IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SUE EVENWEL AND	§	
EDWARD PFENNINGER,	§	
Plaintiffs,	§	
	§	
vs.	§	CAUSE NO. A-14-CA-335-LY
	§	
RICK PERRY, IN HIS OFFICIAL	§	
CAPACITY AS GOVERNOR	§	
OF TEXAS; AND NANDITA BERRY,	§	
IN HER OFFICIAL CAPACITY AS	§	
TEXAS SECRETARY OF STATE,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS

Defendants Governor Rick Perry and Secretary of State Nandita Berry, in their official capacities, file this *Motion to Dismiss Plaintiffs' Original Complaint*, and would respectfully show as follows:

BACKGROUND

Plaintiffs Sue Evenwel and Edward Pfenninger allege they are persons eligible to vote in elections for the Texas Senate. Complaint ¶ 1. Evenwel alleges that she resides in Texas Senate District 1, while Pfenninger alleges that he resides in Senate District 4. *Id.* ¶¶ 6-7.

Plaintiffs complain that the Citizen Voting Age Population (CVAP) in their respective Senate Districts is much higher than in many other Senate Districts in the State.[1] Complaint

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[1] CVAP refers to an estimate of citizen voting age population drawn from the "American Community Survey." *See* Complaint at Ex. A. One Texas federal district court recently explained CVAP this way:

> the Census has developed the American Community Survey ("ACS") to estimate the demographic composition of the United States. The ACS…is not an actual population count; instead, the ACS is an annual nationwide survey conducted by the Census Bureau wherein the Census Bureau randomly samples a large portion of the total population. Those sampled are asked a series of questions designed to capture demographic information, including socio-economic background, citizenship, educational attainment,

¶¶ 27-30. Plaintiffs argue that, as a result of this disparity, the votes that they cast for the Texas Senate carry less weight than those in Senate Districts that have a lower CVAP. *Id.* ¶ 31. Plaintiffs assert that Texas "cannot apportion legislative districts based solely on total population where…doing so would result in grossly unequal weighting of individual electoral power." *Id.* ¶ 34. More specifically, Plaintiffs argue that the alleged differences in CVAP between the Texas Senate Districts violate the equal protection rights of Texas voters who live in Texas Senate Districts with a higher-than-average CVAP. *Id.* ¶¶ 39-42.

Based on the foregoing assertions, Plaintiffs ask this Court to declare the current Texas Senate District map—which was duly enacted by the Texas Legislature in 2013—to be in violation of the Equal Protection Clause. Complaint at 13. Plaintiffs also ask this Court to enjoin Texas from using the current map and to order the Texas Legislature to redraw the map. *Id.*

ARGUMENT & AUTHORITIES

This suit should be dismissed for failure to state a claim upon which relief can be granted because Plaintiffs' equal protection challenge to the Texas Senate District map is based on a legal theory that has never been recognized by any federal court. That is, Plaintiffs argue that the Equal Protection Clause requires Texas to draw Senate Districts to equalize CVAP; however, federal courts have repeatedly recognized that a state satisfies equal protection principles if it draws its state legislative maps—as Texas has done here—to equalize total population between districts. Because the sole legal theory upon which Plaintiffs base their case has no recognized basis in the law, this suit should be dismissed.

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and other information, much of which was formerly included on the Long Form questionnaire. Thus, the ACS data…provides an *estimate* of citizen voting age population of a community based on population samples, rather than an actual enumeration.

Rodriguez v. Harris County, Texas, 964 F. Supp. 2d 686, 727 (S.D. Tex. 2013). (emphasis in original).

I.   STANDARD OF REVIEW

Dismissal is proper pursuant to Federal Rule of Civil Procedure 12(b)(6) when a party's

complaint fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

When considering a motion to dismiss under Rule 12(b)(6), the Court accepts all well-pleaded

facts in the complaint as true and resolves all doubts in the plaintiff's favor. *Vulcan Materials*

Co. v. City of Tehuacana, 238 F.3d 382, 387 (5th Cir. 2001). Although the complaint need not

contain detailed factual allegations, it must include "more than labels and conclusions, and a

formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 553 (2007). Rather, the plaintiff must allege sufficient facts to state a

claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Relevant here, dismissal pursuant to Rule 12(b)(6) is required when the suit is based on an

invalid legal theory; this is true even if the suit is "otherwise well-pleaded." *Breen v. Tex. A&M*

Univ., 485 F.3d 325, 336 and n.11 (5th Cir. 2007) (quoting *Neitzke v. Williams,* 490 U.S. 319

(1989), for the proposition that "if as a matter of law it is clear that no relief could be granted

under any set of facts…a claim must be dismissed, without regard to whether it is based on an

outlandish legal theory or on a close but ultimately unavailing one") (internal quotations

omitted).

II.   THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE APPORTIONMENT BASED ON
        CVAP.

        a. **While States must apportion "on a population basis," there can be no
            question that they may do so using "total population" data.**

The Supreme Court has long held that the Equal Protection Clause requires that states

draw legislative districts of "equal population." *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964)

("the Equal Protection Clause requires that the seats in both houses of a bicameral state

legislature must be apportioned on a population basis"). Since this "equal population" principle

was established, however, the Supreme Court has never mandated what groups must comprise the "population" that must be equalized.

Traditionally, however, the Supreme Court has considered *total population* data when determining whether a state has acted in compliance with the Equal Protection Clause. In *Reynolds,* for example, the Supreme Court reviewed total population data, based on the most recent decennial census, to hold that Alabama's unequal apportionment of its state legislative districts violated equal protection. 377 U.S. at 545, 568-69 (finding problematic fact that only "43% of the State's *total population* would be required to comprise districts which could elect a majority" of the state senate) (emphasis added). Since *Reynolds*, the Supreme Court has continuously relied on *total population* as relevant data for determining whether a state legislative reapportionment survives an equal protection challenge.[2]   *See, e.g., Brown v. Thomson*, 462 U.S. 835, 838-39 (1983) (noting "ideal apportionment" for Wyoming's 64 house districts was 1/64th of state's total population); *Mahan v. Howell*, 410 U.S. 315, 319, 329 (1973) (districts that deviated up to 16 percent from "ideal district size," based on total population, deemed constitutionally permissible).

The Supreme Court has continued to recognize the validity of apportionment by total population, even while also acknowledging that this method may result in variations in eligible voters between districts. *See Gaffney v. Cummings*, 412 U.S. 735 (1973). In *Gaffney*, the Court reaffirmed that state reapportionments must be "'as nearly of equal population as is practicable.'" *Id.* at 742 (quoting *Reynolds*, 377 U.S. at 577). In so holding, the Court recognized that constant changes in the population of eligible voters may lead to variations in voting population among

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[2] Similarly, the Supreme Court has consistently made reference to total population figures, measured by the decennial census, as the measure by which equality between federal congressional districts must be measured. *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) ("Adopting any standard other than *population equality, using the best census data available*…would subtly erode the Constitution's ideal of equal representation") (emphasis added).

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districts of roughly equal total population. *See id*. at 743 (recognizing that "total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan"). Despite this, the Court reaffirmed the "equal population" test as a valid measure for determining whether a state legislative map satisfies equal protection principles.[3] *See id.* at 746-49. Nowhere in *Gaffney* did the Supreme Court suggest that a possible divergence between total population and the population of eligible voters would ever require states to consider any population other than "total population" when apportioning state legislative districts.

Nevertheless, the Supreme Court has held that states may deviate from drawing districts based solely on "raw population figures" in order to achieve certain interests, such as maintaining compact districts. *See Brown*, 462 U.S. at 842 (citing *Gaffney*, 412 U.S. at 745-748). Further, the Court has gone so far as to hold that the "Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Burns v. Richardson*, 384 U.S. 73, 91 (1966). Indeed, the Supreme Court has never held—as the Plaintiffs seek to argue here— that the Equal Protection Clause "requires" the States to use any particular set of population data in order to satisfy the "equal population" principle.

Rather, and dispositive here, the Supreme Court has indicated that the States have *discretion* to decide what data to use for reapportionment purposes. *See Burns*, 384 U.S. at 91 (noting Court has never "suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the

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[3] More specifically, the *Gaffney* Court found that, because decennial census data may not always be a proxy for the population of registered voters, a plaintiff could not simply cite "minor deviations from mathematical equality" to make a prima facie case of discrimination under the Fourteenth Amendment. 412 U.S. at 745.

apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured"). More specifically, the Supreme Court has held that a state's decisions regarding what population data to use for reapportionment purposes "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Id.* Given this, the Court found that, unless the state's decision to include or exclude certain groups from its apportionment base was "one the Constitution forbids…the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby." *Id.* at 92 (citing as example of unlawful exclusion from apportionment base *Carrington v. Rash*, 380 U.S. 89 (1965), which struck down a state provision that disqualified certain members of the military resident in the state from voting in state elections).

In sum, the Supreme Court has repeatedly held that a State may satisfy the Fourteenth Amendment's "one person, one vote" protections by drawing districts that have roughly "equal population," and the "population" by which compliance is measured may be by total population, as calculated by the most recent decennial census. This, of course, is what the state has done here. Critically, however, the choice over what population data to use lies within the sound discretion of the state's legislature. *See Burns*, 384 U.S. at 91-92; *see also Daly v. Hunt*, 93 F.3d 1212, 1225 (4th Cir. 1996) (the "permissive language [in *Burns*] implies that the decision to use an apportionment base other than total population is up to the state").

b. Federal appellate courts have rejected the argument that the Equal Protection Clause ever "requires" the States to consider CVAP.

Despite the fact that the Supreme Court has yet to find a "constitutionally founded reason to interfere" with a state's reliance on total population for reapportionment, Plaintiffs here make the remarkable assertion that the Texas Senate District map is constitutionally infirm because the

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Equal Protection Clause required Texas to draw districts that equalize *both* total population and CVAP. Complaint ¶¶ 41-42. However, no such mandate has ever been imposed on the States. In fact, the Fifth Circuit, along with other federal appellate courts, expressly rejected the argument Plaintiffs put forth here.[4] *See Lepak v. City of Irving Texas*, 453 Fed. Appx. 522 (5th Cir. 2011) *cert. denied* 133 S. Ct. 1725 (2013); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) *cert. denied* 532 U.S. 1046 (2001); *Daly*, 93 F.3d at 1212; *see also Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) *cert. denied* 498 U.S. 1028 (1991).

Indeed, the argument made here was summarily rejected by the Fifth Circuit three years ago in *Lepak*, wherein the Fifth Circuit held, without qualification, that "equalizing total population, but not CVAP, of each district, does not violate the Equal Protection Clause." 453 Fed. Appx. at 523 (citing *Chen*, 206 F.3d at 502). The decision in *Lepak* relied upon an earlier opinion by the court in *Chen*. In that case, the plaintiffs argued—like the Plaintiffs do in this matter—that the city's council districts violated the Equal Protection Clause because there was a greater than 10-percent variance in CVAP between the districts. 206 F.3d at 522-23 (expressly rejecting argument "that when total population is obviously an imperfect proxy for potential voters, the City is constitutionally required to use a more accurate measurement of voters"). In considering the plaintiffs' claim, the court indicated that drawing districts with a goal of achieving "electoral equality" by using voting-age population data, rather than using total population data to achieve what has been termed "representational equality," may not itself be a violation of "one person, one vote" principles. *See* 206 F.3d at 526-27 (citing *Burns,* 384 U.S. at

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[4] Justice Thomas dissented from the denial of certiorari in *Chen*, arguing that the Supreme Court has yet to make clear "the relevant 'population' that States and localities must equally distribute among their districts," in order to satisfy *Reynolds'* "equal population" principle. 532 U.S. 1046, 1047 (2001). However, the Supreme Court has, by denying review in *Chen*, *Garza* and *Lepak*, declined three opportunities—including one just last year—to consider whether *Reynolds'* "equal population" principle requires equalizing voting-age population.

73). However, the *Chen* court expressly rejected the proposition that the Equal Protection Clause *requires* state and local governments to draw legislative districts to achieve "electoral equality" by using voting-age population data; rather, the court held that its "review of the history of the [Fourteenth] amendment cautions against judicial intrusion in this sphere—either for or against either particular theory of political equality."[5] *Id.* (finding that "the drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have…rejected a proposal rooted in…the principle of electoral equality"). Based on this, the *Chen* court found that the plaintiffs could not "create a genuine issue of material fact" with respect to their "one person, one vote" challenge, which was solely based on alleged deviations in CVAP between districts. *Id*.

In finding that the decision to reapportion using total population data, or some other set of data intended to achieve "electoral equality," is ultimately a political choice, the Fifth Circuit agreed with a similar conclusion by the Fourth Circuit in *Daly v. Hunt*. There, the court held that in the "absence of a clear pronouncement from the Supreme Court" federal courts confronting equal protection challenges to state reapportionments "should [be] tempered by the overriding theme…weighing against judicial involvement." *Daly*, 93 F.3d at 1227. The *Daly* court recognized that a state legislature's decision to use voting-age population data in drawing its legislative maps, in an attempt to achieve "electoral equality," may not necessarily be in

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[5] Plaintiffs attempt to distinguish *Chen* by arguing that the *Chen* court did not consider whether the Equal Protection Clause may require states to draw districts to "harmonize" total population and CVAP. Complaint ¶ 15. This is an entirely irrelevant distinction, however, because the *Chen* court—like the Fourth Circuit in *Daly*—rejected the general notion that it would *ever* be proper for a federal court to inject itself into a state's decision to use, or not use, an apportionment base measured by something other than total population data. *See* 206 F.3d at 526-27. In coming to this conclusion, both *Chen* and *Daly* relied on the Supreme Court's statements in *Burns* indicating that it could not identify any "constitutionally founded reason" to interfere in such a decision. 384 U.S. at 91-92. These holdings foreclose any assertion by Plaintiffs that the Equal Protection Clause is somehow violated when if a state fails to "harmonize" CVAP and total population when drawing districts. Further, Defendants note that Plaintiffs' bald assertion that Texas Senate districts can be drawn to "harmonize" CVAP and total population entirely ignores numerous other, valid considerations that must be made when Texas redraws legislative districts.

violation of the "equal population" principle articulated in *Reynolds*. *Id.* However, the Fourth Circuit also found that there was "no reason to believe that voting-age population is significantly better than total population in achieving the goal of one person, one vote." *Id.* As such, the *Daly* court held that permitting federal judicial intervention into a state's decision to use one set of population data instead of the other "would lead federal courts too far into the political thicket." *Id.* (internal citations and quotation omitted).

In short, the Equal Protection Clause imposes no constitutional mandate with respect to what population data must be considered when a state engages in redistricting. To the contrary, even the Supreme Court has yet to identify a "constitutionally founded reason to interfere" with a state's choices in this arena. *See Burns*, 384 U.S. at 91. To the extent Plaintiffs now ask this Court to find that the Equal Protection Clause mandates such judicial interference, their claim simply can find no support in the law.

c. Because the sole legal theory upon which Plaintiffs base this case is invalid, dismissal is warranted.

Read together, the authorities cited herein establish two propositions that are dispositive in this case. *First*, a state that draws districts of relatively equal total population, as Texas has done here, satisfies the "one person, one vote" protections of the Fourteenth Amendment. *Second*, neither the Supreme Court, nor any federal appellate court to date, has ever held the Equal Protection Clause *requires* a state to consider CVAP data when equalizing population between districts. Given this, the sole legal theory upon which Plaintiffs base this suit has no basis in the law.

Moreover, and contrary to the key assumption that forms the basis of Plaintiff's complaint, courts have recognized that "voting-age population" data simply is not a panacea with

respect to achieving "electoral equality" between legislative districts.[6] *See, e.g., Kalson v. Paterson,* 542 F.3d 281, 289 (2d Cir. 2008) (finding any purported right to an "equally weighted vote" is "not vindicated by having districts of equal voting-age population"). Given this, Texas' decision to consider, or not consider, CVAP data (or some other set of voting-age population data) when drawing districts constitutes, at most, a political decision that is reserved to the discretion of the state's legislature. *See Chen*, 206 F.3d at 528 (the "propriety under the Equal Protection Clause of using total population rather than a measure of potential voters" is, in the absence of "more definitive guidance from the Supreme Court…[an] eminently political question [that] has been left to the political process"); *Gaffney*, 412 U.S. at 749 ("the apportionment task, dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process") (internal citations omitted). Accordingly, Plaintiffs simply cannot demonstrate, as a matter of law, that the Equal Protection Clause in any way mandates this Court's intervention into Texas' decision to use, or not use, CVAP data when drawing its Senate districts. *See Chen*, 206 F.3d at 528.

Because no authority supports the proposition that the Equal Protection Clause requires that the Texas Legislature consider *both* total population data and CVAP (or some other set of

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[6] Notably, the Texas Legislative Council found that using CVAP data in the most recent Texas' redistricting process would be "exceptionally challenging" because:

> the margins of error… will likely exceed the margins of error…under the former long-form citizenship data because of the limited ACS sample size. More troublesome will be the fact that the geography containing the citizenship data may not match the 2010 census geography that will be used to draw redistricting plans….Finally, the fact that the data is inherently backwards looking (the average of the previous five years) adds additional uncertainty to using the data to estimate current CVAP within a proposed district, since many persons who were under voting age in the five years used to determine the ACS average will have reached voting age as of census day…and it cannot be assumed that the ratio of those under 18 and those 18 and over remains constant over time.

TEXAS LEGISLATIVE COUNCIL, STATE AND FEDERAL LAW GOVERNING REDISTRICTING IN TEXAS at 15, *available at* http://www.tlc.state.tx.us/redist/pdf/2011_0819_State&Federal_Law_TxRedist.pdf.

data intended to serve as a measure of potential voters) when drawing its Senate districts, Plaintiffs' single claim in this suit is wholly insubstantial and fails as a matter of law.[7] Accordingly, summary dismissal pursuant to Rule 12(b)(6) is warranted. *See Breen*, 485 F.3d at 336 (dismissal under 12(b)(6) warranted when claim based on invalid legal theory).

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court GRANT the instant motion and DISMISS this suit in its entirety.

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[7] At least one federal circuit court has found that a claim similar to that made here was so "insubstantial" that the claim could be disposed of without the need of a three-judge panel. *See Kalson v. Paterson*, 542 F.3d 281, 287-88 (2d Cir. 2008) (disposition of claim that Article I of the U.S. Constitution required federal congressional districts to be apportioned by voting-age population did not require empanelling a three-judge panel under 28 U.S.C. § 2284, because a "single judge may dismiss a claim that must normally be heard by a three judge court if it is 'insubstantial'"). Because Plaintiffs' claim here, which is strikingly similar to the claim made in *Kalson*, is without any legal foundation, this Court would be permitted to dismiss this suit by order of only a single judge. *See id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

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