No. 11-10194

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
_____

KEITH A. LEPAK, *et al.*,

Plaintiffs-Appellants

v.

CITY OF IRVING, TEXAS,

Defendant-Appellee

ROBERT MOON, *et al.*,

Intervenors
_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
_____

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLEE AND URGING AFFIRMANCE
_____

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QUESTION PRESENTED

This brief will address the following question: whether a court-ordered

municipal election plan designed to remedy vote dilution of minority voting rights

complies with the constitutional one-person, one-vote mandate, when the districts

have equal numbers of people, but not equal numbers of citizens.

INTEREST OF THE UNITED STATES

The United States has authority to file this brief pursuant to Federal Rule of Appellate Procedure 29(a).

The United States has a strong interest in ensuring that localities utilize election systems that comply with both the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment, and an interest in ensuring that complete remedies can be obtained for election systems that are found to violate the Voting Rights Act. The Attorney General is charged with enforcement of Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. 1973 and 1973c. Under Section 5, covered jurisdictions must submit all voting changes, including redistricting plans, either to the Attorney General or the United States District Court for the District of Columbia for review of whether such changes have a racially discriminatory purpose or effect. The Attorney General administers the administrative preclearance process under Section 5 and appears in judicial preclearance actions. 42 U.S.C. 1973c, 1973*l*(b). Under Section 2, the Attorney General has authority to bring enforcement actions in federal courts nationwide to remedy discriminatory election procedures, including at-large election systems that lead to vote dilution. 42 U.S.C. 1973j(d). Accordingly, the United States was

granted leave to file an *amicus curiae* brief with the district court in this case. R. 804.[1]

Specifically, this case raises important questions regarding the appropriate population standard a locality should use when drawing its election districts in compliance with the Equal Protection Clause principles established in *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The United States previously addressed this issue in *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991), which upheld the Department of Justice's view that a jurisdiction's use of total population to draw district lines satisfies the one-person, one-vote principle.

STATEMENT OF THE CASE

This is an appeal from a judgment for the defendant in a constitutional challenge to a redistricting plan adopted in February 2010 for single-member city council positions in the City of Irving, Texas (City or Irving). Plaintiffs, citizens of Irving in affected districts (R. 14, 1432-1433) claimed the plan violates the one-person, one-vote principle enunciated in the line of cases beginning with *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The City, and a group of minority voters who intervened, are defendants. R. 14, 88. Following cross-motions for summary

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[1] "R. __" refers to the page number following the Bates stamp "USCA5" on documents in the official Record on Appeal. "Br. __" indicates the page number of appellant's opening brief.

judgment, the district court held that the electoral plan for single member districts does not violate the Fourteenth Amendment and dismissed the action. R. 1431.

A. Background

1. On November 6, 2007, Manuel A. Benavidez, a Hispanic voter in Irving, filed suit challenging the legality of Irving's at-large electoral system under Section 2 of the Voting Rights Act of 1965 (the Act), as amended, 42 U.S.C. 1973. See *Benavidez* v. *City of Irving*, 638 F. Supp. 2d 709, 710-711 (N.D. Tex. 2009). The original at-large plan allowed Irving to conduct an at-large election for each of its eight city council members and its mayor, who also votes as a member of the city council. *Id*. at 711. Under the at-large system, all Irving voters could vote for candidates running for each of the city council positions and for mayor. *Ibid*. At the time, none of Irving's eight city council members were Hispanic, and over the last twenty years, only one Hispanic candidate has succeeded in a bid for Irving's city council. *Ibid*. Benavidez alleged that the City's at-large plan had the result of diluting Hispanic voting strength, in violation of Section 2 of the Act. *Ibid*.

After a four-day bench trial that concluded on February 20, 2009, the district court held that Irving had violated Section 2 of the Act by electing its city council members on an at-large basis. *Benavidez*, 638 F. Supp. 2d at 732; see also R. 198-200. The court found that the City's use of an at-large election system denied Hispanic citizens an equal opportunity to participate in the political process and

elect representatives of their choice. *Benavidez*, 638 F. Supp. 2d at 732; see also R. 1426. The parties later settled and agreed on a new plan containing both single member and at-large districts. R. 16, 31. On February 3, 2010, the district court entered a final judgment enjoining Irving from conducting any future city council elections in which all members are elected at-large. R. 198-200. The court also adopted the parties agreed-upon settlement redistricting plan to remedy the violation it had found. R. 199.

2. The current redistricting plan (Plan 6-2-1), now under challenge, divides Irving into districts based on total population. R. 266. Plan 6-2-1 has six single-member districts, two at-large city council districts, and the mayor is elected at-large. R. 15, 201. Each single-member district contains approximately 31,935 people. R. 202, 266. Thus, Plan 6-2-1 has districts that are "relative[] in total population." R. 257, 259. Plan 6-2-1 designed one of the districts – District 1– to be a majority-Hispanic district. R. 15-16, 201-202.

The citizen voting-age population in District 1 is substantially less than the citizen voting-age population in the other city council districts in Irving. R. 266. Even though District 1 is relatively equal in total population to the other five single-member districts, a disparity exists between the numbers of citizens of voting-age in District 1 and the remaining districts. R. 266. The greatest such disparity is between District 1 and Districts 3 and 6. R. 266. District 1 contains

11,231 citizens of voting-age. R. 266. In contrast, Districts 3 and 6 have 20,617 and 19,920 citizens of voting-age, respectively. R. 266.

The Attorney General precleared the redistricting plan under Section 5 on February 3, 2010. R. 16, 198.[2] The district court later ordered Irving to adopt the precleared plan. R. 198-200. The City implemented this revised redistricting plan during its May 2010 municipal election. R. 199.

The 2010 Census redistricting data now has been released to jurisdictions around the country. As a result, the United States expects Irving will again redistrict its city council plan in order to comply with the "one person, one vote" mandate.

B.   *Prior Proceedings*

1. On February 11, 2010, plaintiffs filed suit challenging the constitutionality of Irving's electoral plan for single-member city council positions. R. 13-18. Plaintiffs argue that the districts under Plan 6-2-1 do not conform to the one-person, one-vote standard articulated in *Reynolds*. R. 17. In particular, Plaintiffs fault the electoral plan imposed by the district court because it provides

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[2]   Pursuant to the Attorney General's role under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, in conducting preclearance reviews aimed at ensuring no discriminatory purpose or retrogressive effect from voting changes, the State of Texas, as well as its subjurisdictions, are subject to Section 5. See Procedures for the Administration of Section 5, 28 C.F.R. Part 51 App.

for apportionment on the basis of general population rather than citizen voting-age population. R. 14.

Specifically, plaintiffs contend that the City engaged in the systemic under-sizing of District 1, a majority-Hispanic district. R. 16. Although the plan's districts are roughly equal in total population, plaintiffs argue that District 1 has nearly half the number of voting age citizens as there are in neighboring districts comprised of majority white populations. R. 14. They claim that voters in District 1 thus have nearly twice as much voting power as voters in neighboring districts. R. 14, 17. Because each district would have a single representative in the city council, plaintiffs allege that the effect of this under-sizing is to dilute the value of votes in districts with larger citizen voting-age populations, *i.e.*, districts that in this case comprised majority white populations. R. 15.

2. In a decision issued on February 11, 2010, the district court granted summary judgment to the City, denied summary judgment for plaintiffs, and declared the defendant-intervenors' motion for summary judgment moot. R. 1430. The district court concluded that Irving's electoral plan for single member districts does not violate the Fourteenth Amendment. R. 1431. The court held that the choice between using total population or citizen voting-age population is a choice "left to the legislative body for determination." R. 1428.

The district court rejected plaintiffs' contention that under *Reynolds*, 377 U.S. at 568, the court was required to formulate a remedy in which each of the districts had an equal number of eligible voters. R. 1426-1427. The court acknowledged *Reynolds* stated that "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." R. 1427 (citing 377 U.S. at 565). But the court noted that the "*Reynolds* court and others like it that have used the terms 'citizens' and 'persons' interchangeably were not dealing with whether the one-person, one-vote principle requires citizen voter equality or representational equality." R. 1427. Rather those courts were "dealing with situations in which total population was presumptively an acceptable proxy for potentially eligible voters." R. 1427 (citation omitted).

Next, the district court held that the Fifth Circuit precedent of *Chen* v. *City of Houston*, 206 F.3d 502 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001), controlled this case. R. 1428. The court noted that the plaintiffs in *Chen* raised the same argument as the plaintiffs raise here, *i.e.*, the "one-person, one-vote" requirement is satisfied by equalizing the citizen voting-age population of a district. R. 1428 (citation omitted). Relying on *Chen*, the court noted that the choice between using total population and citizen voting-age population "should be

left to the legislative body for determination." R. 1428.[3]

Plaintiffs have appealed. R. 12, 1432-1433.

SUMMARY OF THE ARGUMENT

The district court applied the correct legal standard in denying plaintiffs' motion for summary judgment. The court held that the challenged electoral plan for single member districts, which uses total population as an apportionment baseline, satisfies the Equal Protection Clause's one-person, one-vote requirement. Because that decision is consistent with binding Supreme Court and Fifth Circuit court precedent, this Court should affirm.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and its progeny, the Supreme Court consistently has recognized that it is permissible for a municipality to apportion based on total population rather than citizen voting-age population in order to satisfy the Equal Protection Clause's one-person, one-vote requirement. This Court and at least one other circuit have considered a claim identical to the one advanced in this case and rejected it because the decision as to which

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[3] With respect to the one-person, one-vote question presented in this appeal, the district court also concluded that the Fourth and Ninth Circuits have "addressed the issue, with the same outcome." R. 1428. The court stated that the "Ninth Circuit found that total population is a permissible method for measuring population when known significant concentrations of those not eligible to vote exist." R. 1428. The court also noted that the Fourth Circuit, in an analogous case, held "that the choice between total population or a measurement of potential voters must be left to the legislative body." R. 1428.

population figures to use is "a choice left to the political process." *Chen* v. *City of Houston*, 206 F.3d 502, 523 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001); see also *Daly* v. *Hunt*, 93 F.3d 1212 (4th Cir. 1996). In both court of appeals cases, the courts relied on the Supreme Court's decision in *Burns* v. *Richardson*, 384 U.S. 73, 91-92 (1966) in holding that the choice between using total population figures and citizen voting-age population figures was a political choice that the legislature was free to make. This Court similarly should affirm the district court's decision because the City's choice to apportion based on total population rather than citizen voting-age population is one properly left to elected officials.

No court has ever required a jurisdiction to use citizen voting-age population in apportionment instead of total population. One circuit has gone so far as to hold that a jurisdiction is constitutionally required to apportion based on total population rather than citizen voting-age population. *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991). This Court need not go that far to affirm the judgment below, as controlling authority makes clear the apportionment here was, at the very least, constitutionally permissible.

The City's choice of total population, however, also serves important constitutional interests. Among these interests are the principle of equality, and the representative function of legislators. In addition, the City's choice of total

population as an apportionment measure is consistent with the nationwide practice

of States and localities that use total population as the standard baseline to draw

districts in compliance with the constitutional one-person, one-vote requirement.

A holding that the Constitution now forbids this standard practice could have

serious adverse effects on the districting process.

ARGUMENT

THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD IN CONCLUDING THAT IRVING'S 2010 MUNICIPAL ELECTION PLAN COMPLIES WITH THE EQUAL PROTECTION CLAUSE

The district court's decision in this case is consistent with Supreme Court

precedents. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and *Burns* v.

Richardson, 384 U.S. 73 (1966), which establish a general rule that States and

localities may use total population figures in apportionments.

Review of these precedents and their progeny reveal two clear principles.

First, in applying this rule, "more flexibility may * * * be constitutionally

permissible with respect to state [and local] legislative apportionment than in

congressional redistricting," *Gaffney* v. *Cummings*, 412 U.S. 735, 743-744 (1973)

(citation omitted); accord *Mahan* v. *Howell*, 410 U.S. 315 (1973). Second, courts

generally must respect judgments from the political branches regarding

apportionment. See, *e.g.*, *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978). The

remedy adopted by the court below is fully faithful to these principles, consistent

with the precedent of this Court, see *Chen* v. *City of Houston*, 206 F.3d 502 (5th

Cir. 2000), cert. denied, 532 U.S. 1046 (2001), and compatible with the

apportionment standard relied on by States and localities throughout the country.

A. *The Supreme Court And This Court Have Made Clear That A Locality May Apportion Based On Total Population*

The Supreme Court held in *Reynolds*, 377 U.S. at 568, that "the Equal

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

legislature must be apportioned on a population basis." Although total population

figures were the basis of comparison among the districts at issue in that case, the

Court did not address whether total population figures would be the only

permissible measure of the "population" in drawing district lines. As the Court

later noted in *Burns*, 384 U.S. at 91, the discussion in *Reynolds* "carefully left open

the question what population was being referred to," addressing "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." See *Reynolds*, 377 U.S. at 577 (stating that each electoral district

must have "an identical number of residents, or citizens, or voters").

The rule of population equality "is a principle designed to prevent

debasement of voting power." *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969).

But the Court in *Reynolds* indicated that the principle of one-person, one-vote

serves the dual ideals of equality of representation and voter equality. See, *e.g.*,

377 U.S. at 565-566 ("the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment"); *id*. at 565 ("Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature."). In many cases, both goals will be advanced regardless of whether a jurisdiction draws district lines based on total population figures or citizen voting-age population figures because each figure is often a good proxy for the other. But in some cases, such as here, the choice between the two sets of numbers will have a material effect on how districts may be drawn.

The Supreme Court has never held that jurisdictions must use one particular measure of population in state or local districting; it has instead indicated that that choice should be left to States. In *Burns*, the Court rejected an argument that the Equal Protection Clause's guarantee of one-person, one-vote required the State of Hawaii to use total population figures rather than registered voter figures in drawing district lines. 384 U.S. at 92. It held, rather, that the decision whether to include groups such as "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which [a State's] legislators are distributed and against which compliance with the Equal Protection Clause is to be measured * * * involves choices about the nature of representation with which [the Court had] been shown no constitutionally

founded reason to interfere." *Ibid.* Such reasoning indicates that, while a state

may not be absolutely required to apportion according to total population figures

rather than some other reliable measure of representation, certainly it is not

forbidden from using total population figures, as has the City of Irving.

To date, three courts of appeals have confronted the question whether a

jurisdiction may use total population figures instead of citizen voting-age

population figures in drawing district lines. See *Chen*, 206 F.3d 502; *Daly* v. *Hunt*,

93 F.3d 1212 (4th Cir. 1996); and *Garza* v. *County of Los Angeles*, 918 F.2d 763

(9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

In *Chen*, 206 F.3d at 523, this Court held that the decision as to which

population figures to use was "a choice left to the political process." The Court

reasoned that, in choosing among different theories of representation, "the history

of the [Fourteenth] [A]mendment cautions against judicial intrusion in this sphere

– either for or against either particular theory of political equality." *Id*. at 528. The

plaintiffs in *Chen* had challenged apportionment based on the claim that the

Fourteenth Amendment requires the use of citizen voting-age population, a claim

identical to the one advanced in this case, and the Fifth Circuit rejected it. *Ibid*.

This Court's approach is consistent with that of the Fourth Circuit. In *Daly*,

93 F.3d 1212, the Fourth Circuit reached a similar result with respect to a

challenge to the apportionment of the electoral districts for the Board of

Commissioners and Board of Education of Mecklenburg County, North Carolina.

Plaintiffs claimed that the voting district at issue violated the constitutional one-person, one-vote mandate because the voting-age populations of the district were not substantially equal. *Id*. at 1214. In rejecting that claim, the Fourth Circuit held that the decision whether to use total population or voting-age population is a political choice generally not reviewable by the courts. *Id*. at 1227.[4]

One circuit, the Ninth, would go further, holding that a jurisdiction is required to use total population figures rather than voting-age population figures (when the choice would make a difference). See *Garza*, 918 F.2d at 773-776. In *Garza*, the majority concluded that districting based on citizen voting population instead of the total population would be unconstitutional. *Id*. at 775. That court rejected a county's contention that, under *Reynolds*, the district court was required to formulate a remedy in which each one of the districts had an equal number of eligible voters. Rather, the majority ruled that the court-approved plan, which was designed to equalize the number of persons in each district, satisfied *Reynolds*.

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[4] While both this Court's decision in *Chen* and the Fourth Circuit's decision in *Daly* recognize that jurisdictions generally have discretion in choosing a population baseline, that discretion is not unbounded. A jurisdiction is not free to choose a population baseline that results in districts that dilute the electoral opportunity of minority voters in violation of Section 2 of the Voting Rights Act or otherwise violate the Constitution's guarantee of equal protection. Cf. *Burns*, 384 U.S. at 92 (noting that the Court has not interfered with the choice of population baseline so long as the "choice is [not] one the Constitution forbids").

Indeed, the Ninth Circuit explained that on the facts presented in the County's

redistricting plan, the use of citizen voting-age population, instead of total

population, would burden the right to equal representation for those living in the

majority Hispanic district and would therefore "constitute a denial of equal

protection to these Hispanic plaintiffs." *Id*. at 775-776.

Of course, this Court need not join the Ninth Circuit's position to affirm. As

we have seen, this Court's own precedent, and the decisions of the Supreme Court

demonstrate that the City was free to apportion based on total population. [5]

B. *There Are Strong Reasons For The City's Choice Of Total Population As The Measure For Apportionment*

As we have seen, the constitutional value attached to apportionment by

general population has led one circuit to hold that total population is the *required*

baseline to draw districts in compliance with the constitutional one-person, one-

vote mandate. See *Garza*, 918 F.2d at 773-776. This Court need not go that far to

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[5] Plaintiffs cannot avoid the force of the unbroken line of authority by characterizing their claim as a challenge to apportionment based on geography. As the premise for their claim, plaintiffs assert that Plan 6-2-1 violates one-person, one-vote by "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside." Br. 11. (quoting *Reynolds*, 377 U.S. at 563). But this claim does not distinguish this case from other single-member district decisions, including *Reynolds* itself. Congressional districts, of course, are also drawn geographically. Yet, as we have seen, the Supreme Court has used total population as the appropriate apportionment baseline. *Reynolds*, 377 U.S. at 568. Plaintiffs thus fail meaningfully to distinguish the Supreme Court's use of total population in other geographic districting.

affirm the decision here. But it is important to understand the constitutional values furthered by the jurisdiction's choice here, as well as the practical reasons supporting its decision.

> 1.   *The City's Choice Of Total Population Supports The Constitutional Values Of Equality And Of Representative Government*

Population equality will not always accommodate the twin goals of equality of representation and equality of voting power in precisely equal measure, because the population of a district changes, the figures on which apportionment is based are inherently imprecise, and the inhabitants of a district who at the time of apportionment may not be citizens or eligible to vote may become eligible voters before reapportionment occurs. *Gaffney*, 412 U.S. at 744-746 & n.10.

The Supreme Court has explicitly recognized on two occasions a population-based redistricting need not precisely equalize voting power. In *Gaffney*, the Court observed that even though decennial apportionments are based primarily on census figures, "[t]he 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." 412 U.S. at 746-747. The Court noted that the 1970 Census, for example, showed that "New York has a 29% variation in age-eligible voters among its congressional districts, while California has a 25% and Illinois a 20% variation." *Id*. at 747 n.13. The Court recognized that population-based apportionment would by necessity include individuals who were not eligible to

vote, including "aliens, nonresident military personnel, [and] nonresident students." *Id.* at 747. Notwithstanding these disparities, the Court was not concerned that the practice in these States of apportioning districts on the basis of population violated the Fourteenth Amendment. On the contrary, the Court cited the inherent imprecision in population-based apportionment as the reason why "[f]air and effective representation * * * does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of." *Id*. at 748-749 (footnote omitted).

The rule of population equality thus is a principle designed in part to prevent "diminution of access to elected representatives." *Kirkpatrick*, 394 U.S. at 531. Under our representative form of government, an elected official represents all persons residing within his district, whether or not they are eligible to vote and whether or not they voted for the official in the preceding election. *Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986) (plurality). Because elected officials represent *all individuals* in their jurisdiction, population equality therefore "assures that all persons living within a district – whether eligible to vote or not – have roughly equal representation in the governing body." *Garza*, 918 F.2d at 781.

As the City argued below, apportionment based on population equality recognizes the representative's role in providing services to the residents of the

district. R. 413-415. Constituents are members of the community who expect and deserve benefits from their elected officials. An elected official therefore has a duty to ensure that the government addresses the concerns of his or her constituents, regardless of their ability to vote, and ensure that his or her district receives its fair share of equal government services. See, *e.g.*, *Garza*, 918 F.2d at 781 ("[a] principle of equal representation serves important purposes," including assuring "that constituents have more or less equal access to their elected officials" and assuring "that constituents are not afforded unequal government services depending on the size of the population in their districts.").

In contrast, the electoral scheme plaintiffs suggest the Constitution requires (Br. 27-32) is inconsistent with the rule of electoral equality that they purport to advocate. Plaintiffs exclude children and noncitizens from an apportionment base when drawing districts, but include persons ineligible to vote because they have been adjudged to be mentally incompetent or convicted of a felony. As the City notes, "no rational basis is apparent for plaintiffs picking and choosing among those persons ineligible to vote to determine which will be in the apportionment base and which will be excluded." R. 418; see also *Kalson* v. *Paterson*, 542 F.3d 281, 289 (2d Cir. 2008) (noting that a theory of representation based on equally weighted votes is not accomplished by a voting-age population apportionment base because it fails to exclude felons and noncitizens).

In sum, it is entirely appropriate for a jurisdiction to recognize that its government represents *all* people, including those who are ineligible to vote or who choose not to vote. See *Reynolds*, 377 U.S. at 560-561 ("the fundamental principle of representative government is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state").[6] Here, the City properly made the choice to use total population as its measure of compliance with one-person, one-vote.

> 2.   *The Application Of Plaintiffs' Strict Reliance On Citizen Voting-Age Population Would Disrupt A Broad Range Of Well-Established And Valid Apportionment Systems*

Jurisdictions in Texas have uniformly adopted, and submitted for Section 5 review, districting plans that use total population to equalize population figures between districts. Under the Attorney General's Section 5 review process, the redistricting submissions from the State, counties, and municipalities in Texas after the 2000 Census showed that "all these jurisdictions used total population in the districting process as the basis for determining whether population was equal among districts." R. 822. Plaintiffs' attempt to require the use of citizen voting-

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[6] Unique circumstances may exist, like in Hawaii, that may lead a jurisdiction to choose an apportionment base that excludes "transients, short-term or temporary residents." See *Burns*, 384 U.S. at 91-92. That is why, consistent with *Reynolds*, the "flexibility" inherent in State and local apportionments allow political subdivisions to choose which representational model best fits local circumstances. See *Gaffney*, 412 U.S. at 743-744.

age population is without precedent in the most recent districting plans submitted by Texas jurisdictions to the Attorney General for Section 5 review.

The Texas Legislative Council has advised that total population will be the appropriate population benchmark in the upcoming 2010 redistricting cycle. The redistricting guide published by the Texas Legislative Council states that total population is the requisite benchmark for apportionment. See Texas Legislative Council, *Guide to 2011 Redistricting* 15 (2010), available at <www.tlc.state.tx.us/redist/pdf/Guide_to_2011_redistricting.pdf> ("Because of the federal constitutional requirement that districts of a given type have equal or nearly equal population (one person, one vote), redistricting plans must include information about the total population of each district."). The guide further states that "districts of a given type (senate, house congressional, SBOE) must have equal or nearly equal populations," and ideal district size is "the population a district would have if all districts in a plan have equal populations, and it is determined by dividing the total state population by the number of districts in the plan." *Id*. at 5.

Redistricting manuals relied on by States and local jurisdictions across the country have long made clear that, in practice, total population is the standard baseline used to draw districts that comply with the one-person, one-vote requirement. For example, the manual on reapportionment published by the National Conference of State Legislatures in advance of the 1990 redistricting

cycle states that to measure population equality among districts, "a logical starting point is the 'ideal' district population," explaining that in "a single-member district plan, the 'ideal' district population is equal to the total state population divided by the total number of districts." National Conference Of State Legislatures Reapportionment Task Force, *Reapportionment Law: The 1990s* 18 (1989).

This guidance was repeated during the 2000 redistricting cycle and manuals produced in anticipation of the upcoming round of redistricting continue to provide the same instruction. See, *e.g.*, J. Gerald Hebert et al., *The Realist's Guide to Redistricting* 1 (2000) ("Perhaps the most fundamental requirement the law imposes on redistricters is 'population equality' * * *. In practical terms, population equality means that each district in an apportionment plan should have roughly, if not precisely, the same number of people as every other district."); Texas Legislative Council, *Guide to 2001 Redistricting* 26 (2000), available at <www.tlc.state.tx.us/pubspol/redguide01.pdf> (same); National Conference Of State Legislatures, *Redistricting Law 2000* at 21 (1999) (same); J. Gerald Hebert, et al., *The Realist's Guide to Redistricting* 1 (2d ed. 2010) (same); Texas Legislative Council, *Guide to 2011 Redistricting* 15 (same); National Conference Of State Legislatures, *Redistricting Law 2010* at 23 (2009) (same).

In sum, a ruling that the City's choice of total population as the appropriate apportionment measure is unconstitutional not only would conflict with binding

precedent, but it would also be disruptive to the normal redistricting and Section 5

review processes.

CONCLUSION

This Court should hold that a municipality's choice to use an election plan

designed with equal numbers of people as a population baseline complies with the

one-person, one-vote principle of the Equal Protection Clause.

Respectfully submitted,

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I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B), because:

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<u>s/ Roscoe Jones, Jr.</u>
ROSCOE JONES, JR.
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