories is constitutionally required.

The two models of representation are representational equality and electoral equality. Perhaps the leading explanation of the two models is found in a concurring and dissenting opinion by Judge Kozinski of the Ninth Circuit. *Garza v. County of Los Angeles*, 918 F.2d 763, 780-782 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). While Judge Kozinski's view of which

[4] Lepak concedes that a governmental body may choose to draw districts that are equal in total population, but only if they are also equal in terms of voters. Appellants' Brief at 34-36. His position is that equal numbers of potential voters is the constitutional mandate with equally populated districts merely a possible serendipitous by-product.

theory of representation was required was not adopted either by the majority in *Garza* or by this court in *Chen*, his description of the two theories and the choice they present has previously been embraced by this court. *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000).

A. The representational equality model is based on districts containing equal numbers of people.

Judge Kozinski explained that the two theories of representation "are based on radically different premises and serve materially different purposes." One model is representational equality, which requires that districts be drawn so they are equal in terms of total population. Judge Kozinski described the representational equality model by noting that:

> Apportionment by raw population embodies the principle of equal representation; it assures that all persons living within a district—whether eligible to vote or not—have roughly equal representation in the governing body. A principle of equal representation serves important purposes: It assures that constituents have more or less equal access to their elected officials, by assuring that no official has a disproportionately large number of constituents to satisfy. Also, assuming that elected officials are able to obtain benefits for their districts in proportion to their share of the total membership of the governing body, it assures that constituents are not afforded unequal government services depending on the size of the population in their districts.

Garza, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part) (footnote omitted).

B. The electoral equality model requires districts containing equal numbers of potential voters.

In discussing electoral equality, which is the other model of representation, Judge Kozinski explained that:

> The principle of electoral equality assures that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location. Under this paradigm, the fourteenth amendment protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned.

Id. at 782.

As we will discuss in this brief, there are times, such as the debate on adoption of the Fourteenth Amendment, where it has been necessary to grapple with the difference between the two models and to decide between them. Additionally, three courts of appeal, including the Fifth Circuit, have addressed the two models and have had to decide if one or the other is constitutionally required. In most cases, though, it has been unnecessary for courts or legislative bodies to confront the issue because of the "happy coincidence that eligible voters will frequently track the total population evenly—in which case either measurement would produce similar results." *Chen*, 206 F.3d at 525. It is on this line of cases—*i.e.*, ones that do not require the court to confront and distinguish between

the two models of representation---that Mr. Lepak relies for the authority to support his contention that the Constitution forbids including non-citizens and children in the apportionment base. It is much more instructive to look to the cases, including this court's opinion in *Chen*, where the courts actually considered and addressed the issue than to rely on isolated and often contradictory dictum written in cases where the issue was never presented.

III. Courts of Appeal that have specifically addressed the two theories of representation have declined to adopt Lepak's position that electoral equality is constitutionally required. Instead, the rule in this circuit is that the choice between the two theories is a policy question assigned to the governmental body and in which the courts should not interfere.

Three courts of appeal, including the Fifth Circuit, have addressed the plaintiffs' claim that electoral equality is constitutionally required. All three have rejected Mr. Lepak's position.

The initial court of appeals to address the issue was the Ninth Circuit in *Garza* in a case involving county supervisor districts for the County of Los Angeles. The districts were drawn to be equal in population but, because there was a large number of Hispanics residing in the county who were not U.S. citizens, the heavily Hispanic districts had fewer voters than other districts. The majority of the court rejected Judge Kozinski's position that electoral equality was required and, in upholding a plan based on total population, suggested in dictum that

representational equality or equal numbers of people was constitutionally mandated. *Garza*, 918 F.2d at 773-76.

The next court of appeals to address the electoral/representational equality issue was the Fourth Circuit Court of Appeals in *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). Citizenship was not an issue in that case. Rather, the districts, which were equal in terms of population, were unbalanced in terms of persons who were old enough to vote. The plaintiff in *Daly*, like the plaintiffs here and like Judge Kozinski in *Garza*, relied primarily on various statements taken from Supreme Court one person–one vote cases that supposedly suggested equality of electoral strength among districts was constitutionally required. The Fourth Circuit rejected that reading of Supreme Court jurisprudence, finding instead that the more accurate lesson was that the Court did not elevate one theory of representation over the other and generally deferred to the state's choice of an apportionment base. *Id.* at 1223-25. The court found that the choice between the two theories of representation was "quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment." *Id.* at 1227.

The third federal appellate court to confront the issue of the competing models of representation was this court in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). This court expressly addressed Judge Kozinski's argument, which

is the same one that Mr. Lepak makes in this case—*i.e.*, that the Supreme Court's one person–one vote cases speak primarily in terms of equality of voting power, which is the hallmark of electoral equality. This court was unimpressed with the fact that numerous quotations from Supreme Court opinions were phrased in terms of electoral equality. Other quotations—some of which appeared in the same opinions—were phrased in terms of equal population, which is the hallmark of representational equality.[5] While more of the references may have come down on the side of electoral equality, *Chen* recognized that the Supreme Court was generally writing in a context where there was no difference between the two theories, as in most cases equal numbers of people will result in roughly equal numbers of voters. In that situation, the *Chen* court expected to find a slight bias for "the more historically resonant phrase—unquestionably, one-person, one-vote." *Id.* at 526. This court attached little significance to the collection of Supreme Court quotations that were phrased in terms of electoral equality, since the Supreme Court was not addressing the issue of which concept of representation was required.

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[5] Among the examples provided by the Fifth Circuit in *Chen* are *Mahan v. Howell*, 410 U.S. 315, 321 (1973) ("the basic constitutional principle [is] equality of population among the districts"); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats . . . must be apportioned on a population basis"); and *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) ("our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"). *Chen*, 206 F.3d at 525-26.

What the Fifth Circuit did find persuasive was the Supreme Court's decision in *Burns v. Richardson*, 384 U.S. 73 (1966), where the Supreme Court "directly confronted an actual differential between the concepts." *Chen*, 206 F.3d at 526. In *Burns*, Hawaii sought to use a registered voter apportionment base because the state's large population of tourists and military personnel were counted in the census but were generally ineligible to vote since they did not meet residency requirements. The Supreme Court said:

> Neither in *Reynolds v. Sims* nor in any other decision has this court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. *The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.* Unless a choice is one the constitution forbids, [citation omitted] the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.

Burns v. Richardson, 384 U.S. at 92 (emphasis added).

This court found the lesson of *Burns* in the italicized portion of the quotation. The decision to include or exclude non-citizens in the apportionment base is an "eminently political question [that] has been left to the political process." *Chen*, 206 F.3d at 528.

Thus, of the three courts of appeals that have directly addressed the issue of whether there is a constitutional requirement to adopt either an electoral or

representational equality basis of representation, none have adopted the position espoused by Mr. Lepak, and in this Circuit the rule is firmly established that the city has the discretion to adopt a representational equality standard.[6] That rule necessarily follows from the Supreme Court's teaching in *Burns*, which was unable to find a constitutionally founded reason to interfere with the governmental body's decision to choose either an electoral equality or a representational equality basis for apportionment. Here, the city, using its discretion recognized by the Supreme Court and by this court, has elected to draw districts based on equal numbers of people. The Constitution does not forbid that choice.

IV. The appellants' argument that there is a constitutional requirement that children and minors be excluded from the apportionment base is inconsistent with the structure, language, and intent of the Fourteenth Amendment.

A. The Fourteenth Amendment does not mandate discrimination against children and non-citizens.

Mr. Lepak's case is built on the proposition that the Equal Protection Clause of the Fourteenth Amendment requires that districts be drawn on the basis of electoral equality and, more specifically, on the basis of equal numbers of adult citizens. In other words, he reads the Fourteenth Amendment to impose a

[6] *Chen* is controlling on the issue in this case and may not be overruled by another panel absent an intervening change in the law, which could come from statutory amendment, a Supreme Court opinion, or an opinion of the Fifth Circuit sitting *en banc*. *E.g., Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). While Mr. Lepak obviously disagrees with the holding of *Chen*, he does not cite to any such intervening change in the law, and the city is aware of none.

constitutional mandate that requires the districting authority to exclude children and non-citizens from the population when it draws districts. The relevant language of section 1 of the Fourteenth Amendment reads: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, § 1 (emphasis added). The Equal Protection Clause is a check on governmental action that would discriminate—not a requirement to discriminate against certain classes of individuals—in this case, children and non-citizens—by preventing them from being considered when representative districts are drawn.

There is no question that both non-citizens and minors fall under the umbrella of the Fourteenth Amendment's Equal Protection clause. It has long been settled that the clause encompasses lawfully admitted resident aliens as well as citizens of the United States. *E.g.*, *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). A classification based on alienage is suspect and is subject to close judicial scrutiny. *Graham*, 403 U.S. at 371. The protection of the Equal Protection Clause also reaches non-citizens who were not lawfully admitted to the United States even though the level of scrutiny may not be as high as it is for lawfully admitted resident aliens.[7] *Plyer v. Doe*, 457

[7] Unquestionably, Irving, like any large city, contains some persons who did not enter the country legally or remained in the country after their visa or similar authorization to be here expired. Similarly, it is certain that there are many non-citizens who are lawful residents. The evidence

U.S. 202, 210-15 (1982). Further, children are protected by the Equal Protection Clause. As the Supreme Court has stated, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967); *see also, Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981) ("Minors are 'persons' under the United States Constitution and have fundamental rights which the state must respect," and "minors as well as adults are protected by the Bill of Rights and the Fourteenth Amendment"). Mr. Lepak's view that there is a constitutional obligation to exclude children and non-citizens from the apportionment base is not consistent with the structure or the language of the Fourteenth Amendment. For Mr. Lepak to prevail, he must convince the court that the Equal Protection Clause in section 1 of the Fourteenth Amendment not only permits aliens and children to be disregarded when drawing districts but, in fact, mandates that they be disregarded.

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presented in this case related to non-citizens generally and did not distinguish between persons lawfully and unlawfully in this country. Indeed, there are no good data on the precise number of undocumented immigrants. Although the Census Bureau has a sample question on citizenship, it does not ask respondents if they are legally in the country. If it did, there would be a serious question regarding the accuracy of the responses. *E.g.*, *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 573-74 (D. D.C. 1980) (three-judge court); Note, Demography and Distrust: Constitutional Issues of the Federal Census, 94 HARV.L.REV. 841, 845-46 (1981). There are national estimates that most non-citizens are legal residents. Jeffrey S. Passell and D'Vera Cohn, "Unauthorized Immigrant Population: National and State Trends, 2010," Washington, D.C. Pew Hispanic Center (February 1, 2011), at 10, Table 3 (noting 14.1 million legal permanent resident aliens and legal temporary migrants versus 11.2 million unauthorized immigrants) (found at http://pewhispanic.org/files/reports/133.pdf).

B. The framers of the Fourteenth Amendment expressly debated the concepts of representational equality and electoral equality and deliberately chose language that was consistent with a representational equality model and inconsistent with an electoral equality model.

Even if the language of the amendment could admit such a construction, it is highly unlikely the framers of the Fourteenth Amendment could have intended that result. At the same time they were writing section 1 of the Fourteenth Amendment, they were also drafting section 2, which required the framers to confront differing theories of representation and to choose among them. Section 2 of the Fourteenth Amendment revises Article I, section 2, of the Constitution, which provides for apportionment of representatives among the several states. The prior article I provision, which was drafted as part of the original version of the Constitution in 1787, apportioned representation in the House of Representatives on the basis of the whole number of free persons and "three-fifths of all other persons"—*i.e.*, slaves. That section, of course, was one of the compromises in the 1787 Constitutional Convention between the slave-holding states and the free states. Once the Civil War resolved the slavery issue, the three-fifths clause was an anachronism that needed to be addressed.

At the time the Fourteenth Amendment was being debated in the Congress, the Civil War had recently ended and the Thirteenth Amendment, which ended slavery, had only recently been ratified. In most of the country, the former slaves

and other African-Americans were not yet permitted to vote.[8] Similarly, women, minors, and non-citizens were denied the franchise, although it was theoretically possible for states to vary the qualifications for voting. 39th Cong., 1st Sess., Congressional Globe 357 (January 22, 1866) (Rep. Conkling). Thus, as the framers eliminated the three-fifths clause, they were required to confront basic questions regarding the nature of representation. Although they did not use that terminology, the basic issue was whether they would adopt a representational model that apportioned representatives on the total number of persons, including women, children, non-citizens, and disenfranchised African-Americans, or, instead, pursue an electoral equality model that was limited to the number of persons eligible to vote. As Judge Garwood explained in *Chen*, "the drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated this question, and rejected a proposal rooted in—among other things—the principle of electoral equality." *Chen*, 206 F.3d at 527.

[8] The Thirteenth Amendment was passed by the Congress on January 31, 1865. It was ratified by the necessary number of states and added to the Constitution on December 18, 1865. 4 Encyclopedia of the U.S. Congress 1959 (Thirteenth Amendment); Simon & Shuster (1995). The Fourteenth Amendment was debated in 1866. 2 Encyclopedia of the U.S. Congress 882 (Fourteenth Amendment). In 1867, the Congressional Reconstruction system required the former confederate states to permit African-Americans to vote. The border and lower northern states, however, did not extend the right to vote to blacks until the Fifteenth Amendment was adopted. That amendment was enacted by the Congress in 1869 and ratified on March 30, 1870. 2 Encyclopedia of the U.S. Congress 831-33 (Fifteenth Amendment).

Indeed, different proposals considered in the course of drafting and adopting the Fourteenth Amendment had political ramifications that affected various portions of the country differently depending on which model of representation was used. For example, a total population measure was said to favor the north where there was a large number of aliens. 39th Cong., 1st Sess., Congressional Globe 2986-87 (June 6, 1866) (Sen. Wilson noting that the northern states contained 2.1 million unnaturalized foreigners who would be excluded from the apportionment base if citizenship were the standard). On the other hand, a proposal to use eligible voters would be advantageous to western states where there was a smaller percentage of women.[9] 39th Cong., 1st Sess., Congressional Globe 877 (February 16, 1866) (Sen. Hendricks noting that the female population of the six New England states exceeded the male population by 50,000, while in the six agricultural states of the west—Ohio, Indiana, Kentucky, Illinois, Missouri and Iowa—the male population exceeded the female population by 297,758). Although there was support for a pure electoral equality model that would assign congressional seats on the basis of potential voters, a majority did not favor that approach, and ultimately some senators were willing to compromise to obtain the necessary two-thirds vote and present the issue to the states for ratification. 39th

[9] Women were generally ineligible to vote in 1866. Universal female suffrage awaited the ratification of the Nineteenth Amendment in 1920.

Cong., 1st Sess., Congressional Globe 2986 (June 6, 1866) (Sen. Sherman: "I am bound on that question to defer my own opinion to that majority who differ from me in order to secure the passage of this resolution.") In doing so, they coalesced around the proposal to base representation on "persons," which resulted in a total population or representational equality model. *Chen* 206 F.3d at 527, n.19.

The bottom line is that the framers of the Fourteenth Amendment expressly considered a representational scheme that would have excluded non-citizens and other persons who were not eligible to vote, essentially the same sort of apportionment system urged today by Mr. Lepak. In the end, though, the Congress chose to base representation in the House of Representatives on the total population in each state, which had the effect of counting children, non-citizens, and other persons who were not eligible to vote, when determining how to allocate seats in the House of Representatives among the several states. The way the framers accomplished this result was by drafting section 2 in terms of "persons" rather than using some less inclusive noun such as voters or citizens. The term "persons" was very deliberately chosen for the specific purpose of ensuring an apportionment base composed of the total population, which the framers were well aware included persons who were not eligible to vote. More recent members of Congress share this understanding as the statutory scheme governing the way the census is conducted reflects the Fourteenth Amendment framework as it directs the

Census Bureau to complete "[t]he tabulation of *total population by States . . . as required for the apportionment of Representatives in Congress* among the several States." 13 U.S.C. § 141(b) (emphasis added).

Admittedly, section 2 of the Fourteenth Amendment governs apportionment of congressional seats and does not apply to city council positions. Nevertheless, it is highly relevant to the issues in this case. First, given the language and background of section 2 of the Fourteenth Amendment, it is not possible to conclude that our fundamental concepts of representation are based on electoral equality rather than representational equality. Second, the framers' very careful and deliberate choice to use the noun "person" in section 2 gives us insight as to what they intended when they used the same noun in section 1—in fact, in the immediately preceding sentence. When the framers were so careful to use the term "persons" to make it clear that apportionment was to be conducted on a representative rather than an electoral model, it is inconceivable that they could use the same word in the preceding sentence and expect it to have the opposite effect. While the language of the Constitution may provide flexibility so that local governmental bodies may have some discretion in choosing an apportionment base, it is not so flexible that the same words mean one thing in one section and just the opposite one sentence later.

V. The city has a rational basis for choosing total population as an apportionment base.

The Equal Protection Clause does not require precise population equality among districts, and deviations are measured on a rational basis standard. "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The Court was speaking of deviations from strict population-based apportionment to recognize history, economic, and similar interests. *Id.* at 579-80. Even though the Court was utilizing the relatively relaxed rational basis standard, it was reluctant to find a rational basis for permitting deviations from population equality to enhance representation for sparsely populated areas or to provide a representative for small communities that had historically had their own legislator.

A. An equal population model recognizes the representative's role in providing service to the residents of the district.

Here the issue is not use of a representation model that considers factors other than population. Rather, the question is what sort of population is to be considered. Certainly, there is a rational basis for seeing that all the residents of a district are included in the apportionment base. Judge Kozinski, for example, even though he preferred a different standard, admitted that a system based on equal

numbers of people "serves important purposes." *Garza*, 918 F.2d at 781. It is well recognized that a citizen-voting-age apportionment plan would disadvantage those electoral districts with large total populations, but a smaller number of potential voters, by reducing constituents' access to their elected officials and government services. In order to equalize the citizen-voting-age population within the City of Irving, certain districts (in particular, District 1) would be forced to bear an overall population disparity in comparison to neighboring districts. Courts have acknowledged that all persons within those overcrowded districts, including registered voters, would then suffer diminished access to local governmental resources. *See Garza v. County of Los Angeles*, 918 F. 2d at 774 ("[r]esidents of the more populous districts [would] have less access to their elected representative.") *See Chen*, 206 F.3d at 525 ("the area with the smaller number of voters will find itself relatively disadvantaged. Despite the fact that it has a larger population—and thus perhaps a greater need for government services than the other community—it will find that its political power does not adequately reflect its size.")

Part of an elected representative's duty is to see that government addresses the concerns of his or her constituents and, to the extent that there is an allocation of government resources among the different parts of the city, to see that his or her district receives its fair share. Rec. 545-48. Those needs and concerns are held by

residents of the district without regard to whether they are eligible to vote. *Id.* To the extent that a district is significantly larger than other districts, the elected official's representational role is compromised. *Id.*

B. An equal population model is consistent with the model the Constitution mandates for the representative branch of the federal government.

It can hardly be doubted that a city's choice of a representational equality model for its city council districts is rational given that the Constitution itself uses representational equality as the basis for apportioning congressional seats. U. S. CONST. amend. XIV, § 2. Claims that the Constitution mandates a system with equal numbers of voters ring hollow when congressional seats are allocated according to the whole number of persons with children, non-citizens and other persons ineligible to vote included in the apportionment base even though they cannot vote. The framers of the Fourteenth Amendment embraced and required a representational equality system for the House of Representatives. It is hardly conceivable that they would understand that the theory of representation they mandated for the Congress is constitutionally suspect and forbidden when applied to the Irving City Council.

C. The model urged by plaintiffs does not make rational choices as to which persons should be included in the apportionment base and which persons should be excluded.

Indeed, it seems much more rational to have an apportionment base that includes the entire population than to have one that, as urged by the plaintiff, picks and chooses in a way that includes persons eligible to vote as well as some who are not eligible. Certainly, the system the plaintiffs espouse has little to do with its supposed rationale—equalizing voting power. In Texas, persons who reside in a district but who are not eligible to register to vote are (1) those who are not yet 18 years of age, (2) those who are not U. S. citizens, (3) those who have been adjudicated to be mentally incompetent, and (4) those who have been finally convicted of a felony and have not yet discharged their sentence, including any period of probation or parole. TEX. ELEC. CODE § 13.001(a). By claiming a constitutional requirement that citizen-voting-age population be used as the apportionment base, the plaintiffs argue that the Constitution mandates that the city delete the first two groups—children and non-citizens—from the apportionment base when drawing districts while including persons adjudged to be mentally incompetent or convicted of a felony. It is unclear exactly what theory of representation the plaintiffs espouse that mandates considering felons and persons adjudicated to be incompetent to be counted for representation purposes while children and resident non-citizens are excluded. *See Kalson v. Paterson*, 542 F.3d

281, 289 (2nd Cir. 2008) (noting that a theory of representation based on equally weighted votes is not accomplished by a voting-age population apportionment base because it fails to exclude felons and non-citizens). Certainly, no rational basis is apparent for the plaintiffs' picking and choosing among those persons ineligible to vote to determine which will be in the apportionment base and which will be excluded.

VI. Using citizen-voting-age population as the apportionment base is not a practical option.

The City of Irving, like almost every other jurisdiction in the United States, draws its single-member districts on the basis of total population. Rec. 526-29. *See* Joshua M. Rosenberg, *Note, Defining Population for One Person, One Vote*, 42 LOY. L.A.L. REV. 707, 723 (2009) (*Burns* is the only case the Supreme Court has upheld where the apportionment scheme was based on an equal number of voters rather than an equal number of people). The Department of Justice, appearing in this case as an amicus, indicated that 340 redistricting plans were submitted to the Department by the State of Texas and counties and municipalities within the state for review under section 5 of the Voting Rights Act (42 U.S.C.

§ 1973c) following the 2000 census. All 340 used total population as the apportionment base.[10] Rec. 821-22.

There is a reason that total population is the virtually universal standard. Total population, which is reported at the smallest unit of census geography—the census block—is highly accurate. Rec. 441. Since the constitutional imperative is to draw districts that are equal, having accurate data that is reported at a small unit of geography makes it possible to make an accurate assessment of the relative size of each district and, hence, to conclude whether the districts are, in fact, equal.

On the other hand, with citizen-voting-age population which is the apportionment base Mr. Lepak claims is constitutionally required, it is simply not possible to tell if the districts are balanced. The available data are so imprecise that we have no good idea exactly how many citizens of voting age reside in a district. The city's motion for summary judgment was accompanied by an affidavit and report from its expert, Dr. Steven H. Murdock. Rec. 431-521. Among his impressive list of credentials, Dr. Murdock is a distinguished demographer and is the immediate past Director of the U.S. Census Bureau. Rec. 467. Dr. Murdock explained that total population data come from the comprehensive census-head-count, which attempts to obtain information on every

[10] In 57 of those submissions, the jurisdiction omitted the prison population, but otherwise used total population. Rec. 822. In Texas, inmates in penal institutions are not considered residents of the jurisdiction in which the penal institution is located. TEX. ELEC. CODE § 1.015(e).

household and person in the country. Rec. 436-37. Because the head-count-data questionnaire includes only a small number of items, one of which is total population, it was known as the "short form." Rec. 437. In the 2000 and several earlier censuses, questions on more detailed characteristics of the population, including citizenship, were included on the "long form," which was sent to about one-in-six households. *Id*. It was conducted at the same time as the primary census and, thus, provided of a snapshot of the population on April 1 of the decennial census year. *Id.* Following the 2000 census, the Bureau replaced the long form with the American Community Survey (ACS), which is taken continuously and reported for a summation period of either one, three, or five years. Rec. 439. While the number of households sampled over five years is expected to be between 11 and 12 million, that is only about half the number of households that would receive the long form, which was keyed to a single day. Rec. 439. Although the overall sample size is large, it is spread over a long period of time and results in a substantial sampling error when one looks to specific groups (*e.g.,* voting-age Hispanic citizens) and at the relatively small geographic areas that are typically used when drawing districts. *Id.*

When assessing local governmental body districts for compliance with the one person-one vote, the maximum permissible deviation between the largest and the smallest district will typically be ten percent. *Brown v. Thomson*, 462 U.S.

835, 842-43 (1983). Using a total population apportionment base, that is an easy number to compute because we know the precise number of people in each district. Total population comes from the 100 percent headcount, is reported at the block level, and is highly accurate. Rec. 441. On the other hand, if we attempt to balance districts using citizenship numbers, which is what Mr. Lepak insists is required, we have no real way of knowing if the districts are in balance. While we can compute a number, it is necessarily qualified due to sampling error and will be bounded by a margin of error showing a range of values within which we can be 90 percent confident that the actual value falls. Dr. Murdock used studies from the census on the accuracy of the ACS data to see how the expected margins of error would apply to districts drawn in Irving. As Table 4 of Dr. Murdock's Report shows, using the available data from which citizenship numbers are derived, we can be 90 percent confident that the number of citizens in District 1 falls somewhere between 17,698 and 22,932 or a range of 5,234 persons. Rec. 465. The ranges for the other five districts are 2,344, 1,786, 3,216, 2,778, and 2,984.[11] *Id*. If we cannot tell with any reasonable degree of certainty how many citizens

[11] Table 4 of Dr. Murdock's report, which is the source of these numbers, assumes that American Community Survey error rates for Harris County can be applied to Irving and Dallas County. Rec. 440. The error rates come from a study conducted by the Census Bureau to measure the accuracy of the multi-year American Community Survey as compared to the census long form, which was the prior source of citizenship data. *Id.* Dr. Gaddie, the plaintiffs' expert, did not accept the assumption that the Harris County error rates can be applied to Irving. Rec. 268. At his deposition, though, he admitted that Harris County was the most comparable of the counties studied to Dallas County. Rec. 530-31.

there are in each district, we have no way of knowing if the districts are balanced in size. How is it possible to say if a district that we are relatively sure has somewhere between 26,062 citizens and 28,406 citizens has a roughly equal number of citizens to one that has somewhere between 23,272 citizens and 26,050 citizens?[12] They could be within 12 citizens of each other. Or, the difference could be 5,134. There is no reasonably accurate way to know if the districts are in population balance. As Dr. Murdock concludes, "[citizen-voting-age population] cannot be used in actually drawing population-balanced districts. . . . [The data sources from which citizen-voting-age population are derived] do not produce the data with sufficient precision and for small enough geographic areas to be used in drawing districts." Rec. 441-42.

Using total population rather than citizen-voting-age population as the apportionment base is an eminently reasonable choice if for no other reason than the fact that we have accurate data to use to draw population-balanced districts, while we have no sufficiently accurate source of citizen-voting-age population that

[12] These are the expected ranges, at a 90 percent confidence level, for Districts 3 and 6 using the error ratio for the American Community Survey, which is the data source we will have to draw districts if required to use citizen-voting-age population as the apportionment base. Rec. 465.

would permit us to conclude that districts drawn using that measure are in population balance.[13]

CONCLUSION

This court has previously ruled in *Chen v. City of Houston* that the decision to balance districts on total population as opposed to some other measure such as citizen-voting-age population is a political one in which the courts should not interfere. The City of Irving's decision to use total population as the apportionment base is consistent with the virtually universal practice in the state and nation and is not precluded by the Fourteenth Amendment. Accordingly, the district court's judgment should be affirmed.

[13] Mr. Lepak contends that *Chen*'s holding affording districting authorities the option not to use citizen-voting-age population as the apportionment base is somehow inconsistent with *Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009), which requires consideration of citizen-voting-age population when performing the threshold analysis required by *Thornburg v. Gingles*, 478 U.S. 30 (1986). Appellants' Brief at 31, n. 24. There is, however, no inconsistency as the companion is akin to comparing apples and oranges. The use of citizen-voting-age population in *Reyes* and the Fifth Circuit cases preceding it is a means of establishing a minority group's potential to elect representatives in the absence of the challenged electoral structure. *Gingles*, 478 U.S. at 50, n. 17. It is essentially a measure of standing and not a necessary basis for drawing districts. Further, the issues regarding the accuracy of the data are not the same. All that is necessary in the *Reyes* analysis is to determine if a group's citizen-voting-age population is above 50 percent. That is a far cry from needing to know the precise citizen-voting-age population for each district and to know the citizen-voting-age population for the very small geographic areas that must be combined when constructing districts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2011, I electronically submitted this Brief of Appellee to the clerk of court for the U.S. Court of Appeals, Fifth Circuit using the electronic case filing system of the court, and that a true and correct copy of this document was served upon all counsel of record listed below by electronic service through the Court's ECF system pursuant to the applicable Rule(s) and a bound paper copy of this brief was mailed to all counsel of record listed below by certified mail

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 7,013 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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