

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

APPELLEE'S RESPONSE TO
APPELLANTS' PETITION FOR REHEARING EN BANC

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Standard for Decision

The standard for rehearing en banc is set out in Rule 35 of the Federal Rules of Appellate Procedure. That Rule provides that rehearing en banc is not favored and ordinarily will not be granted in the absence of a conflict with a decision of the United States Supreme Court or of this court or unless there is a question of exceptional importance. FED. R. APP. PROC. Rule 35(a). The rule provides a single example of an issue of exceptional importance, which involves a direct conflict with the authoritative decisions of other courts of appeal that have addressed the issue. FED. R. APP. P. Rule 35(b)(1)(B). Here, there is no conflict with a decision of the Supreme Court, of this court, or of any other court of appeals.

ARGUMENT AND AUTHORITIES

Pursuant to Rule 35(b)(1)(A), FED. R. APP. P., Mr. Lepak urges that this court should grant rehearing en banc because “the panel decision conflicts with an unbroken line of Supreme Court cases guaranteeing the right to an undiluted vote.” Petition for Rehearing En Banc, at iii. In fact, though, the Supreme Court cases Lepak relies on did not deal with the issue presented here, the apparent conflict Mr. Lepak perceives was missed by this court in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) as well as by the other two courts of appeal to face the issue, and the Supreme Court itself did not recognize any conflict when it, in fact, did decide a case where the issue of the permissible apportionment base was presented. The

panel opinion is fully consistent with Supreme Court jurisprudence, with the precedents of this court, and with the other courts of appeal. The standard for rehearing en banc has not been satisfied.

I. There is no conflict between the panel opinion and decisions of the Supreme Court that would meet the standard required to justify a rehearing en banc.

A. The “unbroken line of Supreme Court cases” that Lepak asserts conflict with the panel opinion do not address the issue presented here.

The underlying issue in this case involves the nature of representation. Are districts required to provide representation solely to voters or, perhaps instead, to persons generally without regard to whether they are eligible to vote? In other words, are electoral districts permitted by the Constitution to be drawn so that they are equal in population (including children and resident aliens) or, alternatively, are districts required to contain an equal number of potential voters. Courts have referred to this dichotomy as being the difference between representational equality (equal numbers of people) and electoral equality (equal numbers of voters). *Chen*, 206 F.3d at 525; *Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996); *Garza v. County of Los Angeles*, 918 F.2d 763, 781-82 (9th Cir. 1990) (Kozinski, J., concurring and dissenting). While the Supreme Court cases on which Lepak relies state the one person-one vote rule, they do not address the specific issue present in

this case, which is whether that rule must be applied to produce representational equality or electoral equality.¹

The cases relied on by Lepak involve situations where representation was assigned to pre-existing geographic units rather than being allocated by drawing districts that were equal on the basis of some type of population measure. Thus, *Gray v. Sanders*, 372 U.S. 368 (1963), involved the Georgia county unit election system where statewide officials obtained a party nomination by carrying a certain number of counties rather than by receiving the greatest number of votes. As a result, a single resident of the smallest county exercised the voting strength of 99 residents of the largest county. *Gray*, 372 U.S. at 371. In *Reynolds v. Sims*, 377 U.S. 533 (1964), legislative seats were apportioned to counties rather than being allocated on an equipopulous basis, resulting in population ratio variances of about 41:1 in the Senate and about 16:1 in the House. *Reynolds*, 377 U.S. at 545. In *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50 (1970), trustee positions in a junior college district were assigned to school districts grouped by “school enumeration” (the number of persons between ages six and 20 residing in a district) with a bias that assigned a larger number of positions to

¹ While Mr. Lepak cites several one person-one vote cases in his petition, the four he relies on for the proposition that there is an unbroken line of cases requiring electoral equality rather than representational equality are *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989); *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50 (1970); *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Gray v. Sanders*, 372 U.S. 368 (1963).

smaller school districts. *Hadley*, 397 U.S. at 51, 58.² In *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989), the issue involved the assignment of seats on a municipal board with one seat going to each of New York City's boroughs so that Brooklyn (population 2,230,936) had one representative just as did Richmond (Staten Island) (population 352,151). In all the cases, the basic issue was the assignment of seats on some geographic or political basis and was not whether one type of population measure rather than another should be used. In fact, as noted in footnote 2, *supra*, in the one case where the population measure (school enumeration) might have been an issue, the Supreme Court expressly declined to address that question. Rather, the fundamental message of the cases Lepak cites as establishing a conflict with the panel opinion is simply that "[l]egislators represent people, not trees or acres [and] are elected by voters, not farms or cities or economic interests." *Reynolds*, 377 U.S. at 562. That message does not encompass whether representational equality or electoral equality is the constitutionally required standard and is in no way inconsistent with the holding of the panel opinion. For Lepak to suggest that these cases represent an unbroken line of cases in conflict with the panel opinion reads far more into the cases than their language justifies.

² Although the seats assigned to each districts depended on a measure using a count of persons who were below the voting age, the Court focused solely on the imbalance between districts and not on "whether school enumeration figures, rather than actual population figures, can be used as a basis for apportionment." *Hadley*, 397 U.S. at 57, n.9.

This absence of any conflict with Supreme Court one person-one vote jurisprudence is exactly the conclusion this court reached barely more than a decade ago in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). The same issue presented in the panel opinion—*i.e.*, whether districts could be balanced by total population rather than citizen-voting-age population or some similar measure of potential voters—was also presented in *Chen*. The *Chen* court, in a well-reasoned and extensively researched opinion by Judge Garwood, expressly rejected the idea that the line of Supreme Court one person-one vote opinions requires that districts be balanced by voters rather than population. This court noted that while there is unquestionably language in the one person-one vote cases suggesting it is the right of the individual voter that must be protected and, thus, that electoral equality is the proper standard, there is also language in those cases suggesting that equal population is the necessary measure so that representational equality is the ideal. *Chen*, 206 F.3d at 525-26. Indeed, as Judge Garwood noted, in some of the opinions the language suggesting an electoral equality standard is contradicted by language in the same opinion apparently opting for representational equality. *Id.* at 526. This court concluded in *Chen* that the Supreme Court language Dr. Chen relied on there and that Mr. Lepak urges here, is “not decisive, given the strong possibility that much of the language he relies on may be traceable to the use of terms interchangeably in a context where their meaning does not diverge.” *Id.*

Chen was the subject of a petition for writ of certiorari, which the Supreme Court denied. Justice Thomas, though, in his dissent from the denial of the petition expressly rejected the proposition Lepak is arguing here—*i.e.*, that there is a line of Supreme Court cases requiring that districts be balanced by voters rather than by population. Justice Thomas stated that the Supreme Court has “never determined the relevant ‘population’ that States and localities must equally distribute among their districts.” *Chen v. City of Houston*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of petition for writ of certiorari). If the Supreme Court has never determined the issue presented in the panel opinion, that opinion cannot conflict with a decision of the Supreme Court.

B. When the Supreme Court did address a case that raised the issue of the proper apportionment base, it held, as did the panel opinion and the *Chen* court, that it was a choice appropriately left to the political process.

This question involving the nature of representation and, more specifically, whether a particular type of population measure should be used to determine if districts are in balance was, in fact, before the Supreme Court in *Burns v. Richardson*, 384 U.S. 73 (1966). *Burns*, which was decided only two years after the landmark case of *Reynolds v. Sims*, 377 U. S. 533 (1964), dealt with Hawaii’s method for apportioning seats in its legislature. Rather than using total population as the standard for apportionment, Hawaii drew its districts to be equal in terms of registered voters. This made a significant difference in how representation was

allocated. Hawaii used multi-member districts and assigned each district a certain number of legislative seats. If total population was used as the apportionment base, then the ninth and tenth representative districts would be entitled to eleven representatives. On the other hand, if registered voters was the measure, then those two districts would have only six representatives. *Burns*, 384 U.S. at 90-91. Essentially, this is a difference of the same sort of magnitude that Mr. Lepak claims exists in this case.

Nevertheless, the Court declined to say that one of those two population measures was constitutionally required. To the contrary, the Court, in discussing its earlier holding in *Reynolds v. Sims*, emphasized that:

[O]ur discussion carefully left open the question of what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. . . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the right to vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

Burns, 384 U.S. at 91-92 (footnotes omitted).

Although Lepak seeks to have this court hold that there is a constitutional requirement to exclude non-citizens as well as children from the apportionment

base, the clear language of *Burns* indicates that the Supreme Court is unaware of any constitutionally founded reason either to include or exclude non-citizens from the apportionment base. Far from meeting the Rule 35(b)(1)(A) requirement that the panel decision conflict with a decision of the Supreme Court, *Burns* teaches that the panel decision is entirely consistent with the only Supreme Court decision that specifically addresses the choice of the apportionment base.

C. *Bush v. Gore* did not change the constitutional dynamic.

Seizing on a statement in the *Chen* opinion that its decision was made “in face of the lack of more definitive guidance from the Supreme Court,” *Chen*, 206 F.3d at 528, Lepak argues that *Bush v. Gore*, 531 U.S. 98 (2000), which was decided nine months after *Chen* now provides that “guidance.” Motion for Rehearing En Banc, at 6. *Bush v. Gore*, however, relates to issues of election administration and procedure in counting and recounting votes. There is no discussion at all in that opinion about the permissible apportionment base. Further, it was not intended as a general precedential statement even about election administration and procedures. The Court expressly stated, “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” *Bush*, 531 U.S. at 109.

Additionally, the Court made it clear that it was not considering whether the Equal Protection Clause afforded local entities the flexibility to develop different systems

for implementing elections. *Id.* It is difficult to imagine how such a carefully limited opinion on a different issue and that studiously avoided deciding the possibility of flexible approaches to election issues could be interpreted to say that local entities have no flexibility to make decisions on whether an electoral or a representational equality model is appropriate when drawing districts.

Lepak's argument that *Bush v. Gore* is a game changer that somehow unified the analyses presented in the prior one person-one vote cases so that now they must be interpreted as requiring an electoral equality model of representation draws no support from the language of the case. Further, the fact that the Supreme Court does not consider the case a lodestar by which we can understand the Court's election law jurisprudence is apparent not only from the express statement that its holding was limited to the specific circumstances of that case but also from the fact that in the more than eleven years after it was decided the Supreme Court has yet to cite the opinion in any other case.

II. The panel decision is consistent with this court's jurisprudence and with the decisions of the other courts of appeal that have addressed the issue.

Lepak focuses his argument on an alleged conflict with decisions of the Supreme Court, which is the primary reason stated in the Rules to permit rehearing en banc. FED. R. APP. P. Rule 35(b)(1)(A). Rule 35 also permits en banc consideration if a panel decision conflicts with a decision of this court or is a matter of exceptional importance with the sole example in the Rules relating to

matters that conflict with authoritative decisions of the other courts of appeal.

These alternative grounds for rehearing are inapplicable here, because there is no conflict with the opinions of this court or of any other court of appeals.

As the panel recognized, the precise issue presented in this case was before the court in *Chen. Lepak v. City of Irving*, No. 11-10194, 2011 WL 6217946 (2011) (unpublished). The panel expressly followed the holding of *Chen*, so there is no conflict with a decision of this court. Similarly, there is no conflict with any decision of another court or appeals.

Only two other courts of appeal have addressed the issue. The first court to consider the issue of whether the constitution requires districts to be balanced with equal numbers of potential voters rather than equal numbers of people was *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). While Judge Kozinski argued in dissent that electoral equality (equal number of voters) was the required measure, *Garza*, 918 F.2d at 780-85, the majority in dictum³ suggested that representational equality or equal numbers of people was the constitutional standard. *Id.* at 773-76. What was abundantly clear from the majority opinion is that it rejected the contention that Lepak makes here that electoral equality is constitutionally required.

³ Any decision that total population was the constitutionally required measure is arguably dictum since the court recognized that California law required that districts be drawn on the basis of total population. *Garza*, 918 F.2d at 774 and 775. So long as the court determined that electoral equality was not required, the requirement of California law made it unnecessary to decide whether representational equality was constitutionally required.

The other court to consider the issue was the Fourth Circuit in *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). The Fourth Circuit concluded, just as this court subsequently ruled in *Chen*, that the choice between the two theories of representation was “quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.” *Daly*, 93 F.3d at 1227.

The panel decision is entirely consistent with the rulings of this court and of every other court of appeals to consider the issue.

CONCLUSION

The panel decision does not conflict with any decision of the Supreme Court, of this court, or of any other court of appeals. Accordingly, the petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2012, I electronically submitted the foregoing document to the clerk of court for the U.S. Court of Appeals, Fifth Circuit using the electronic case filing system of the court, and that a true and correct copy of this document was served upon all counsel of record listed below by electronic service through the Court's ECF system pursuant to the applicable Rule(s):

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 3,361 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft WORD 2007 in 14 point Time New Roman type style.

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Dated: January 27, 2012