NO. 11-10194

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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RESPONDENT-INTERVENORS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons and entities, as described in the fourth sentence of Local 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

Respondent-Intervenors submit that oral argument is warranted in this case because it raises complex issues under the Equal Protection Clause of the U.S. Constitution in the context of voting and representation. Oral argument will assist the Court in interpreting the principles at issue and applying controlling precedent in the specific context of this case.

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STATEMENT OF THE CASE

This case involves an attempt to invalidate a redistricting plan adopted by the City of Irving, Texas for election of its city council members. Appellants filed this case nine days after the district court enjoined Irving's at-large election system pursuant to the federal Voting Rights Act, and ordered into place an agreed-upon remedial redistricting plan ("redistricting plan") in *Benavidez v. City of Irving*, Case No. 3:07 CV 1850-P (N.D. Tex. 2010).[1]

Appellants claim that the City's balancing of total population in its redistricting plan, pursuant to long-standing U.S. Supreme Court precedent, is unconstitutional. Following discovery and cross-motions for summary judgment, the district court concluded that Irving's redistricting plan is constitutional and entered summary judgment for the City.

STATEMENT OF FACTS

A. *CITY OF IRVING*

Irving is a city of approximately 215,000.[2] Located in Dallas County and to the northwest of the City of Dallas, Irving is the 13th largest city in Texas.[3]

Compared to the state average, Irving residents in 2000 were more highly educated, had a higher per capita income, and owned more valuable homes.[4]

[1] USCA5 198-200.
[2] USCA5 641.
[3] USCA5 641.

Irving is a growing city that has become increasingly racially diverse over the past 20 years. According to the 2000 Census, Irving's demographic composition closely reflects that of the State of Texas.[5] Whites comprise 64% of Irving's population.[6] African Americans comprise 10% of the population, Asian Americans comprise 8% of the population and Hispanics (of all races) comprise 31% of the population.[7]

Irving's population includes immigrants from around the globe. According to the 2000 Census, the foreign-born residents living throughout the City of Irving included 13,711 individuals from Asia, 1,863 from Europe 2,164 from Africa, and 32,147 from Latin America.[8] The majority of Irving residents born abroad and living in the U.S. for more than 20 years are U.S. citizens.[9]

Irving's neighborhoods are as diverse as the city itself. Irving's downtown area has been revitalized over the past 10 years.[10] Formerly in decline, today the area is vibrant and growing, due to the arrival of new residents and businesses.[11]

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[4] USCA5 642-43.
[5] USCA5 642.
[6] USCA5 642.
[7] USCA5 644-45.
[8] USCA5 646.
[9] USCA5 646.
[10] USCA5 629-30, ¶ 12 (Declaration of Robert Moon).
[11] USCA5 629-30, ¶ 12.

However, the infrastructure of the downtown area and its surrounding neighborhoods is older than the rest of the City.[12]

The urban neighborhoods near downtown include older housing stock and apartment complexes.[13] Residents of the downtown area tend to be low- to middle-income and many have immigrated to the United States.[14,15] In the neighborhoods closest to downtown, the majority of the population is Hispanic.[16]

In contrast, Irving's more suburban neighborhoods, including two well-known master-planned communities – Las Colinas and Valley Ranch – feature newer housing and infrastructure. These areas advertise beautiful homes, quality schools and immaculate parks.[17] Irving's suburban neighborhoods are diverse but predominantly White non-Hispanic in their population.[18]

Approximately one in four Irving residents is a child under the age of 18.[19] However, the child population is not evenly distributed in Irving. The

[12] USCA5 629-30, ¶ 12; *see also* USCA 5 634, ¶ 14 (Declaration of Aurora Lopez) ("The structures and buildings in District 1 are older.").
[13] USCA5 630, 634.
[14] USCA5 597, ¶ 11 (Declaration of Tex. State Rep. Rafael Anchia).
[15] USCA5 629-30, ¶¶ 12, 14 ("The people in District 1 tend to rely more on public transportation when compared to northern Irving."); *see also* USCA 5 635, ¶¶ 15, 18 ("In District 1, I see many residents relying on public transportation.").
[16] USCA5 647-49; *see also* USCA5 650.
[17] USCA5 663.
[18] USCA5 647, 650.
[19] USCA5 642.

neighborhoods closer to downtown include a greater proportion of children when compared to neighborhoods farther from the city's core.[20]

B. *IRVING'S REDISTRICTING PLAN*

Irving's remedial redistricting plan apportions Irving residents into six single-member districts. The remaining two members of the city council and the Mayor are elected at-large.[21] In compliance with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, each district in the redistricting plan contains approximately 31,935 people, according to the 2000 Census.[22] The redistricting plan, therefore, relatively equalizes total population across the six single member districts in the Plan.[23] Irving City Council District 1 contains a sixty-three percent (63%) Hispanic voting age population according to the 2000 Census.[24] The U.S. Department of Justice precleared the redistricting plan on February 3, 2010.[25]

Irving used the redistricting plan for the first time in its May 8, 2010 municipal election.[26] All city voters had the opportunity to cast a ballot in the

[20] USCA5 647 (showing populations per district), 650 (map of districts).
[21] USCA5 667.
[22] USCA5 647-649.
[23] USCA5 647-649.
[24] USCA5 647-649.
[25] *See* USCA5 198 (Final Judgment, *Benavidez v. City of Irving*, No. 07-CV-01850-P (Dkt. No. 89) (N.D. Tex. Feb. 3, 2010), at 1).
[26] USCA5 668-81; *see also* USCA5 199.

Place 2 race, since Place 2 is elected citywide.[27] Voters in single member Districts 1 and 7 also cast ballots for their district representatives.[28] On May 14, 2011, Irving held an election for the position of mayor and for council members in Districts 3 and 5. Districts 4 and 6 do not have elections scheduled until 2012.[29]

The U.S. Census Bureau released new population data for Irving, based on the 2010 Census, earlier this year.[30] Following the release of Census 2010 data, Irving must redistrict its City Council plan to comply with the equal population rule of the Fourteenth Amendment.

STANDARD OF REVIEW

The Fifth Circuit "review[s a district court's grant of summary judgment] *de novo*, applying the same substantive test set forth in Rule 56." *Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001) (citing FED. R. CIV. P. 56). Significantly, "[t]he evidence and inferences from the summary judgment record are viewed in the light most favorable to the nonmovant." *Minter v. Great Am. Ins. Co. of N.Y.*, 423 F.3d 460, 465 (5th Cir. 2005).

SUMMARY OF THE ARGUMENT

Appellants maintain that Irving's remedial redistricting plan is

[27] USCA5 672.
[28] USCA5 671-72.
[29] *See* USCA5 199.
[30] USCA5 700-01, at 57:18-58:20.

unconstitutional because it balances population between the election districts. This claim is baseless. In fact, state and local jurisdictions throughout the United States, pursuant to long-standing U.S. Supreme Court precedent, apportion population equally across districts to ensure equality in elections and representation.

Appellants' malapportionment claim, which seeks to force apportionment of population based only on citizens of voting age, is misleading and disingenuous. Appellants do not – and cannot – point to a single case that required or permitted apportionment based on citizen voting age population. Appellants cannot point to a single redistricting plan in another jurisdiction that uses citizen voting age population as an apportionment base. In short, there is simply no legal basis for Appellants' proposed compelled exclusion of broad categories of the population from the apportionment base.

However, if successful, Appellants' claim will strip Latino voters and their neighbors of political representation, as well as an equal opportunity to participate in the political process and elect candidates of their choice. Appellants' ultimate goal in this "test case" is to overturn almost fifty years of established precedent in order to create population-imbalanced districts and to preclude remedies for violations of the Voting Rights Act.

ARGUMENT

A. *INTRA-CIRCUIT STARE DECISIS REQUIRES THE COURT TO FOLLOW* CHEN V. HOUSTON

As a preliminary matter, *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) governs this case, and no panel of the Fifth Circuit may overrule *Chen*.

In the district court's reasoned decision, it noted that "[a]t the core of this dispute is whether the City is constitutionally permitted to draw districts based on equal populations as opposed to equal numbers of voters."[31] The district court then held that the Fifth Circuit already had "addressed this precise issue [in] *Chen v. Houston*."[32] Awarding summary judgment to the City of Irving, the Court relied on *Chen*, stating that "the *Chen* court held that the choice between using total population or CVAP should be left to the legislative body for determination."[33]

This appeal presents the exact same issues as those already decided in *Chen*, and Appellants specifically (and improperly) request that this panel overrule *Chen*. In *Chen*, the plaintiff-appellants "claim[ed] that the district court erred as a matter of law when it measured the City's compliance with the one-person, one-vote requirement using total population rather than figures that accurately reflected the distribution of potentially eligible voters in the City." 206 F.3d at 505. Appellants here contend that the one-person, one-vote requirement forces the City of Irving to

[31] USCA5 1426.
[32] USCA5 1428.
[33] USCA5 1428.

equalize citizen voting age population, not total population, within districts. (Appellants' Brief, filed Apr. 12, 2011 [hereafter, "AB"], at 17-18.) Appellants urge this panel to "overrule" *Chen* as "bad law" throughout their briefing. (*See e.g.*, *id.* at 13 ("To the extent *Chen* stands for this proposition, however, it is bad law and must be overruled."); *id.* at 21 ("[*Chen*] is flawed and must be reversed."); *id.* at 21 ("Contrary to the holding in *Chen* . . . ."); *id.* at 26 ("This argument is deeply flawed . . . ."); *id.* at 30 ("[C]ontrary to the premise of the court's conclusion in *Chen* . . . ."); *id.* at 36 ("Under *Chen*'s flawed interpretation of the 'one person, one vote" requirement . . . ."); *id.* at 37 ("Nor can *Chen*'s 'political choice' doctrine be squared with . . . ."). This panel is without the power to overturn *Chen*, and Respondent-Intervenors urge the Court to affirm on these grounds.

Given that the Fifth Circuit already has ruled regarding the constitutionality of using total population to draw election districts, Appellants may not secure reversal here. "The rules of intra-circuit stare decisis require [a Fifth Circuit panel] to abide by a prior panel decision until the decision is overruled . . . by the Supreme Court or by the Fifth Circuit sitting en banc." *United States v. Mask,* 330 F.3d 330, 334 (5th Cir. 2003); *see also United States v. Garcia Abrego*, 141 F.3d 142, 151 n.1 (5th Cir. 1998) ("Garcia Abrego urges us to 'reconsider' our decision in *Cervantes-Pacheco*. However, in the absence of any intervening Supreme Court

or en banc circuit authority that conflicts with *Cervantes-Pacheco* . . . we are bound by our decision in that case."); *Ryals v. Estelle*, 661 F.2d 905, 906 (5th Cir. 1981) ("It has long been a rule of this court that no panel of this circuit can overrule a decision previously made by another."). Intra-circuit *stare decisis* applies whether the prior ruling is "right or wrong" in the estimation of the current panel. *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir. 1998). Further, "where two previous holdings or lines of precedent conflict, the earlier opinion controls and is the binding precedent in the circuit." *Id.* (quoting *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (1991) (internal quotations and citation omitted)); *see also Crowley Maritime Corp. v. Panama Canal Comm'n*, 849 F.2d 951 (5th Cir. 1998) ("We are bound by *Alcorn County* [*v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984)], whose reference to older precedent controls where an intra-circuit conflict exists."). Thus, even if this panel were to hold that the Constitution requires equalization of citizen voting age population across districts, the conflicting decision in *Chen* would control.

For these reasons, Respondent-Intervenors respectfully request that this Court affirm the district court's opinion.

B. *ESTABLISHED LAW REQUIRES APPORTIONMENT BASED ON EQUAL POPULATION*

Appellants' arguments on appeal fail for two reasons. First, Appellants blatantly ask for relief that contravenes clearly established U.S. Supreme Court and Fifth Circuit precedent. *See 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."); *see also Garza v. Cnty. of L.A.*, 918 F.2d 763, 774-76 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *Chen*, 206 F.3d at 522. As discussed below, the established doctrine of equalizing population in redistricting plans requires equalization of total population when use of different criteria would result in substantial inequality. No court has ever mandated what Appellants seek here – equalization based on selective population characteristics that only partially reflect voter eligibility and that discriminate against voters living in neighborhoods containing high proportions of children and racial minorities. Second, Appellants' desired remedy would itself violate the Equal Protection Clause of the Fourteenth Amendment by selectively employing apportionment criteria to disadvantage Latinos in the jurisdiction.

1. Established Law Requires the Equal Distribution of Population Among Districts

Appellants are incorrect in asserting that any of the cases they cite support their contention that district population must be equalized based on citizen voting

age population ("CVAP"). Contrary to Appellants' assertion, Irving's redistricting plan – which distributes total population relatively equally among the city council districts – comports with the constitutional mandate of equality in the distribution of population.

Appellants grossly misconstrue established precedent on the rule of apportionment based on equal population. The Supreme Court and lower courts have long held that apportionment of population in redistricting plans is based on total population.

In *Baker v. Carr*, the Supreme Court held for the first time that malapportionment claims under the Fourteenth Amendment are justiciable. 369 U.S. 186 (1962). The Court allowed voters in Tennessee, which had not redistricted its state legislature since 1901, to sue the state to enforce the Tennessee Constitutional mandate that legislative districts be apportioned based on population from the U.S. Census.

In 1964, the Supreme Court interpreted the Fourteenth Amendment's Equal Protection Clause to mandate that congressional districts be equal in population. *See Wesberry v. Sanders*, 376 U.S. 1, 9 (1964) ("[N]o matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives."). Later that same term, the Supreme Court interpreted the Equal Protection Clause also to require that state legislative

and smaller jurisdiction districts be "as nearly of equal population as is practicable" with respect to total population. *Reynolds*, 377 U.S. at 577.

The historical line of malapportionment cases struck down redistricting plans that drew districts based on improper or irrational criteria, such as geographic territory, instead of the total population. The Court in *Wesberry* and *Reynolds* confronted redistricting plans that sought to enhance the voting power of rural as opposed to urban areas of the state. In response, the Court created the rule requiring equal apportionment of population in order to bring the focus onto the individuals in the districts as opposed to the geographic characteristics of the areas in which they lived.

In ruling that malapportionment claims could be heard in the courts, the Supreme Court focused on the concept of malapportionment as arbitrary and irrational state action:

> Their constitutional claim is, in substance, that the 1901 statute [violates] the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties.

Baker, 369 U.S. at 207-08 (finding that claims of malapportionment in state legislative districts are justiciable) (citations omitted).

In rare instances, and only based on special circumstances, the Supreme Court has approved an apportionment that is based on a measure other than total population. *See Burns v. Richardson*, 384 U.S. 73, 93 (1966) (allowing apportionment based on voter registration – not citizen voting age population – "only because [it would not produce a result that is] substantially different from that which would have resulted from the use of a permissible population basis"). At the same time, the Supreme Court has consistently required and approved redistricting plans based on total population. *See, e.g.*, *Wesberry*, 376 U.S. at 2; *see also Reynolds*, 377 U.S. at 577 (holding that the Equal Protection Clause requires that legislative and smaller political subdivisions be "as nearly of equal population as is practicable" in total population).

As a remedy for irrational or improper redistricting, such as plans that favored urban over rural areas, plans that were never updated after subsequent censuses, or plans that distributed representation to counties instead of population, the Court has always turned to equal population as the neutral standard.

2. Appellants Can Point to No Legal Precedent Requiring the Remedy They Seek

Appellants' claim that apportionment should be based only on adults who are citizens,[34] and Appellants' similar claim that the Supreme Court's references to "total population [are] a proxy for citizens of voting age," (*id.* at 12), are

[34] *See, e.g.*, AB, at 11-13.

unsupported by any legal precedent. In fact, Supreme Court cases, including *Wesberry* and *Reynolds*, refer to voters, citizens and people interchangeably. *See Chen*, 206 F.3d at 526 (noting that "the terms [are] used interchangeably . . .").

None of the Supreme Court's malapportionment cases have ever held that variations across districts in the eligibility of constituents to vote – including variations in age or citizenship – justify deviating from the rule requiring equal total population in districts. Furthermore, Appellants cannot point to a single case that required or permitted apportionment based on CVAP. On the contrary, in *Gaffney v. Cummings*, 412 U.S. 735, 747 (1973), decided seven years after *Burns*, the Supreme Court acknowledged that apportionment based on total population may lead to disparities in the number of eligible voters across districts, but the Court did not rule that these disparities are unconstitutional:

> So, too, if it is the weight of a person's vote that matters, total population -- even if stable and accurately taken -- may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters. The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States.

Gaffney, 412 U.S. at 746-47 (footnote omitted). As this language illustrates, the Supreme Court was not concerned by the inevitable variations in voter eligibility across localities and political subdivisions. *See also Garza*, 918 F.2d at 775-76, *cert. denied*, 498 U.S. at 1028 ("[*Gaffney*] made no intimation that . . . disparities

[in the size of the eligible voting population among districts] would render . . . apportionment schemes constitutionally infirm."). *Gaffney*, therefore, supports apportionment based on total population even when it results in disparities across electoral districts.

Appellants' selective reading of the Supreme Court's language in these cases to support their claim of CVAP apportionment is as disingenuous as suggesting that the Court's references to "one man one vote"[35] dictate the exclusion of women from the apportionment base. In fact, when asked if there are any redistricting plans that use an apportionment base other than total population, Appellants' own expert witness could only point to Hawaii, which, because of its large military and tourist population, has been allowed to use voter registration – not CVAP – as a basis for apportionment rather than total population.[36] However, the *Burns* fact pattern was unique; the Supreme Court approved Hawaii's apportionment of population based on registered voters because the alternative, inclusion of the many transient non-resident military personnel and tourists who were not constituents of Hawaii's elected representatives, would have distorted the true picture of the constituent population. 384 U.S. at 94-95.

Appellants' reliance on *Hadley v. Junior College District* is similarly misplaced. In *Hadley*, Appellants challenged a Missouri redistricting law that

[35] *See Moore v. Ogilvie*, 394 U.S. 814, 819 (1969).
[36] USCA5 689-90, at 43:20-44:4.

distributed junior college trustees to each local school district based on which range of population the school district fell into, as opposed to distributing trustees to school districts based on population. *Hadley v. Jr. Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 51-52 (1970). As a result, one urban school district, which contained approximately 60% of the enumeration in the junior college district, received only 50% of the trustees. *Id.*

In *Hadley*, the Supreme Court struck down a redistricting law which used population ranges – instead of strict population – as an apportionment basis. The Court found that the use of population ranges systematically and irrationally discriminated against the more densely populated urban areas:

> Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the Act *necessarily results in a systematic discrimination against voters in the more populous school districts*. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. . . . Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case. We would be faced with a different question if the deviation from equal apportionment presented in this case resulted from a plan that did not contain a *built-in bias in favor of small districts*, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts.

Id. at 57-58 (emphasis added) (footnote omitted).

Hadley, therefore, supports the proposition that apportionment should be based on total population. As a result of the Supreme Court's decision in *Hadley*, today Missouri law requires that each community college district must contain:

> at least two but not more than six subdistricts which are to the extent possible so apportioned on the basis of population that the population of any such subdistrict divided by the number of trustees to be selected therefrom substantially equals the population of any other subdistrict divided by the number of trustees to be selected therefrom.

See MO. REV. STAT. § 178.820(2).

Nothing in *Hadley* supports Appellants' claim that CVAP should be used as an apportionment base. In fact, the case stands for the opposite proposition. The Supreme Court in *Hadley* addressed a redistricting system in which "trustees [were] apportioned among the separate school districts on the basis of 'school enumeration,' defined as the number of persons between the ages of six and 20 years, who reside in each district." *Hadley*, 397 U.S. at 51. Thus, in *Hadley* the Supreme Court mandated that the apportionment be tailored more closely to the total *child population* than it had previously been.

The Supreme Court observed, but was not troubled by the fact that apportionment for Missouri junior colleges was based almost exclusively on ineligible voters – specifically, children "between the ages of six and 20 years."

Id.[37] Thus, the Court permitted the State in *Hadley* to do precisely what Appellants in Irving claim is unconstitutional: to include in the apportionment process children ineligible to vote.

Plaintiffs' reliance on *Board of Estimate of City of New York v. Ponterio*, 489 U.S. 688 (1989) is similarly unavailing. The Court in that case did not consider a situation in which total population and CVAP figures diverged significantly. Instead, it upheld the Second Circuit's "focus on population per representative." *Id.* at 692; *see also id.* at 698 ("We agree with the reasons given by the Court of Appeals that the population-based approach of our cases from *Reynolds* through *Abate* should not be put aside in this litigation."). Specifically, densely populated Brooklyn was entitled to more Board of Estimate members than under the current scheme, just as more densely populated cities in the South were entitled to more representatives in *Reynolds* and *Wesberry*. *Id.* at 690.

The lower courts have uniformly rejected claims that the Equal Protection Clause mandates apportionment that excludes non-citizens. For example, in *Chen*, which this Court must follow, the Fifth Circuit expressly rejected a challenge to apportionment based on the claim that the Fourteenth Amendment requires the use

[37] In *Hadley*, the Supreme Court acknowledged that "[t]here is some question in this case whether school enumeration figures, rather than actual population figures, can be used as a basis of apportionment," but found that "[t]here is no need to decide this question at this time since, even if school enumeration is a permissible basis, the present statute fails to apportion trustees constitutionally." 397 U.S. at 58 n.9.

of CVAP. *Chen*, 206 F.3d at 528. In *Chen*, the Court recognized that CVAP apportionment would disadvantage communities with fewer eligible voters:

> 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. In addition, it could be argued that because the representative chosen from such a district will have a larger number of constituents, the ability of her constituents-whether or not they are potential voters-to petition and voice their opinions will be proportionately reduced.

Id. at 525 ("If one accepts the principle of representational equality—that representatives are chosen by a district's voters, but should represent all persons resident therein—these results may be unacceptable."). Although the Court acknowledged that "[t]he propriety under the Equal Protection Clause of using total population rather than a measure of potential voters . . . presents a close question," it upheld the use of total population for apportionment in the redistricting plan at issue in *Chen* and rejected a CVAP malapportionment challenge. *Id.* at 528. The CVAP malapportionment claim stubbornly advanced by Appellants in this case is identical to the claim rejected in *Chen*.[38]

[38] Alternatively, if the Court holds that apportionment based on total population is not constitutionally required under *Chen* or *Reynolds*, Respondent-Intervenors respectfully submit that the City of Irving has the right to select the apportionment base for its redistricting plan. *See Daly v. Hunt*, 93 F.3d 1212, 1225 (4th Cir. 1996) (rejecting challenge to apportionment based on total population and holding that "[t]he decision to use an apportionment base other than total population is up to the state and [] courts should not interfere unless the apportionment base is unconstitutionally discriminatory on its face or produces an unacceptably wide variation from total population equality."); *see also Chen*, 206 F.3d 502 at 528 ("[I]n the face of the lack of

3. Appellants Seek to Force the Court to Adopt a Rule of Apportionment That Itself Would Violate the Equal Protection Clause of the Fourteenth Amendment

Although Appellants claim to seek equalization of the weight of their votes, they target only certain individuals for exclusion from the apportionment base, ignoring other classes of persons ineligible to vote.

In relevant part, the Texas Election Code provides:

> To be eligible for registration as a voter in this state, a person must:
> (1) be 18 years of age or older;
> (2) be a United States citizen;
> (3) not have been determined mentally incompetent by a final judgment of a court;
> (4) not have been finally convicted of a felony or, if so convicted, must have:
> (A) fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or
> (B) been pardoned or otherwise released from the resulting disability to vote; and
> (5) be a resident of the county in which application for registration is made.

TEX. ELEC. CODE § 13.001 (emphasis added).

Age and citizenship are only two requirements for voter eligibility. Other criteria include domicile (*e.g.*, college students who are domiciled or registered to

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more definitive guidance from the Supreme Count, we conclude that this eminently political question has been left to the political process."). Since "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court," the Court is "bound to respect [Irving's] apportionment choices." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (citations omitted).

vote outside the jurisdiction are not eligible to vote), having completed any period of probation or parole following a felony conviction, and mental capacity.

Appellants' theory of malapportionment fails entirely to consider the impact of all voter eligibility requirements on the redistricting plan. For example, Appellants fail to take into account the hundreds of students living in the dormitories of the University of Dallas, a private college located in Irving. Despite the fact that students residing in the dormitories at the University of Dallas may be domiciled outside of Irving, and thus ineligible to vote in Irving elections, Appellants do not seek to equalize voting strength by taking this aspect of voter ineligibility into account.

Appellants similarly do not seek to exclude convicted felons or the mentally incompetent from apportionment. Instead, Appellants' theory of malapportionment selectively targets only two groups – children and non-U.S. citizens – for exclusion from the apportionment base, while keeping other ineligible populations within the apportionment base.

There can be no dispute that CVAP is not an approximation of the potential electorate. Even Appellants' expert, Dr. Gaddie, aptly stated, "[t]here is no

scientific rationale" for choosing CVAP over voter registration as the most refined measure of potential electorate.[40]

Appellants' selective exclusion of certain classes of people from the apportionment base, if performed by Irving, would violate the Equal Protection Clause. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 342, 347-48 (1960) (districting plan that meets the one person, one vote standard, or that is otherwise satisfactory, can still violate the Equal Protection Clause if it discriminates on the basis of race or other suspect classification, including alienage). Such exclusion of discrete classes of persons cannot be a constitutional mandate.

The Supreme Court in *Burns v. Richardson* was careful to note that singling out certain groups for exclusion from the apportionment base could violate the Equal Protection Clause of the Fourteenth Amendment. 384 U.S. at 92. Although approving, because it did not create inequality, a departure from the rule of equalizing total population, the Court also noted that basing apportionment on registered voters is "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process or perpetuate a ghost of prior malapportionment" and also observed that because voter registration can fluctuate substantially from one election to the next, "it is particularly a matter of concern"

[40] USCA5 693, at 47:5-12; *see also* USCA5 689-90 at 43:14-44:4 (all redistricting plans Dr. Gaddie has worked with use total population as an apportionment basis).

where registration figures from one election are locked in for the next 10 years in a redistricting plan. *Id.* at 92-93 (internal quotation marks omitted).

In *Burns*, the Supreme Court concluded that "[i]n view of these considerations, we hold that the present apportionment [based on voter registration] satisfies the Equal Protection Clause *only because* on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93 (emphasis added). The holding in *Burns* is, therefore, extremely narrow and confined to Hawaii's particular circumstances.

In this case, Appellants have not argued that the Irving constituents they seek to exclude from the apportionment base are like the "transients, short-term or temporary residents" of Hawaii. *Id.* at 91-92. Children and residents who have not yet achieved U.S. citizenship are domiciled in Irving and constituents of the City Council. Indeed, Texas State Representative Rafael Anchia, who represents a portion of Irving, stated:

> The children and non-U.S. citizens who live in District 103 are, in most cases, permanently domiciled in the District, long-time residents of the District, and active members of the community. They are involved in local churches, schools, social and neighborhood associations and civic organizations.[41]

[41] USCA5 598, ¶ 18.

The constituents Appellants seek to exclude from the apportionment base "are important members of the community who expect and deserve constituent services from their elected and appointed officials."[42] Even Appellants' expert witness, Dr. Keith Gaddie, testified that constituents need and expect their local elected officials to "interven[e] with state bureaucracies or federal bureaucracies" on their behalf.[43]

Indeed, Dr. Gaddie agrees that "an elected representative represents *all individuals* in the entire jurisdiction."[44] Similarly, Texas State Representative Rafael Anchia testified that "I represent all the people in District 103. My representation is not limited to U.S. citizens, or voters, or people who voted for me. As a Texas Representative, my duty is to all the people living in District 103, regardless of their ability to vote."[45]

In *Garza*, when the County of Los Angeles argued that the district court's remedial redistricting plan, which equalized total population across county

[42] USCA5 598, ¶ 18.
[43] USCA5 708, at 85:9-18 ("Law-makers and representatives have been known to go as far as to assist constituents with the identification of sources of medical service, [and] seeking help in employment."); *see also* USCA5 599, at ¶ 23 ("[C]onstituent services include: helping individuals verify their eligibility for medical services; securing lists of care providers with the Texas Department of Aging and Disability Services; assisting individuals in their dealings with Child Protective Services; helping families secure hardship transfers from the TDCJ; and assisting individuals with applications for benefits from the Texas Workforce Commission, the federal Social Security Administration, and the Texas Health and Human Services Commission."); *see also* USCA5 634, at ¶ 12 ("I expect the City to provide services such as a street and drainage repair to its constituents.").
[44] USCA5 708-09, at 85:24-86:4 (emphasis added).
[45] USCA5 598, at ¶ 17.

supervisor districts, "unconstitutionally weight[ed] the votes of citizens in [the Latino-majority] district more heavily than those of citizens in other districts," the Ninth Circuit rejected the CVAP malapportionment challenge. 918 F.2d at 773 (approving court ordered plan using total population for apportionment and opining that use of CVAP for apportionment "would constitute a denial of equal protection to these Hispanic Plaintiffs"), *cert. denied*, 498 U.S. 1028. Interpreting *Reynolds*, the Ninth Circuit held that "the people, *including those who are ineligible to vote*, form the basis for representative government. Thus population is an appropriate basis for state legislative apportionment." *Id.* (emphasis added). *Garza* found that "[b]asing districts on voters rather than total population results in serious population inequalities across districts." *Id.* at 744-775. The Court was concerned that "[r]esidents of the more populous districts [would] have less access to their elected representative . . . citizens of voting age, minors and others residing in the district will suffer diminishing access to government in a voter-based apportionment scheme." *Id.*

Irving's elected officials and constituents share the serious concerns expressed in *Chen* and *Garza*. Indeed, Texas State Representative Rafael Anchia is concerned that:

> CVAP apportionment necessarily increases the number of constituents, relative to other districts, who need and seek services from their state House member.

> The "packing" caused by CVAP apportionment would put a strain on the residents of the district, force the residents to compete against more individuals for the attention of the elected official, reduce the ability of the elected representative to serve all the people in the district and stretch the resources of the elected representative's district office and staff.[46]

Representative Anchia's concerns are echoed by Irving residents. Aurora Lopez, a resident of District 1, testified that if apportionment is based on CVAP:

> City Council District 1 will have to take on more new people to meet redistricting requirements. I believe that this would be harmful to me and other District 1 residents because we have greater economic and infrastructure needs when compared to other city council districts. . . . Adding more new people to District 1 will make it more difficult for people to communicate with elected officials about neighborhood concerns and problems.[47]

Robert Moon, a resident of District 7 which is also "underpopulated" under Appellants' theory of CVAP apportionment, testified that "adding more population and more constituents to District 7 will reduce my access to my City Councilman by increasing the number of people who rely on him for constituent services and for representation. Adding more people to District 7 will also increase the burden on [the incumbent] Mr. Farris to meet the infrastructure and economic development needs of the neighborhoods in District 7 . . . ."[48] Mr. Moon further testified that adding more population to District 1 would be harmful to the

[46] USCA5 599, at ¶¶ 21-22.
[47] USCA5 635, at ¶¶ 19-20.
[48] USCA5 631, at ¶ 21.

residents of that district and make it more difficult for the City to meet the needs of the constituents of District 1.[49]

District 7 contains a higher proportion of children than the city average, and more children than Districts 3, 5, and 6.[50] According to the U.S. Census, the city council district with the highest number of children is District 1, with 10,712 children.[51] Districts 1, 4 and 7, all located adjacent to each other in central and south Irving, contain the greatest number of children.[52] As a result of the uneven distribution of children across Irving, even if Appellants limited their equal protection claim to voting age population, and targeted only children for exclusion from the apportionment base, the current redistricting plan would be malapportioned. According to the 2000 Census, the total deviation in voting age population in the current six single member districts is 5,070 – a deviation of 21%.[53]

Guillermo Ornelaz, who is 16 years old and a resident of District 7, testified, in opposition to the theory that children are properly subtracted from the apportionment base, that "no matter how young a person may be, that person has a

[49] USCA5 631, at ¶ 19.
[50] USCA5 647-49; *see also* USCA5 650.
[51] USCA5 647.
[52] USCA5 647, 650.
[53] USCA5 647.

right to speak to elected representatives to make things better for the community . . . . Children deserve representation too."[54]

Although Appellants insist that the Equal Protection Clause mandates the use of CVAP as the apportionment base in Irving redistricting, Appellants' own expert agrees that redistricting is based on total population in Texas:

> Q. . . . If you were asked to advise . . . the Texas Legislature, on drawing its House and Senate districts, what would you advise them to use as the apportionment base?
>
> A. The apportionment base should be . . . under the existing law . . . census data.
>
> Q. And by census data, what do you mean?
>
> A. I mean data collected from the most recent census … and apportionment of legislative districts in the State of Texas has been historically done on total population data.
>
> Q. . . . So you would advise them total population would be the base to use to draw districts?
>
> A. I would advise them that total population is the standard upon which they have relied in the past and which states have generally relied on, yes.[55]

Irving voters who live in neighborhoods that contain proportionally more children and non-citizens, including voters in Irving City Council District 1, cannot control the demographic characteristics of their neighborhoods, or make them more

[54] USCA5 639, at ¶¶ 14, 18.
[55] USCA5 710, at 89:8-24.

similar to other parts of the City. Nevertheless, Appellants seek to change the quality and nature of the votes cast by these voters. If Appellants secure the ruling they seek, and Irving is forced to reapportion its population into council districts based on citizens of voting age, District 1 voters will be placed at a severe disadvantage when compared to voters in suburban districts. Instead of having the power to elect a representative of a roughly equal number of constituents, the votes of District 1 voters will be downgraded to elect a representative to serve a grossly overcrowded district. Such a representative will devote less time and bring fewer resources to the voters of District 1 because the representative is committed to address the needs of vastly more constituents when compared to Districts 3, 5 and 6.

Latino adult citizens in Irving are most densely concentrated in District 1.[56] There is no dispute that in the City of Irving, Latinos are most likely to live in and among children and non-U.S. citizens.[57] Appellants' choice of these two groups -- children and non-U.S. citizens -- for exclusion from the apportionment base is bluntly aimed at the Latino-majority District 1. Excluding children and non-U.S. citizens, and no other ineligible voters, from the apportionment base will result in

[56] USCA5 647.
[57] USCA5 647-49.

the overcrowding or dismantling of District 1. *See Chen*, 206 F.3d at 525 (expressing same concerns).[58]

Notably, in finding that Irving's at-large election system violated Section 2 of the Voting Rights Act, the district court found in *Benavidez* that Latinos in Irving satisfied all three of the preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). *See Benavidez v. Irving*, 638 F. Supp. 2d 709, 712 (N.D. Tex. 2009) (analyzing *Gingles* factors). The district court concluded, under the totality of the circumstances, that Irving's election system violated Section 2 of the Voting Rights Act:

> The two Senate factors most critical to establishing a Section 2 violation, racially polarized voting (Senate factor 2) and the failure to elect minority candidates have been established (Senate factor 7). Two additional Senate factors also support Plaintiff's claims. Specifically, Irving's electoral system has in place a number mechanisms that enhance vote dilution, such as staggered elections, a majority vote requirement, and numbered places (Senate factor 3). Also, the Hispanic population of Irving has a lower socioeconomic status and lower political participation rate than the non-Hispanic, white majority (Senate Factor 5). *The Court finds that these four Senate factors are present in Irving and weigh heavily against the ability of Hispanics to elect candidates of their own choosing*; accordingly, the totality of the circumstances indicates that Defendants' method of electing the mayor and members of its City Council violates Section 2 of the Voting Rights Act.

Benavidez, 638 F. Supp. 2d at 732 (emphasis added). Appellants' demand that Irving apportion its districts on the basis of CVAP, and only CVAP, isolates and

[58] *See also* USCA5 599, at ¶¶ 21-22; USCA5 635, at ¶¶ 19-20; and USCA5 631, at ¶ 21.

penalizes the very Latino community that the district court concluded had suffered voting discrimination in Irving.

The impact of using CVAP as an apportionment base is felt by two distinct populations. First, the impact of exclusion from the apportionment base is felt by children and non-citizens, constituents of their elected officials who can be civically engaged in many ways. The second group is citizens of voting age who live in neighborhoods with greater proportions of non-U.S. citizens and children. As Representative Anchia states:

> The negative effect of CVAP apportionment is never limited to the children and non-U.S. citizens living in a district. Such individuals always live in households and neighborhoods with adults and U.S. citizens. Children usually live with their adult parents, and non-U.S. citizens often live in mixed status households with U.S. citizen relatives. Thus, "packing" of population into an overcrowded, CVAP-apportioned district harms everyone living in the district, not just those who are the target of the exclusionary policy. The adults and U.S. citizens who share homes, neighborhoods and cities with those who don't meet the CVAP standard are subjected to the same scarcity of resources, lack of representation and increased competition as children and non-U.S. citizens.[59]

Notably, Appellants also urge an Equal Protection Clause violation against children. Because the child population is more concentrated in south and central Irving Council Districts 1, 4 and 7, singling out voting age, and selectively ignoring other aspects of voter ineligibility, favors the remaining Irving City

[59] USCA5 602-03, at ¶ 34.

Council Districts 3, 5 and 6.[60] Relying on the selective and under inclusive criterion of voting age, in a city where the child population is unevenly distributed, produces the type of irrational results criticized by the Supreme Court in *Reynolds* and its progeny. *See Reynolds*, 377 U.S. at 560-61.

4. Equalizing the Number of "Voters" in a District Is Constitutionally Suspect When It Operates to Perpetuate Historical Exclusion From the Political Process

While Appellants appear to advocate for apportionment and districting based on CVAP, they rely on the term "voter" throughout their Opening Brief, suggesting that the City has a constitutional duty to equalize the number of "voters" for each election.[61] Appellants even go so far as to suggest that their votes are unconstitutionally diluted by voter turnout rates.[62]

Appellants' suggestion that the Constitution requires apportionment of districts based on the number of *voters* in any given election is both without legal foundation and incapable of remedy. The number of voters changes with every election and is influenced by many factors, including the offices on the ballot,

[60] USCA5 650.

[61] *E.g.*, AB, at 18 ("Because the Population Disparity Between Voter Populations in District 1 and Neighboring Districts is Nearly Two to One, it is a Per Se Violation of the Equal Protection Clause."), 19 ("Specifically, if the population of voters deviates between districts by more than 10 percent, it constitutes a prima facie case . . . .").

[62] AB, at 8 n.13 ("This illustration is based on the highly unlikely assumption of full voter turnout. The 2010 election results in Irving using this Plan, however, confirmed that the real impact on citizen votes was far greater than the ratios listed above. In the election held on May 9, 2010—the first to utilize Irving's new Plan—the total number of voters casting a vote in District 1 was 449. In contrast, the total number of voters casting a vote in District 7 was 1,556. Thus, to win a seat in District 7, a candidate needed over *three times* as many votes as a candidate in District 1.").

voter interest, and changes over time in the composition of the electorate itself. It is also impossible to measure the number of voters for city council where, as here, a city employs staggered terms and the election of city council members occurs in different years.

Finally, equalizing city council districts based on the number of people who cast ballots only serves to disadvantage areas with low turnout rates, including neighborhoods that are predominantly low-income and historically disfranchised, and to obstruct further the efforts of racial minorities to close the gap in political participation. Because it is well-established that the legacy of historical disfranchisement includes disproportionately lower voter turnout among Texas racial minorities,[63] basing apportionment on voter turnout would improperly "pack" districts that are heavily Latino. As noted in *Burns*, 384 U.S. at 92-93:

> Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, cause by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions.

[63] *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (observing that "the political, social, and economic legacy of past discrimination for Latinos in Texas may well hinder their ability to participate effectively in the political process" (internal quotation marks and citation omitted)).

> Such effects must be particularly a matter of concern where . . . registration figures derived from a single election are made controlling for as long as 10 years.

That is, using a count of "voters," as Appellants urge, would cause a constitutional violation, not remedy one, unless there is ample evidence that the number of "voters" closely tracks the jurisdiction's total population or does not otherwise discriminate against classes of residents.

5. Appellants' Malapportionment Claim Is a Thinly-Veiled Attack on Irving's Latino-Majority Remedial District

Appellants seek to force one of two negative outcomes for Irving: first, Latinos will be less likely, and possibly unable, to secure the creation of a Latino-majority district under Section 2 of the Voting Rights Act because they will be forced to comprise the citizen voting age majority of a district far larger in total population than the remaining districts in the plan; and, second, even if Latinos in Irving are able to secure the creation of a Latino-majority district, the Latino residents of that district, and their non-Latino neighbors will be "packed" into a district with reduced quality of representation.

Appellants have consistently tied their criticism of District 1 to Irving's Hispanic population.[64] The Complaint bases Appellants' malapportionment claim

[64] Notably, in an article published on the website of the Dallas Morning News, Joe Sissom, one of the original Plaintiffs in this case, opined that a Latino-majority remedial district would only be ordered by a judge who was the beneficiary of "ethnic quotas":

on the presence of *Hispanic* non-U.S. citizens in Irving's redistricting plan, without regard to the thousands of non-U.S. citizens in Irving who are not Hispanic.[65] The description of non-U.S. citizens as Hispanic, and the crafting of a lawsuit to subtract non-U.S. citizens from the apportionment base, raises a strong inference of race with respect to the remedy sought by Appellants in this case.

In fact, when discussing the importance of this case, the Director of the Project on Fair Representation, which claims to be "providing counsel" to Appellants, argued for the importance of adopting a citizenship-based method of apportionment while noting that "Hispanic immigration has surged in Florida, Texas, California, New York, and other states."[66]

6. Apportionment Based on CVAP in Irving Would "Pack" Population into Certain Districts, Create Huge Variations in Total Population, and Harm Both Constituents and Elected Officials

The relief Appellants seek in this case would "pack" more population into Districts 1 and 7 and create wide variations in total population among Irving's city council districts. "Packing" population into Districts 1 and 7 will harm

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> A college classmate of mine on the faculty at McMurry University assures me that that institution had no ethnic quotas when [Judge] Solis was admitted there. Several lawyers informed me that there are no dispensations on the Texas bar exam. Sen. Phil Gramm recommended [Judge] Solis to President George W. Bush, who appointed him. Neither is known to support quotas. So why . . . did he allow a district that is clearly racially/ethnically gerrymandered?

USCA5 717.

[65] *See* USCA5 152-53 (calculating the total number of non-U.S. citizens in Irving by estimating the number of *Hispanic* non-U.S. citizens in Irving) *and compare* USCA5 647-49 (showing 12,494 non-Hispanic, non-U.S. citizens of voting age living in Irving in 2000).

[66] USCA5 726-28.

constituents and elected officials. Because of the relatively higher proportion of non-U.S. citizens who reside in District 1, "the total number of residents, and constituents, would increase substantially."[67] A dramatic increase in the total population of District 1 would "have a serious and negative impact on the constituents and on [ ] the elected representative."[68]

As Respondent-Intervenors have testified, "[f]or decades, District 1 was abandoned and neglected."[69] Today, "[t]he structures and buildings in District 1 are older," and "[m]uch of the housing stock needs significant maintenance."[70] In fact, "District 1 needs continued efforts to improve the quality of neighborhoods and housing that is sensitive to the needs of low-income residents."[71]

The types of constituent services sought by District 1 residents reflect the needs of the district's low-income residents. Indeed, as Representative Anchia states, apportionment based on CVAP "would exacerbate the very serious problems already faced by this community with respect to access to information and assistance in obtaining government services."[72] Even though CVAP apportionment would increase the total number of residents and constituents, it "would not result in any increased budget for constituent services, although it

[67] USCA5 598-99, ¶¶ 19-20.
[68] USCA5 598-99, ¶¶ 19-20.
[69] USCA5 634, ¶ 13.
[70] USCA5 634, ¶ 14.
[71] USCA5 630, ¶ 13.
[72] USCA5 600, ¶ 27.

would increase the demand for constituent services."[73] This would force elected officials "to serve proportionally more people with the same limited resources as those provided to other legislative districts" with far less people.[74]

Notably, "packing" this district harms U.S. citizens and registered voters who live in the district as much as it harms those who are subtracted from the apportionment base –children and non-U.S. citizens. It is irrational to punish the registered voters in Districts 1 and 7 simply because they live in closer proximity to greater numbers of children and non-U.S. citizens.

C. *APPELLANTS CANNOT SHOW THAT THE DISTRICTS IN IRIVING'S CITY COUNCIL PLAN ARE MALAPPORTIONED, SO THEIR CASE IS NOT RIPE*

Under well-established Supreme Court precedent, the results of the 2010 Census are the appropriate data to use for redistricting and to measure whether Irving's redistricting plan is malapportioned. *See, e.g., Beer v. United States*, 425 U.S. 130, 130 (1976) ("In 1961 the council, as it was required to do after each decennial census, redistricted the city based on the 1960 census . . ."). Nevertheless, relying on outdated 2000 Census data instead of a current, actual enumeration, Appellants urged the district court to declare that the redistricting plan was malapportioned. Appellants' malapportionment claim, based on obsolete 2000 Census data, warranted the district court's adverse summary judgment ruling.

[73] USCA5 600-01, ¶ 28.
[74] USCA5 600-01, ¶ 28.

That is, Appellants must wait for Irving to draw its City Council districts based on 2010 Census data before a court may appropriately review the plan. Respondent-Intervenors urge the Court to affirm on these grounds.

Appellants' expert witness Dr. Gaddie conceded that "absent this litigation, no redistricting plan in America would be based upon 2000 census data."[75] Dr. Gaddie further testified that Irving would normally rely, for its next redistricting plan, on "data from the census that is being completed and finalized right now, the 2010 census."[76] Dr. Gaddie agreed that "no one knows" the total population of Irving's City Council districts today and that he cannot say what the CVAP of the districts is today.[77] Dr. Gaddie testified that he had "never been involved in a case at this period of the census cycle."[78] At the time of Dr. Gaddie's deposition, the 2010 Census already had been taken, and the Census Bureau was preparing the data for release. Dr. Gaddie testified that Texas expected the 2010 Census data in March 2011.[79]

Appellants' injuries are necessarily hypothetical. That is, Appellants sued the City of Irving not knowing the composition of their post-2010-Census districts. Future elections will be based on districts of yet-to-be-determined size, shape, and composition. Appellants have no idea if they will live in districts they themselves

[75] USCA5 700, at 57:11-17.
[76] USCA5 700,at 57:18-22.
[77] USCA5 704, at 70:19-71:3.
[78] USCA5 706-07, 77:19-78:2.
[79] USCA5 701, at 58:2-20.

would label as infirm or not. They have no idea if the new districts will even violate their flawed theory of apportionment.

Article III confines federal courts to adjudicating "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *see also Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010) ("Ripeness is a component of subject matter jurisdiction, because a court has no power to decide disputes that are not yet justiciable."). Prudential ripeness reflects a judicial interest in avoiding unnecessary adjudication and deciding issues in a concrete setting. In evaluating the "prudential" ripeness of a claim, a court must consider "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). To satisfy the "hardship" prong of *Abbott*, a court must look to the "degree and nature of the regulation's present effect on those seeking relief," *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967), and conclude that "the impact of the regulation[ ] upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this time," *Abbott Labs.*, 387 U.S. at 152; *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir. 2000) ("[E]ven where an issue presents purely legal questions, the plaintiff must show *some* hardship in order to establish ripeness." (emphasis added)).

In this case, the lack of updated and accurate census data militates strongly in favor of affirming the district court's Order. Appellants relied on data from the 2000 Census[80] even though the 2010 Census, which was conducted at the same time as Appellants brought this case, supersedes the 2000 Census.[81] A decade after its release, data from the 2000 Census simply are not accurate or reliable. The data Appellants cite provide a snapshot of Irving's population in 2000, but Appellants have failed to proffer any evidence that the 2010 Census will report the same information. In fact, it is highly unlikely that 2000 Census data adequately captures current demographics in Irving because the rates of adult citizenship and the number of people who are adult citizens in a jurisdiction change over time. Even Appellants' expert agrees that CVAP fluctuates:

> Q. Do you agree with me that rates of adult citizenship can change over time?
>
> A. Yes.
>
> Q. And also that the number of people who are adult citizens in a jurisdiction can change over time?
>
> A. Yes.[82]

[80] USCA5 688, 41:9-16.

[81] The U.S. Constitution requires a decennial census of the population. *See* U.S. CONST. art. I, § 2, cl. 3. Data from the census is used to calculate state population totals for congressional apportionment. *Id.* The Secretary of Commerce reports state population totals from the census to the President within nine months of the census. *See* 13 U.S.C. § 141(b). Data from the census is used by states to draw boundaries for state and local legislative bodies. 13 U.S.C. § 141(c) (requiring the Census Bureau to report block-level data for use in state redistricting directly to the states "within one year after the decennial census date").

[82] USCA5 692, at 46:17-22.

"Texas is one of the fastest growing states in the nation, and its population continues to shift and migrate." *Vera v. Bush*, 980 F. Supp. 251, 253 (S.D. Tex. 1997). In light of CVAP fluctuations over time, Appellants should be required to present a malapportionment claim based on 2010 Census data that purports to demonstrate the failings of Irving's redistricting plan.

In *Lopez v. City of Houston*, the plaintiffs challenged, among other things, districts that had not yet been drawn because the 2010 Census figures had not been released yet. 617 F.3d at 342. In holding that the case was not ripe for review for future elections, the Fifth Circuit noted that "new census figures will be available prior to the next election, giving the City the opportunity to redraw and rebalance council districts based on data that is the 'best available' which means that *appellants will suffer no hardship because [the Court] decline[s] to consider their claims at this time*." *Id.* at 342 (emphasis added). In other words, "this is an event that may not occur as anticipated, or indeed may not occur at all, which means that the claim is merely abstract or hypothetical, and thus too speculative to be fit for judicial review at this time." *Id.* (citation and internal quotation marks omitted). Since the harm in this case "necessarily is speculative," the district court would not have been able to fashion a remedy or provide judicial relief, had it attempted to do so. *Virginia v. Reno*, 117 F. Supp. 2d 46, 50 (D.D.C. 2000) *aff'd* 531 U.S. 1062 (2001) ("Because the Census Bureau has not yet decided to release adjusted data,

[the] dispute relies on a contingent future event, not an established fact."). Appellants' alleged harm is pure speculation, and Respondent-Intervenors urge the Court to affirm on these prudential ripeness grounds.

Appellants aggressively sought a court ruling based on outdated and obsolete data because they believed that the 2000 Census data helped their case, and they did not know what the Census 2010 data will reveal. The only certainty is that Census 2010 data will be different from what the Appellants present in their brief. Aware of this fact, Appellants did not want to wait for the release of current data. Rather, they sought to force the district court to rule on stale data, and thus to deprive Irving of an opportunity to make redistricting decisions based on the Census 2010 data.

Apportionment and redistricting are quintessentially legislative functions. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). Federal courts should not intervene prematurely, particularly at a point when new Census data is about to be released. Notably, courts have found that malapportionment and redistricting claims raised late in the decade are not ripe for adjudication until new census data is reported. *See, e.g.*, *Virginia*, 117 F. Supp. 2d at 54 *aff'd* 531 U.S. 1062 (abating case); *see also Vera*, 980 F. Supp. at 253 (same); *Valero v. City of Kerrville*, No. 96-CA-413, 1998 WL 929648, at *1 (W.D. Tex. Dec. 4, 1998) (abating case "in the interest of judicial economy" until information from the 2000 census became

available, noting the likelihood that proceeding to trial with eight year-old data would result in the need for a new trial or that the new census data would obviate the need for trial altogether).

Significantly, the final election under an old redistricting plan and before implementation of a new redistricting plan is always malapportioned. *See French v. Boner*, 963 F.2d 890, 891 (6th Cir. 1992) ("In any system of representative government, it is inevitable that some elections for four-year or longer terms will occur on the cusp of the decennial census. The terms inevitably will last well into the next decade; and, depending on shifts in population in the preceding decade, the representation may be unequal in the sense that the districts no longer meet a one-person-one-vote test under the new census."); *Lopez*, 617 F.3d at 340-41 (declining to invalidate a 2009 election based on 2000 Census figures). Despite the inevitable malapportionment that exists in all late-decade redistricting plans, courts and political jurisdictions tolerate that malapportionment until the new Census data provides an accurate picture of how to proceed with redistricting.

Because Appellants could not, and still cannot, prove injuries beyond mere speculation, Respondent-Intervenors urge the Court to affirm the district court's decision based on Article III prudential ripeness grounds.

D. *APPELLANTS LACK STANDING*

Appellants who reside in Districts 4, 5, 6 and 7 lack standing. No future elections are scheduled for Districts 4, 5, 6 and 7 under the current redistricting plan, and thus Appellants residing in these districts face no future injury; in addition, Appellants in Districts 4 and 7 lack standing because their districts are not overpopulated beyond a 10% deviation, even when using CVAP as the apportionment base.

1. Appellants Who Suffered No Injuries Lack Standing

As a threshold matter, in order to establish federal court jurisdiction over this case, Appellants were required to demonstrate that they "suffered 'injury in fact,' that the injury [wa]s 'fairly traceable' to the actions of the defendant, and that the injury [was] likely [to] be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Courts cannot exercise jurisdiction where the plaintiff's alleged injury cannot be redressed by a favorable decision. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Cnty. of Del., Pa. v. Dep't of Transp.*, 554 F.3d 143 (D.C. Cir. 2009); *Henderson v. Stalder*, 287 F.3d 374 (5th Cir. 2002).

Appellants who live in districts where no future elections will be held under the current redistricting plan lack standing because they face no prospective injury under the current plan. *See, e.g.*, *Assoc. of Cmty. Orgs. for Reform Now v. Fowler*,

178 F.3d 350 (5th Cir. 1999) (granting summary judgment on standing grounds). Appellants residing in District 4, including Appellant Main in 5, including Lepak, Randle, and Cooley, in District 6, including Appellant McComb, and Appellants residing in District 7, including Appellants Tate, Clements and Bailey could not, and cannot, establish standing because they face no prospective injury.

Districts 4 and 6 are not scheduled for election until 2012.[84] Appellants Main and McComb have not and never will cast a ballot in the current redistricting plan. Similarly, the Appellants living in District 7, including Appellants Tate, Clements and Bailey, voted for the first and last time under this redistricting plan in the May 2010 election. Notably, Appellants did not seek to enjoin the May 2010 election. Appellants Tate, Clements and Bailey face no future injury under the plan and thus lack standing to challenge it. Whatever injury Appellants Tate, Clements and Bailey claimed to have suffered in May 2010 cannot be addressed by a court order that alters the way city elections are conducted in other districts.

Dallas County held elections on May 14, 2011, which included Irving City Council Districts 3 and 5.[85] In District 3, there will be a runoff election on June 18.[86] Councilwoman Rose Cannaday was reelected in District 5.[87] This recent

[84] USCA5 198-200.
[85] Dallas County Elections: Unofficial Cumulative Results, http://results.enr.clarityelections.com/TX/Dallas/30600/44744/en/summary.html (last accessed May 15, 2011). These elections occurred two days before the filing of this Brief.
[86] *Id.*
[87] *Id.*

election mooted any existing claims from the Plaintiffs in District 5 (Lepak, Randle, and Cooley), as well as rendered unripe all of their future malapportionment claims. *See, e.g.*, *Lopez*, 617 F.3d at 340 (mootness) ("[T]o qualify as a case for federal court adjudication, a case or controversy must exist at all stages of the litigation, not just at the time the suit was filed. Invalidation of a past election can, in some instances, be a viable remedy that will save a claim from mootness even if the election has passed. But such invalidation is an extraordinary remedy that can only be employed in exceptional circumstances, usually when there has been egregious defiance of the Voting Rights Act on the part of the covered entity. Appellants have made no claim of the kind of egregious or invidious discrimination that would make invalidation of the 2009 election an appropriate remedy."); *id.* at 342 (mootness) ("We hold that the issues presented by appellants are not yet ripe for judicial review. As noted above, new census figures will be available prior to the next election, giving the City the opportunity to redraw and rebalance council districts based on data that is the 'best available,' which means that appellants will suffer no hardship because we decline to consider their claims at this time.").

By 2012, a new redistricting plan will be in place based on the results of the 2010 Census. At this time it is impossible to know what Irving's future redistricting plan will look like, how it will distribute population across districts,

which districts (if any) will be malapportioned under Appellants' theory, or which Appellants will have standing to sue. *See, e.g.*, *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989) (granting summary judgment and finding that Appellants lacked standing to sue to prevent inclusion of undocumented persons in the 1990 Census because the demographic evidence presented by Appellants could not show which states would gain or lose representation in Congress, and thus no member could prove a threatened injury).

2. Appellants Living in Districts that Are "Underpopulated" under the CVAP Standard Lack Standing

Malapportionment, by definition, entails the "underpopulation" of some districts and "overpopulation" of other districts. Courts have consistently found that only persons in districts that are actually overpopulated – as opposed to underpopulated – have standing to bring a malapportionment claim. *See, e.g.*, *Reynolds*, 377 U.S. at 554-561; *Baker*, 369 U.S. at 204-208. More specifically, the Fifth Circuit has ruled that injury results only to constituents living in overpopulated districts. *See Fairley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974) (finding that the original plaintiffs in the case were not proper class representatives because they did not live in overpopulated districts).

In this case, Appellants in Districts 4 and 7 lack standing to challenge the redistricting plan because, even using a CVAP standard, their districts are within the 10% deviation typically permitted to local jurisdictions in redistricting. *See*

Connor v. Finch, 431 U.S. 407, 418 (1977) (referring to "'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity"). In fact, District 7 would have to gain additional people to meet the CVAP ideal population if Appellants prevail on their claims.[88] Appellants' expert conceded that Districts 4 and 7 are not malapportioned within the 10% deviation, even when using the CVAP standard.[89] Since District 7 is underpopulated, and District 4 lies within the 10% deviation, Appellants Main, Tate, Clements and Bailey lack standing. Accordingly, Appellants residing in Districts 4 and 7 lacked standing to litigate the case, and Respondent-Intervenors urge the Court to affirm on these grounds.

3. Appellants' Request for Attorney's Fees Is Premature

Appellants ask the Court to award "attorney's fees." Opening Brief, at 37. This request for attorney's fees is premature. Respondent-Intervenors respectfully submit that the issue of attorney's fees should be the subject of a separate motion schedule in the district court in which the parties will have the opportunity to litigate their entitlement to attorney's fees following resolution of the merits of the case.

[88] USCA5 647-49.
[89] USCA5 702-03, at 67:7-68:7.

CONCLUSION

For the foregoing reasons, Respondent-Intervenors respectfully request that the Court affirm the district court's Order and remand for a determination of costs and attorneys' fees.

Dated: May 16, 2011

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains: 11,629 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.