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

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APPELLANTS' PETITION FOR REHEARING EN BANC

Kent D. Krabill
Texas Bar No. 24060115
Jeremy A. Fielding
Texas Bar No. 24040895
LYNN TILLOTSON PINKER & COX, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
Telephone: 214-981-3800
Facsimile: 214-981-3839
ATTORNEYS FOR APPELLANTS

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.

Plaintiffs/Appellants:

Keith A. Lepak, Marvin Randle, Dan Clements, Dana Bailey, Kensley Stewart, Crystal Main, David Tate, Vicki Tate, Morgan McComb, and Jacqualea Cooley

Parents & Affiliates of Plaintiffs/Appellants:

Donors Trust

Counsel for Plaintiffs/Appellants:

Kent D. Krabill
Texas Bar No. 24060115
Jeremy A. Fielding
Texas Bar No. 24040895
LYNN TILLOTSON PINKER & COX, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
Telephone: 214-981-3800
Facsimile: 214-981-3839

Defendant/Appellee:

City of Irving, Texas

Counsel for Defendant/Appellee:

C. Robert Heath
Texas Bar No. 09347500
BICKERSTAFF, HEATH, DELGADO & ACOSTA, LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
Telephone: 512-472-8021
Facsimile: 512-320-5638

Charles R. Anderson
Texas Bar No. 01170500
City Attorney
City of Irving, Texas
825 W. Irving Blvd.
Irving, Texas 75060
Telephone: 972-721-2541
Facsimile: 972-721-2750

Intervenor Defendants-Appellees:

Robert Moon, Rachel Torrez Moon, Michael Moore, Guillermo Ornelaz, Gilbert Ornelaz, and Aurora Lopez

Counsel for Intervenor Defendants-Appellees:

Nina Perales
Iván Espinoza-Madrigal
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, Texas 78205
Telephone: 210-224-5476
Facsimile: 210-224-5382

/s/ Kent D. Krabill
Kent D. Krabill

STATEMENT REGARDING PETITION FOR REHEARING EN BANC

This Petition concerns what the United States Supreme Court has called the most precious of all constitutional rights, the right of a voter to an undiluted vote. The panel decision conflicts with an unbroken line of Supreme Court cases guaranteeing the right to an undiluted vote beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), through *Bush v. Gore*, 531 U.S. 98 (2000).

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STATEMENT OF THE ISSUE FOR REHEARING EN BANC

Do cities or states have the "political discretion" to violate the well-settled constitutional right of voters to an undiluted vote?

STATEMENT OF THE CASE

Appellants – concerned citizens of the City of Irving (the "City" or "Irving") – filed suit on February 11, 2010, challenging the constitutionality of Irving's electoral plan (the "Plan") for single-member city council positions. As the Supreme Court has recognized in countless cases over the past fifty years, the Equal Protection Clause of the Constitution guarantees all voters the right to an undiluted vote. Irving's Plan violates this constitutional "one person, one vote" requirement because, although the Plan's districts are roughly equal in total population, there are nearly twice as many voters in District 1 as there are in neighboring districts. As such, voters in District 1 have nearly twice as much voting power as voters in neighboring districts.

By impermissibly weighing the votes of voters differently "merely because of where they reside," the Plan violates Irving's voters' constitutional right to an undiluted vote. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Based on this clear constitutional violation, Appellants filed suit and asked the district court to hold the Plan unconstitutional.

Several Irving residents who favored the Plan intervened in the suit on May 12, 2010. The parties subsequently filed competing motions for summary judgment.

On February 11, 2011 the district court entered an order granting summary judgment for Irving, denying summary judgment for Appellants, and denying Defendant-Intervenors' motion for summary judgment as moot.[1] Relying specifically on this Court's opinion in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), the district court held that a city has the political discretion to unequally weight the votes of its voters provided it instead create districts containing equal numbers of total residents. Based on this reading of *Chen*, the district court entered a final judgment on February 11, 2011, and Appellants timely filed their notice of appeal on February 16, 2011.

On December 14, 2011, a panel consisting of Judges Dennis, Clement, and Owen issued an unpublished, *per curiam* opinion affirming the district court's grant of the City's motion for summary judgment.[2] Like the district court, the panel concluded that this Court had "confronted this exact argument in *Chen*" where it held that "equalizing the total population of districts" – even where it resulted in unequally weighted votes – "does not violate the Equal Protection Clause." *Id*. Noting that "we are not at liberty to overrule *Chen*," the panel

[1] USCA5 1425-30 (Memorandum Opinion and Order). Although their motion for summary judgment was mooted by the district court's ruling on the City's motion, Intervenor Defendants-Appellees still obtained the relief sought by their pleadings, *i.e.*, the affirmation of the Plan.
[2] *See* Exhibit A attached hereto (*Lepak v. City of Irving, Tex.*, No. 11-10194, 2011 WL 6217946 (5th Cir. 2011)).

concluded that it had no choice but to affirm the district court. *Id*. This Petition for Rehearing En Banc followed.

STATEMENT OF FACTS

In 2010, Irving, Texas (the "City" or "Irving") adopted a new electoral plan (the "Plan") for the election of its city council.[3] The Plan was approved by the United States Department of Justice and used in the recent Irving elections.[4]

The Plan divides Irving into six districts that are "relativ[e] in total population."[5] The number of voters residing in the districts, however, is substantially unequal. For instance, District 1 contains 11,231 citizens of voting age. In contrast, the total number of citizens of voting age in Districts 3 and 6 are almost double: 20,617 and 19,920 respectively.[6] This disparity reflects a substantial dilution of the votes of Irving voters in District 3 and District 6, votes which are now weighted differently depending solely upon where that voter lives.

ARGUMENT AND AUTHORITIES

This Court's decision in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) must be overruled. As the Supreme Court has repeatedly recognized in an unbroken line of cases stretching back nearly fifty years, the Equal Protection Clause of the Fourteenth Amendment "guarantees" the right of all voters to an

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[3] USCA5 198-254 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1).
[4] USCA5 29-33 (Def.'s Original Ans. at ¶ 13); USCA5 198-200 (Feb. 2, 2010 Final Judgment).
[5] USCA5 201-02 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1); USCA5 255-69 (Def.'s Resp. to Pl.'s Interrogs. at No. 1-6). Irving relied on the total population numbers from the "2000 Census 100 percent count" to calculate and equalize total population among the districts. USCA5 255-69 (Def.'s Resp. to Pl.'s Interrogs. at No. 1-6).
[6] USCA5 255-69 (Def.'s Resp. to Pl.'s Interrogs., Exhibit 1).

equally-weighted vote. *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). Further, as the Court underscored post-*Chen* in *Bush v. Gore*, while the Constitution grants cities and states substantial deference over electoral matters, that deference ends where the "one person, one vote" right begins. Indeed, "having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *See Bush v. Gore,* 531 U.S. 98, 104-05 (2000). This is because in the hierarchy of fundamental constitutional rights, "other rights, even the most basic, are illusory if the right to vote is undermined." *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

In contrast, *Chen* held a city has the unbounded political discretion to unequally weight voters' votes – even intentionally – provided the city equalizes total population among its electoral districts. *Chen's* essential holding – that a city or state has the choice to violate a fundamental constitutional right – cannot stand.

I. <u>There is a Fundamental, Constitutional Right to an Undiluted Vote.</u>

Because it is "preservative of all other rights," "no right is more precious in a free country" than the right to vote. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry*, 376 U.S. at 17. And, as the Supreme Court recognized in *Reynolds*, the right to vote can be denied by diluting a voter's vote just as effectively as by wholly prohibiting the person from voting:

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly

> prohibiting the free exercise of the franchise. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen.

377 U.S. at 555, 567. Reasoning from this truism, the Court held the Equal Protection Clause "guarantees" the right of all voters to an undiluted vote. *Id.* at 565-66. Characterizing this principle as "one person, one vote," the Court wrote:

> How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit. ***This is required by the Equal Protection Clause of the Fourteenth Amendment.***

Gray v. Sanders, 372 U.S. 368, 379 (1963) (emphasis added). Thus, "[t]he basic principle of representative government remains and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds*, 377 U.S. at 567.

The Supreme Court underscored the supreme importance of this "one person, one vote" constitutional maxim in an unbroken line of cases following *Reynolds*. In *Hadley*, the Court observed that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, ***or diluted***." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 52 (1970) (emphasis added). Accordingly, "once a State has decided to use the process of popular election and once the class of voters is chosen and their

qualifications specified, ***we see no constitutional way by which equality of voting power may be evaded***." *Id.* at 59 (citations omitted and emphasis added). In *Morris*, the Court wrote:

> [A] citizen is . . . shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way ***if he may vote for one representative and the voters in another district half the size also elect one representative***."

Board of Estimate of City of New York v. Morris, 489 U.S. 688, 698 (1989).

II. The Political Deference Cities and States Normally Have Over Electoral Matters Must Yield to the Constitutional Right of a Voter to an Equally Weighted Vote.

In *Bush v. Gore*, the Court made clear that a voter's constitutional right to an undiluted vote supersedes the discretion ordinarily afforded to cities and states in administering and overseeing the electoral process. Decided shortly after *Chen*, the Court in *Bush* confronted a *Chen*-like clash between the discretion granted states in administering and supervising the electoral process and the supremacy of the "one person, one vote" requirement. In *Bush*, various counties in Florida had adopted "varying standards to determine what was a legal vote." *Bush*, 531 U.S. at 108. Some counties adopted very strict standards for discerning the intent of voters, only counting votes when the chad had completely detached from the punch card. *Id*. at 106-107. Other counties adopted "a more forgiving standard," counting votes when the chad was merely "dimpled." *Id*.

The Court observed that this "uneven treatment" of votes would result in one group being "granted greater voting strength than another." *Id*. at 106-7. Because "the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government," the Court concluded that this fact alone rendered the entire Florida recount scheme unconstitutional. *Id*. at 105-107. Citing to *Reynolds*, *Grey*, and several other "one person, one vote" cases that followed, the Court concluded that: "having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05.

In reaching its ruling, the Court acknowledged the deference that states and cities normally possessed to "develop different systems for implementing elections." *Id*. at 109. But the Court firmly held that this political deference must yield to the fundamental right of a voter to an equally weighted vote. *Id*.

III. ***Chen*** **was Wrongly Decided.**

Because it concludes that a city or state has the discretion to choose whether to equally weight its voters' votes, *Chen* is contrary to the plain language of *Reynolds* and the "one person, one vote" cases that followed, including most recently, *Bush*. In *Chen*, the panel was presented with a voting scheme adopted by Houston, which like here, featured districts containing approximately equal numbers of people but substantially unequal numbers of voters. 206 F.3d at 528.

Though calling the issue a "close question" and professing "the lack of more definitive guidance from the Supreme Court," the *Chen* panel concluded that the decision about whether to equalize voters among its districts was an "eminently political question [that] has been left to the political process." *Id.* In effect, the *Chen* panel held that the Constitution grants a city the political discretion to unequally weight its voters' votes provided the city otherwise equalizes total population between districts. *See id.* *Chen* is flawed and must be reversed.

A. *Chen* is Inconsistent with Prior Supreme Court Case Law.

All "qualified voters" have a "constitutional right" to an undiluted vote. *Hadley*, 397 U.S. at 54-55.[7] A city cannot "choose" to ignore this constitutional right any more than it could choose to arbitrarily disenfranchise or impose a poll tax on voters. Regardless of how districts are otherwise organized, the Constitution still commands that states "insure that each person's vote counts as much . . . as any other person's." *See Hadley*, 397 U.S. at 54.

B. *Chen* is Inconsistent with *Bush v. Gore*.

Chen expressly premised its holding on a "lack of more definitive guidance from the Supreme Court." 206 F.3d at 528. The Court provided that guidance in

[7] This Court has also recognized that the Equal Protection Clause "guarantees the opportunity for equal participation by all voters in local government elections." *Fairly v. Hattiesburg, Miss.*, 584 F.3d 660, 674 (5th Cir. 2009).

Bush. There it held – contrary to *Chen* – that state political discretion must yield to a voter's fundamental right to an equally weighted vote. *Bush*, 531 U.S. at 109.

C. *Chen* Assumes a False Either/Or.

Chen discusses at great length a claimed conflict between the principle of "electoral equality" – equally weighting votes – and the principle of "representational equality" – ensuring that all residents, voters and non-voters, are provided access to equal representation. At the heart of this discussion is the assumption that the "one person, one vote" requirement can be met if either of the two principles are satisfied. This assumption forms the basis of *Chen*'s conclusion that a city can make the "political choice" about which of these "theories of representation" it wishes to pursue. This argument is deeply flawed, however, as it assumes the "one person, one vote" requirement presents a kind of constitutional either/or – a requirement that a state either equally weight the votes of its voters or provide its voting and non-voting residents with equal access to representation.

The "one person, one vote" doctrine is not an either/or proposition. Instead, the right to an undiluted vote stands on its own constitutional grounds. As *Gray*, *Reynolds*, *Burns*, *Hadley*, and the other "one person, one vote" cases over the past fifty years unambiguously declare, the "one person, one vote" requirement exists not to protect the rights of non-voting residents, but to protect the rights of voters.

The right does not evaporate when and if a state is pursuing some other constitutional, statutory, or public policy goal like equality of representation.

1. The "One Person, One Vote" Requirement Protects Voters.

As the Court made clear in *Reynolds* and reaffirmed in every "one person, one vote" case it has resolved since, the "person" being protected by the "one person, one vote" requirement is the voter, not the non-voter resident, and the thing being protected is the weight of that voter's vote, not a non-voter resident's access to representation. This is implicit in the very description of the doctrine. It is the "one person, one vote" requirement, not the "one resident, one equal share of access to representative" requirement.

In *Reynolds*, the Court emphatically stressed that voters are entitled to equally weighted votes regardless of where they reside. *See, e.g.*, *Reynolds*, 377 U.S. at 563 (emphasis added).[8] And dozens of "one person, one vote" cases that

[8] "Weighting the *votes of citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." In the "one person, one vote" cases following *Reynolds*, the Court maintained its focus on protecting the rights of the voter, not the rights of a resident to equal representation. In *Moore*, the Court held that "[t]he idea that one group can be granted a ***greater voting strength than another is hostile to the one man, one vote basis of our representative government***." *Moore v. Olgivie*, 394 US 814, 819 (1969) (emphasis added). Similarly, in *Hadley*, the court instructed that "[w]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that ***equal numbers of voters*** can vote for proportionally equal numbers of officials." *Hadley*, 397 U.S. at 56, 90 S.Ct. at 795. The Fifth Circuit has faithfully applied this same focus in its "one person, one vote" cases, similarly scrutinizing electoral districting schemes to determine whether they result in the votes of voters being equally weighted. *See, e.g., Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981) ("The one person, one vote principle commands constituencies to include approximately ***equal numbers of voters***, so that the weight

followed *Reynolds* make clear that, contrary to the premise of the court's conclusion in *Chen*, the "one person, one vote" requirement has nothing whatsoever to do with the rights of non-voters to equal representation. Instead, this requirement focuses exclusively on ensuring that states do not encroach on a voter's "constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." *See Hadley*, 397 U.S. at 54. The doctrine thus demands voter equality, not representational equality. And this demand cannot be met unless voters are equally distributed among districts, regardless of whether those same districts contain equal numbers of total population.[9]

2. Changing Demographics Have Undermined the Accuracy of Using Total Population as a Reliable Proxy for Voter Population.

In *Reynolds* and other cases recognizing a constitutional right to an undiluted vote, the Supreme Court often interchangeably refers to "total population" and "voters" or "citizens" as the relevant apportionment base. The *Chen* panel devoted

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of individual votes in larger districts will not be substantially diluted and individuals in those districts will not be deprived of fair and effective representation.") (emphasis added).

[9] *Chen's* holding is also in significant tension with this Court's recent holding in *Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019 (5th Cir. 2009). As Fifth Circuit law now stands, a city may completely ignore CVAP deviations when creating or redistricting single-member voting districts, *see Chen*, 206 F.3d at 523-28, but a plaintiff must use CVAP to prove a vote dilution claim under section 2 of the Voting Rights Act. *Reyes*, 586 F.3d at 1023-25 ("This court's rule requiring an inquiry into citizenship under the first *Gingles* test remains good law…"). This creates a paradoxical situation in which a plaintiff must use CVAP to break electoral districts up under the Voting Rights Act, but once broken up, there is no requirement a city use CVAP to put the districts back together.

a good deal of attention to this issue. *Chen* 206 F.3d at 524-26. After reviewing the Court's interchangeable use of these terms, the *Chen* panel concluded that the "one person, one vote" requirement could be satisfied when either total population or voter population is equalized. *See* 206 F.3d at 524-26. The panel's analysis, however, ignores the context in which the Court used these terms and conflates the discussion of acceptable means to an end (which apportionment base to use to equalize voters) with the end itself (creating districts of equal voter population).

The reason the Court has, at times, used the terms total population and voter population interchangeably is because, historically speaking, total population has been an effective proxy for determining voter population. *See Chen*, 206 F.3d at 525 (noting that the Court used the term total population because it was "presumptively an acceptable proxy for potential eligible voters."). Subsequent demographic changes over the past fifty years, however, have undermined the reliability of using total population as a proxy for voter population in certain areas of the country where large numbers of non-citizens reside. The extreme non-citizen population that currently exists in cities such as Irving simply was not at issue in the *Reynolds*-era cases or any of its progeny. Thus, the Court's past interchangeable use of such terms as "voter," "citizen," and "population" was both predictable and understandable. It is certainly not, however, a basis for concluding that the "one person, one vote" requirement is satisfied merely by equalizing total

populations among electoral districts, even if those districts contained substantially unequal numbers of voters.

D. *Chen* Misreads the Supreme Court's Decision in *Burns*.

In holding that Houston's choice to equalize total population among its districts while failing to equalize the numbers of voters was an "eminently political question [that] has been left to the political process," the *Chen* panel relied on the holding in *Burns v. Richardson*, 384 U.S. 73 (1966). *Chen*, 206 F.3d at 526-28. The *Chen* panel's reliance on *Burns*, however, is based on a misreading of that case. Although *Burns* discusses the political deference courts should extend to cities or states in drawing electoral districts, the opinion makes clear that this deference only applies to the choices states make regarding the ***means*** of equally distributing ***voters*** among its electoral districts. *Burns* ***never*** discusses giving states the ability to choose whether to equalize voting power in the first place. To the contrary, *Burns* specifically holds that, however a state draws it districts, the apportionment process must always result in equally weighted votes for all voters.

In *Burns*, the question presented was whether Hawaii's use of registered voters, rather than total population, as an apportionment base to equalize voter populations among its districts complied with the "one person, one vote" requirement. *See Burns*, 384 U.S. at 91-97. Hawaii chose to use registered voters because a large population of military and tourists on one island were counted in

census population but largely ineligible to vote due to residency requirements, and thus skewed voter equality among the state's other districts. *Id.* at 93-95.

The Court began its analysis of the issue by underscoring that there was no debate regarding the required end of any state districting process. Indeed, the Court wrote that the "overriding objective" of *Reynolds*' insistence on "substantial equality of population among the various districts" was to ensure "that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." *Burns*, 384 U.S. at 92 n.20. It noted, however, that *Reynolds* had "carefully left open the question" of which apportionment base could be used in achieving that objective – *i.e.*, the objective of equally weighting citizens' votes. *Id.* at 91.

The Court observed there were many possible demographic apportionment bases that could produce the voter equality required by *Reynolds* – including registered voters, actual voters, total population, or total population figures adjusted to exclude specific sub-groups like aliens, transients, or convicted criminals. *See id.* at 91-92.[10] Any of these groups, depending upon the circumstances in a particular locality, might be an acceptable proxy for identifying and quantifying voters in a state. *Id.* The Court held, however, that the choice of

[10] CVAP falls into the latter of these three categories as it represents total population, adjusted to remove non-citizens and individuals below the voting age of 18. As *Burns* holds, there is no requirement that a city use CVAP or any other particular voter apportionment base. Here, however, where Irving flatly admits it made no attempt to equalize voting populations among the districts using CVAP, registered voters, or any other voter-specific apportionment base, the deference discussed in *Burns* has no applicability.

which apportionment base to use as a means of equalizing voting populations among electoral districts "involved choices about the nature of representation which we have shown no constitutionally founded reason to interfere." *Id.* Accordingly, the Court held that unless the state's choice of its apportionment base "is one the Constitution forbids," it was not subject to judicial interference. *Id.* Concluding that Hawaii's use of registered voters as an apportionment base was, under the circumstances, an effective means for equalizing the number of voters among its districts, the Court upheld Hawaii's electoral plan. *Id.* at 96.

The Court's conclusion in *Burns* is consistent with its clear instruction in other "one person, one vote" cases. Those cases make clear that though a city has substantial leeway in constructing voting districts, it cannot do so in a manner that produces unconstitutional results:

> [O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966) (citation omitted). Similarly, as the Court noted in *Gray*, "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 372 U.S. at 381 (citation omitted). Thus, "once the class of voters is chosen and their qualifications

specified, we see no constitutional way by which equality of voting power may be evaded." *Id.* This same principle was most recently affirmed in *Bush*, where the Court underscored that a state's political deference in the electoral context ends where constitutional rights begin. 531 U.S. at 104-05.

E. *Chen* Allows a City to Dilute Votes Without Limit.

Chen is not only wrongly-decided, it also sets a dangerous precedent by effectively granting cities a free license to dilute the weight of its voters' votes to any extreme degree they desire provided they otherwise equalize total population among districts. In Irving, that approach led to the devaluation of a voter's vote by almost 50%. This result is pernicious enough. But if *Chen's* "political deference" doctrine is taken to its logical conclusion, it is just the tip of the iceberg.

Under *Chen's* flawed interpretation of the "one person, one vote" requirement, there are literally ***no limits*** on how severely a city could dilute the weight of its voters' votes. So long as the total populations between the districts are equalized, a city could arbitrarily "choose" to make one voter's vote worth two times, ten times, or even ten thousand times as much as another voter's vote. Under *Chen*, any of these "political choices" would be acceptable. Yet such an outcome is completely inconsistent with an unbroken line of Supreme Court cases expressly holding that districts must be structured so that "equal numbers of voters can vote for proportionally equal numbers of officials" and that the vote of any

citizen must be "approximately equal in weight to that of any other citizen." *See, e.g.*, *Hadley*, 397 U.S. at 56; *Morris*, 489 U.S. at 701.

IV. Irving's Plan Violates the "One Person, One Vote" Requirement Because it Dilutes Votes Almost 2 to 1.

Irving's Plan violates the "one person, one vote" requirement because it dilutes votes. The voter population disparities between District 1 and neighboring districts far exceed 10 percent.[11] Indeed, they range from 58 percent to as high as 84 percent. Thus, they are a per se violation of the Equal Protection Clause.[12] Accordingly, this Court should enjoin the Plan as unconstitutional.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court grant this Petition for Rehearing En Banc. Appellants further request such additional relief as is necessary and just, whether in equity or at law.

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[11] The Constitution requires that voter populations be "approximately equal" among the districts. *See Morris*, 489 U.S. at 701 ("In calculating the deviation among districts, the relevant inquiry is whether the vote of any citizen is ***approximately equal*** in weight to that of any other citizen") (citation and quotation marks omitted). Courts apply a burden shifting approach in analyzing voter populations among districts. If the population of voters deviates between districts by more than 10 percent, it constitutes a prima facie case of invidious discrimination requiring a city to prove a legitimate reason for the discrepancy. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). If the deviation is extreme enough, courts may find a per se constitutional violation. *See Daly v. Hunt*, 93 F.3d 1212, 1217-18 (4th Cir. 1996) (noting that "there is a level of population disparity beyond which a state can offer no possible justification" and that "the Court has stated in dictum that a maximum deviation of 16.4% 'may well approach tolerable limits.'") (citation omitted). Irving's deviation of 84 percent is more than five times the "maximum deviation" suggested by the Court in *Daly*.

[12] Irving did not offer any evidence of a legitimate explanation for the discrepancy. Accordingly, even if there is no per se violation, Irving failed to carry its burden of rebutting the presumption that the disparities are discriminatory.

Respectfully submitted,

/s/ Kent D. Krabill

Kent D. Krabill
Texas Bar No. 24060115
Jeremy A. Fielding
Texas Bar No. 24040895
LYNN TILLOTSON PINKER & COX, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
Telephone: 214-981-3800
Facsimile: 214-981-3839
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served, as indicated below, on counsel of record on January 3, 2012.

Via Court's ECF Notification
C. Robert Heath
BICKERSTAFF, HEATH, DELGADO & ACOSTA, LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746

Via Certified Mail/RRR
Charles R. Anderson
City Attorney
City of Irving, Texas
825 W. Irving Blvd.
Irving, Texas 75060

Via Court's ECF Notification
Nina Perales
Iván Espinoza-Madrigal
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, Texas 78205

/s/ Kent D. Krabill
Kent D. Krabill

EXHIBIT A

***Lepak v. City of Irving, Tex.*, No. 11-10194, 2011 WL 6217946 (5th Cir. 2011)**

4842-8649-3198, v. 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 14, 2011

Lyle W. Cayce
Clerk

No. 11-10194

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

Plaintiffs - Appellants

v.

CITY OF IRVING TEXAS,

Defendant - Appellee

ROBERT MOON; RACHEL TORREZ MOON; MICHAEL MOORE; GUILLERMO ORNELAZ; GILBERT ORNELAZ; AURORA LOPEZ,

Intervenor Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas
U.S.D.C. No. 3:10-cv-00277-P

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

This case presents the question of whether the "one person, one vote" principle embodied in the Fourteenth Amendment's Equal Protection Clause requires the City of Irving, Texas, to apportion its city council election districts to equalize the citizen voting age population ("CVAP"), as opposed to equalizing

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the total population of each district. The plaintiffs contend that the constitutionally mandated measure is CVAP, and thus, the City's current apportionment plan, which was drawn with districts of relatively equal total population, but unequal CVAP, is unconstitutional.

We confronted this exact argument in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), and held that equalizing total population, but not CVAP, of each district, does not violate the Equal Protection Clause. *Id.* at 505; *see also id.* at 528. The Appellants do not attempt to distinguish *Chen*, nor do they argue that there has been any intervening contrary or superseding decision of the Supreme Court or this court sitting en banc. Instead, they merely argue that *Chen* was wrongly decided. However, we are not at liberty to overrule *Chen* as the Appellants desire. *See, e.g.*, *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision." (citing *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir. 1998))). Accordingly, we AFFIRM the district court's grant of the City's motion for summary judgment.[1]

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[1] We disagree with the Intervenors' arguments that this appeal is not justiciable under Article III of the Constitution. *See Reno v. Bossier Parish School Board*, 528 U.S. 320, 327-28 (2000) (holding that even though the challenged apportionment plan would almost certainly be superseded by a new plan before the next election, the case nonetheless presented a live Article III case or controversy because the challenged plan "will serve as the baseline against which [the] next voting plan will be evaluated for the purposes of [§ 5] preclearance"); *Baker v. Carr*, 369 U.S. 186, 204-08 (1962) (holding that the alleged dilution of an individual voter's power to elect representatives provides that voter with standing). Because there are plaintiffs with standing, and they seek only injunctive relief, we need not address the Intervenors' argument that Appellants who reside in Districts 4 and 7 lack standing. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) ("We . . . agree with the unanimous view of [the Seventh Circuit] that [some of the petitioners] have standing to challenge the validity of [the state law requiring voters to present photo identification] and that there is no need to decide whether the other petitioners also have standing."), *aff'g* 472 F.3d 949, 951 (7th Cir. 2007) ("Only injunctive relief is sought, and for that only one plaintiff with standing is required . . . ." (citing *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 585-86 (5th Cir. 2006))).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

January 04, 2012

Mr. Kent Davis Krabill
Lynn, Tillotson, Pinker & Cox, L.L.P.
2100 Ross Avenue
Suite 2700
Dallas, TX 75201-0000

No. 11-10194, Keith Lepak, et al v. City of Irving Texas
USDC No. 3:10-CV-277

Dear Counsel:

The following pertains to your rehearing electronically filed on January 4, 2012.

You must submit the 20 paper copies of your rehearing en banc required by 5th Cir. R. 35.2 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By: Melissa Mattingly
Melissa V. Mattingly, Deputy Clerk
504-310-7719

cc: Ms. Rebecca McNeill Couto
Mr. John Thomas Cox III
Mr. Jeremy Alan Fielding
Ms. Diana Katherine Flynn
Mr. Claude Robert Heath
Mr. Roscoe Jones Jr.
Ms. Nina Perales