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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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.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. Oral argument will help the Court understand the vital constitutional question that lies at the heart of this case regarding the political franchise of voting, which, in the words of the Supreme Court, is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071 (1886). Accordingly, Appellants submit that oral argument would aid in clarifying the issue for the Court, and ask the Court to grant oral argument.

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STATEMENT OF JURISDICTION

Appellants appeal from the district court's final judgment entered on February 11, 2011, which followed the district court's grant of summary judgment to the City of Irving on the same date. Appellants timely filed a notice of appeal on February 16, 2011. *See* Fed. R. App. P. 4(a)(1)(A).

The district court had original jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4). This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court's February 11, 2011 order is a final, appealable order that disposes of all claims.

STATEMENT OF ISSUES

Does the City of Irving's electoral scheme, in which the votes of voters in one district are worth nearly twice as much as the votes of voters in neighboring districts, violate the Constitution's "one person, one vote" requirement protecting the right of all 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 to 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' right to an undiluted vote. *See Reynolds v. Sims*, 377 U.S. 533, 563, 84 S.Ct. 1362, 1382 (1964). Indeed, the Plan directly offends what the Supreme Court refers to as "the basic principle of representative government" – specifically, that "the weight of a citizen's vote cannot be made to depend on where he lives." *See id.* at 567, 84 S.Ct. at 1385. Based on these clear constitutional violations, 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 the City, denying summary judgment for Appellants, and denying Intervenor Defendants-Appellees' motion for summary judgment as moot. The district court ruled that Appellants had "not demonstrated that, under these circumstances, the Fifth Circuit would require this court to intervene in the political process and judicially mandate Irving to track the size of the districts by [citizens of voting age] instead of by population." The district court entered a final judgment on February 11, 2011, and Appellants timely filed their notice of appeal on February 16, 2011.

STATEMENT OF FACTS

A. In Response to a Voting Rights Act Lawsuit, the City Created an Electoral Plan with a Majority-Hispanic District.

On November 6, 2007, Manuel A. Benavidez brought suit against the City of Irving, Texas (the "City" or "Irving"), its mayor, and its city council members, challenging the legality of Irving's at-large electoral system under Section 2 of the Voting Rights Act. *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 710-11 (N.D. Tex. 2009). Benavidez alleged that the at-large electoral system had the effect of diluting the voting power of Hispanic voters, and, consequently, denied them an opportunity to elect a representative of their choice. *Id.* at 711.

As a result of Benavidez's suit, an electoral plan (the "Plan") was offered as a settlement plan to the district court.[1] The proposed scheme broke up the existing eight at-large city council seats into six single-member districts, two at-large districts, and a single mayor.[2] The proposed scheme also specifically designed one of these single-member districts, District 1, as a majority-Hispanic district.[3]

Irving vigorously resisted Benavidez's claims.[4] Among other things, Irving argued that the majority-Hispanic district urged by Benavidez would contain a much smaller number of total citizens of voting age than the remaining five

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[1] USCA5 198-254 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1).
[2] USCA5 29-33 (Defendants' Original Answer at ¶ 11).
[3] USCA5 201-02 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1); USCA5 29-33 (Defendants' Original Answer at ¶¶ 11, 14).
[4] USCA5 29-33 (Defendants' Original Answer at ¶ 12).

districts. *Benavidez*, 638 F. Supp. 2d at 714. Irving contended the proposal would unconstitutionally dilute the votes of the citizens in these five districts. *Id.* The district court rejected this argument, relying on the Fifth Circuit case *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). *Id.*

The district court ultimately found that Irving's at-large electoral system violated the Voting Rights Act. *Benavidez*, 638 F. Supp. 2d at 732.[5] Faced with the prospect of a judicially-imposed electoral scheme followed by a long and expensive appeal, Irving acquiesced and agreed to offer the Plan to the district court as part of a settlement agreement.[6] The United States Department of Justice subsequently approved the Plan, and it was used in the recent Irving city-council member elections.[7]

B. The New District 1 Has Barely Half the Number of Voters as Neighboring Districts.

The Plan divides the City of Irving into six districts that are "relativ[e] in total population."[8] Irving relied on the total population numbers from the "2000 Census 100 percent count" to calculate and equalize total population among the districts.[9] The number of voters residing in the districts, however, was

[5] *See also* USCA5 198-200.
[6] USCA5 29-33 (Defendants' Original Answer at ¶ 13).
[7] USCA5 29-33 (Defendants' Original Answer at ¶ 13); USCA5 198-200 (Feb. 2, 2010 Final Judgment).
[8] USCA5 201-02 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1); USCA5 255-69 (Def. City of Irving's Resp. to Pl.'s Interrogs. at No. 1-6).
[9] USCA5 255-69 (Def. City of Irving's Resp. to Pl.'s Interrogs. at No. 1-6).

substantially unequal. The following chart – reflecting a citizen voting age population ("CVAP") breakdown for each of the Districts under the Plan – illustrates this fact.[10]

City of Irving							
Settlement 6-2-1 Plan							
2000 Census Total and Voting Age Population/Special Tabulation 56 Derived Citizenship Data							
Plan 6-2-1	**Total Population**	**Total VAP****	**Total CVAP*****	**Hispanic CVAP**	**Anglo CVAP**	**Black CVAP**	**Other* CVAP**
1	31, 642	20,930	11,231	4,144	5,628	935	524
3	32,309	25,275	20,617	2,808	11,770	4,934	1,105
4	31,870	22,635	19,161	2,872	14,302	978	1,009
5	33,126	26,000	19,673	2,463	13,811	2,232	1,167
6	30,674	25,187	19,920	1,362	14,996	2,080	1,482
7	31,992	23,368	17,785	2,858	13,171	1,058	698
Totals	191,613	143,395	108,387	16,507	73,678	12,217	5,985
Data Source	PL94-171 Data 100%	PL94-171 Data 100%	Special Tab 56 Derived to Block	Special Tab 56 Derived to Block	Special Tab 56 Derived to Block	Special Tab 56 Derived to Block	Special Tab 56 Derived to Block
* Other Citizens is comprised of a combination of American Indian, Asian, Hawaiian/Pacific Islander and Other.							
** Voting Age Population							
***Citizen Voting Age Population							
Some totals may not add to 100% due to rounding.[11]							

While the total population numbers are roughly equal between districts, the Plan features conspicuous and significant disparities between CVAP totals in District 1 compared to neighboring districts. The greatest CVAP disparities exist when comparing District 1 with District 3 and District 6. District 1 contains

[10] The CVAP numbers reflected in this table are not disputed in this case. They were provided by the City of Irving in response to Appellants' interrogatories and are based on the "Special Tabulation 56" data obtained from the US Bureau of the Census and derived from the 2000 Census "long form" data. *See* USCA5 255-69 (Def. City of Irving's Resp. to Pl.'s Interrogs. at No. 1-6).

[11] USCA5 255-69 (Def. City of Irving's Resp. to Pl.'s Interrogs., Exhibit 1).

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.[12] 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.

For a candidate to win any of Irving's single member districts, he or she must carry only a majority of the electorate. Consequently, it takes far fewer votes to elect a city council member in District 1 than it does in any other single member district. The table below illustrates the substantial effect of Irving's Plan on the weight of a vote by a voter in District 1 compared to votes by voters in the remaining districts.[13]

District	Total Votes Needed to Elect a Council Member	Ratio of Vote Weight Compared to District 1
1	5,631	--
3	10,309	1.83 to 1
4	9,581	1.70 to 1
5	9,837	1.75 to 1
6	9,960	1.77 to 1
7	8,893	1.58 to 1

[12] USCA5 255-69 (Def. City of Irving's Resp. to Pl.'s Interrogs., Exhibit 1).

[13] *See id.* This illustration is based upon the highly unlikely assumption of full voter turnout. The 2010 election results in Irving using this Plan, however, confirmed that the real impact on citizen votes was far greater than the ratios listed above. In the election held on May 9, 2010— the first to utilize Irving's new Plan — the total number of voters casting a vote in District 1 was 449. USCA5 361-74 (May 8, 2010 Irving Election Results at p.4). In contrast, the total number of voters casting a vote in District 7 was 1,556. USCA5 361-74 (May 8, 2010 Irving Election Results at p.5). Thus, to win a seat in District 7, a candidate needed over <u>three times</u> as many votes as a candidate in District 1. *See id.*

Thus, the Plan substantially dilutes the votes of Irving's voters, weighting each one differently based solely upon where he or she lives. Indeed, the votes of voters living in District 1 are worth nearly twice as much as the votes of voters residing in Districts 3, 5, and 6 and over one-and-a-half times as much as the voters in Districts 4 and 7. The geographical arbitrariness of this vote-weight imbalance is most conspicuous in District 1 and District 6, which border one another. In those districts, there are literally streets where, on the District 1 side, a voter's vote is worth nearly twice as much as the vote of her neighbor located only a few steps away on the District 6 side of the street.

C. Appellants Challenge the City's Plan, But the District Court Grants Summary Judgment for the City.

Appellants, concerned citizens of Irving, filed suit on February 11, 2010, challenging the constitutionality of the City's Plan for single-member city council positions.[14] Several Irving residents who supported the City's Plan intervened in the suit on May 12, 2010.[15] The parties 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.[16]

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[14] USCA5 13-18 (Original Complaint).

[15] USCA5 88 (Order).

[16] 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.

Applying a broad reading of this Court's opinion in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), the district court ruled that Appellants had "not demonstrated that, under these circumstances, the Fifth Circuit would require this court to intervene in the political process and judicially mandate Irving to track the size of the districts by CVAP instead of by population."[17] The district court entered a final judgment on February 11, 2011,[18] and Appellants timely filed their notice of appeal on February 16, 2011.[19]

STANDARD OF REVIEW

The Court of Appeals reviews a summary judgment de novo, applying the same legal standards as the district court. *Tradewinds Envtl. Restoration, Inc. v. St. Tammany Park, LLC*, 578 F.3d 255, 258 (5th Cir. 2009). Review of constitutional questions is also de novo. *Nat'l Solid Waste Mgmt Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 497 (5th Cir. 2004).

SUMMARY OF THE ARGUMENT

> "[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."
>
> *Reynolds v. Sims*, 377 U.S. 533, 555, 567, 84 S.Ct. 1362, 1378, 1384 (1964).

[17] USCA5 1425-30 (Memorandum Opinion and Order at 6).
[18] USCA5 1431 (Final Judgment).
[19] USCA5 1432-33 (Notice of Appeal).

The Equal Protection Clause of the Fourteenth Amendment "guarantees" the right of all voters to an undiluted vote. *See id.* at 565-66, 84 S.Ct. at 1383-84. The sole issue before this Court on appeal is whether Irving's electoral scheme, in which the votes of voters in one district are worth nearly twice as much as the votes of voters in neighboring districts, violates this Constitutional "one person, one vote" requirement. The answer is clearly "Yes."

The Supreme Court has observed that "no right is more precious in a free country" than the right to vote and that "other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535 (1964). In scores of cases stretching back more than fifty years, the Court has made clear that the Equal Protection Clause stands as a rigid bulwark against any state actions that undermine this "most basic" of all rights. Such unconstitutional actions not only include outright disenfranchisement, but also vote "debasement or dilution," as vote dilution "just as effectively" undermines the right to vote "as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555, 84 S.Ct. at 1378. This Constitutional right to an undiluted vote, dubbed "one person, one vote" by the Supreme Court, strictly prohibits states from "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside . . . ." *See id.* at 563, 84 S.Ct. at 1382.

Any districting plan that gives grossly disparate voting power to voters in different districts of the same city violates the Constitution's "one person, one vote" requirement. This is true even if the plan is constructed with districts of equal total population. The right to an undiluted vote stands on its own constitutional grounds, demanding that political subdivisions establish districts where "equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56, 90 S.Ct. 791, 795 (1970). Equalizing total population among districts does not cause this constitutional right to evaporate, giving cities and states a free license to dilute the weight of it voters' votes. To the contrary, "[w]eighting the votes of citizens differently, ***by any method or means***, merely because of where they happen to reside, hardly seems justifiable." *See Reynolds*, 377 U.S. at 563, 84 S.Ct. at 1382; *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698, 109 S.Ct. 1433, 1440 (1989) ("The personal right to vote is a value in itself, and 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."). Indeed, as the Supreme Court observed in *Reynolds*, any "debasement or dilution" of the weight of a voter's vote would be

tantamount to "prohibiting the free exercise of the franchise." 377 U.S. at 555, 84 S.Ct. at 1378.

Notwithstanding the Supreme Court's repeated reaffirmations of this constitutional right to an undiluted vote, the district court upheld the City's vote-dilutive plan. In doing so, the district court relied upon this Court's prior ruling in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), concluding that *Chen* permits a city to make the "political choice" to dilute the weight of its voters' votes, provided the city's districts are otherwise equal in total population. To the extent *Chen* stands for this proposition, however, it is bad law and must be overruled. As both prior and subsequent Supreme Court and Fifth Circuit case law makes clear, while states and cities are granted broad discretion over many aspects of a districting process, this discretion does not extend to violating the "one person, one vote" requirement protecting the right of all voters to an undiluted vote. Put simply, the extreme two-to-one vote dilution present in Irving's Plan is not justified by the fact that these districts contain approximately equal numbers of people.

Based on this clear constitutional violation, this Court should reverse the district court's summary judgment order, render judgment for Appellants, and enjoin the City's use of the Plan.

ARGUMENT

A. The Equal Protection Clause's "One Person, One Vote" Requirement Strictly Prohibits State Voting Schemes that Dilute the Weight of Voters' Votes.

1. Each Voter Has the Constitutional Right to an Undiluted Vote.

Of all the rights enshrined in the Constitution, the Supreme Court has made it abundantly clear that none are more important than the right to vote. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535 (1964). The reason is obvious. Without the right to vote, there can be no such thing as a representative government in the first place. This is why the right to vote is "preservative of all rights" and why "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071 (1886); *Wesberry*, 376 U.S. at 17, 84 S.Ct. at 535; *see also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990 (1979)("voting is of the most fundamental significance under our constitutional structure."); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698, 109 S.Ct. 1433, 1440 (1989) ("[t]he personal right to vote is a value in itself").

Given the primacy of the right to vote in the hierarchy of constitutional rights, the Supreme Court has placed strict prohibitions on the ability of states to burden and interfere with this "most basic" of all rights. As the Court explained in

the landmark decision *Reynolds v. Sims*, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 377 U.S. at 555, 84 S.Ct. at 1378. Such unconstitutional restrictions naturally include outright disenfranchisement. *See id.* But, as the Supreme Court has recognized, there are other means of infringing on the right to vote that can be just as pernicious as a straightforward ban on the franchise.

Election schemes that unequally weight the votes of voters fall squarely into this category. The Court first recognized each voter's constitutional right to an undiluted vote in *Gray v. Sanders*, characterizing it as "one person, one vote." 372 U.S. 368, 381, 83 S.Ct. 801, 809 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."). Describing this right, the Court reasoned:

> 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.***

Id. at 379, 83 S.Ct. at 808 (emphasis added).

The Supreme Court subsequently applied this right to an undiluted vote to state legislative redistricting in *Reynolds*. There, the Court declared that the right of suffrage can be denied "just as effectively" by "a debasement or dilution of the weight of a citizen's vote" as by "wholly prohibiting the free exercise of the franchise." 377 U.S. at 555, 84 S.Ct. at 1378. And, the Court observed, "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567, 84 S.Ct. at 1384 (emphasis added); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S.Ct. 817, 833 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.") (*citing Reynolds*, 377 U.S. at 555, 84 S.Ct. at 1378). Summarizing the Supreme Court's holdings on the subject, the Sixth Circuit observed: "[V]ote dilution is as nefarious as an outright prohibition on voting." *Duncan v. Coffee County, Tenn.*, 69 F.3d 88, 93 (6th Cir. 1995).

Most recently, the Supreme Court underscored this same principle in *Bush v. Gore*, declaring:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. ***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.***

Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 530 (2000) (emphasis added) (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 1080

(1966) ("[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.")).

2. The "One Person, One Vote" Requirement Prohibits State Electoral Schemes That Unequally Weight the Votes of Voters.

The "one person, one vote" requirement stands for the principle 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, 90 S.Ct. 791, 793 (1970) (emphasis added). Indeed, "[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*, 489 U.S. at 698, 109 S.Ct. at 1440 (emphasis added). The "one person, one vote" requirement operates as a bulwark against attempts by the states to "shortchange" its voters in this manner. By insisting that states create districts where "equal numbers of voters can vote for proportionally equal numbers of officials," the "one person, one vote" requirement prevents the states from encroaching on a voter's "fundamental" right to cast an equal and undiluted vote. *See Hadley*, 397 U.S. at 56, 90 S.Ct. at 795.

The Supreme Court has repeatedly struck down state redistricting schemes that failed to comply with this standard. For instance, in *Hadley*, the Court held that "the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive ***any voter of his right to have his own vote given as much weight, as far as practicable, as that of any other voter in the . . . district***." 397 U.S. at 52, 90 S.Ct. at 793 (emphasis added). The Court explained that, to protect a voter's "constitutional right to vote," without having the vote "denied, debased, or diluted," the states are "required to insure that ***each person's vote counts as much, insofar as it is practicable, as any other person's***." *Id.* at 54, 90 S.Ct. at 794 (emphasis added). "[O]nce 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, 90 S.Ct. 796-97 (quotations and citations omitted and emphasis added).

3. Because the Population Disparity Between Voter Populations in District 1 and Neighboring Districts is Nearly Two to One, it is a Per Se Violation of the Equal Protection Clause.

The Constitution does not require absolute equality of voting power. Instead, it only requires that voter populations be "approximately equal" among the districts. *See Board of Estimate*, 489 U.S. at 701, 109 S.Ct. at 1442 ("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). Moreover, in recognition that certain circumstances may require additional flexibility, courts apply a burden shifting approach in analyzing voter populations among districts. Specifically, if the population of voters deviates between districts by more than 10 percent, it constitutes a prima facie case of invidious discrimination that requires the city to prove a legitimate reason for the discrepancy. *See Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S.Ct. 2690, 2696 (1983). Conversely, if the population of voters deviates by less than 10 percent, it is considered minor and does not suffice, alone, to make out a prima facie case of discrimination. *Id.* Finally, 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.'") (quoting *Mahan v. Howell*, 410 U.S. 315, 329, 93 S.Ct. 979, 987 (1973).

Here, the voter population disparities between District 1 and neighboring Districts in Irving far exceed 10 percent. Indeed, they range from 58 percent to as

high as 84 percent. Thus, they are a per se violation of the Equal Protection Clause.[20] Accordingly, this Court should enjoin the Plan as unconstitutional.

B. To the Extent *Chen* Grants the City the "Political Choice" to Dilute the Weight of its Voters' Votes, it is Directly Contrary to the Equal Protection Clause of the Constitution.

In concluding Irving's electoral Plan was not a violation of the "one person, one vote" requirement, the district court relied almost exclusively on this Court's prior holding in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).[21] In *Chen*, this Court was presented with a voting scheme adopted by the City of 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* court 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." *See Chen*, 206 F.3d at 528. In effect, the Court in *Chen* held that the Constitution permits a city to make the "political choice" to dilute the weight of the votes of its voters provided the city otherwise equalizes total population among its districts. *See id.*

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[20] 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.

[21] USCA5 1428 (Memorandum Opinion and Order).

To the extent *Chen* grants a city the "political choice" to dilute the weight of its voters' votes, it is flawed and must be reversed. First, such a holding cannot be squared with both existing and subsequent Supreme Court and Fifth Circuit case law. As the Supreme Court has made repeatedly clear, all "qualified voters" have a "constitutional right" to an undiluted vote. *Hadley*, 397 U.S. at 54-55, 90 S.Ct. at 794-95; *see also Fairly v. Hattiesburg, Miss.*, 584 F.3d 660, 674 (5th Cir. 2009) (noting that the Equal Protection Clause "guarantees the opportunity for equal participation by all voters in local government elections"). A city cannot "choose" to ignore this constitutional right possessed by each voter any more than it could choose to arbitrarily disenfranchise or impose a poll tax on that voter.

Second, contrary to the holding in *Chen*, the fact that a city has equalized total population among its districts does not obviate that city's obligation to comply with the "one person, one vote" requirement. The right to an undiluted vote stands on its own independent constitutional ground. This right does not evaporate when and if a city equalizes total population among its districts. To the contrary, regardless of how the 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, 90 S.Ct. at 794; *see also Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 530 (2000) (holding 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.").

1. Irving Cannot Choose to Ignore Its Voters' Constitutional Right to an Undiluted Vote.

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* court relied on the Supreme Court's holding in *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286 (1966). *See Chen*, 206 F.3d at 526-28. The *Chen* court's reliance on *Burns*, however, is based on a misreading of the holding in that case. *Burns* does discuss the political deference courts should extend to state political subdivisions in drawing electoral districts. But *Burns* 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 to the Supreme Court was whether Hawaii's use of registered voters, rather than total population, as an apportionment base to equalize voter populations among its legislative districts complied with the "one person, one vote" requirement. *See Burns*, 384 U.S. at 91-97, 86 S.Ct. at

1296-99. The Court noted Hawaii chose to use registered voters because of its large population of military personnel and tourists. *Id.* at 94-95, 86 S.Ct. at 1298. Those temporary residents, who were counted in census population but largely ineligible to vote because of residency requirements, were concentrated primarily on one island and would have skewed voter equality among the state's other districts. *Id.* at 93-94, 86 S.Ct. at 1297.

The Court began its analysis 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." *See Burns*, 384 U.S. at 92 n.20, 86 S.Ct. at 1297. It noted, however, that *Reynolds* had "carefully left open the question" of which apportionment base could be used in achieving that objective. *Id.* at 91, 86 S.Ct. at 1296. 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, 86 S.Ct. at 1296-97.[22]

[22] 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,

Any of these groups, depending upon the circumstances in that particular locality, might be an acceptable proxy for identifying and quantifying voters in a state or city. *Id.* The *Burns* court held, however, that the choice of which of these possible apportionment bases 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 after analysis that Hawaii's use of registered voters as an apportionment base was, under the circumstances there, an effective means for equalizing the number of voters among its districts, the Court upheld Hawaii's electoral plan. *Id.* at 96, 86 S.Ct. at 1299.

The Supreme Court's conclusion in *Burns* is consistent with the Court's 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. That is to say, the right of suffrage 'is subject to the imposition of state standards which

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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.

> are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.'

Harper, 383 U.S. at 665, 86 S.Ct. at 1081 (*quoting Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51, 79 S.Ct. 985, 990 (1959). Similarly, as the Supreme 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, 83 S.Ct. at 809 (citation and quotation marks 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, 121 S.Ct. at 530 ("The right to vote is protected in more than the initial allocation of the franchise . . . . ***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***.") (citing *Harper*, 383 U.S. at 665, 86 S.Ct. at 1081) (emphasis added).

2. Contrary to *Chen*, Equalizing Total Population Among Districts Does Not Then Entitle a City to Dilute the Votes of its Voters.

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" Supreme Court 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. It does not evaporate when and if a state is pursuing some other constitutional, statutory, or public policy goal like equality of representation or maximizing the voting power of minority groups.

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

As the Supreme 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*, Chief Justice Warren emphatically stressed that voters are entitled to equally weighted votes regardless of where they reside. Throughout the opinion, he repeatedly emphasized the bedrock principle that "one person, one vote" requires that voting power be equalized among the districts:

- "Weighting the *votes of citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." *Reynolds*, 377 U.S. at 563, 84 S.Ct. at 1382 (emphasis added).

- "With respect to the allocation of legislative representation, all *voters*, as *citizens* of a State, stand in the same relation regardless of where they live." *Id.* at 565, 84 S.Ct. at 1383 (emphasis added).

- "Since the achieving of fair and effective representation for *all citizens* is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by *all voters* in the election of state legislators. *Id.* at 565-66, 84 S.Ct. at 1383-84 (emphasis added).

- "Simply stated, an individual's *right to vote* for state legislatures is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with *votes of citizens* living in other parts of the State." *Id.* at 568, 84 S.Ct. at 1385 (emphasis added).

- "The 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." *Id.* at 567, 84 S.Ct. at 1384 (emphasis added).

In a companion case to *Reynolds* released the very same year, the Court underscored that the "person" protected by the "one person, one vote" requirement is the voter. *Wesberry*, 376 U.S. at 8, 84 S.Ct. at 530 ("To say that a *vote* is worth more in one district than in another would … run counter to our fundamental ideas of democratic government . . . .") (emphasis added).

In the "one person, one vote" cases following *Reynolds* and *Wesberry*, the Supreme Court maintained its focus on protecting the rights of the voter. In *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493 (1969), the Supreme 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***." *Id.* at 819, 89 S.Ct. at 1496 (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; *see also Lockport v. Citizens for Cmty.*

Action, 430 U.S. 259, 264-65, 97 S.Ct. 1047, 1051-52 (1977) ("[I]t has been established that the Equal Protection Clause cannot tolerate the disparity in *individual voting strength* that results when elected officials represent districts of unequal population . . . the concept of ***equal protection therefore requires that their votes be given equal weight***.") (emphasis added); *Connor v. Finch*, 431 U.S. 407, 416, 97 S.Ct. 1828, 1834 (1977) ("[T]he Equal Protection Clause requires that legislative districts be of nearly equal population, ***so that each person's vote may be given equal weight*** in the election of representatives.") (emphasis added).[23]

Most recently, this Court in *Fairley v. Hattiesburg, Miss.*, reaffirmed this same principle. 584 F.3d 660 (5th Cir. 2009). There, the Court observed that:

> [T]he one person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment . . . ***guarantees the opportunity for equal participation by all voters*** in local government elections.

Id. at 674 (*citing generally Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114 (1968) (emphasis added).

The *Reynolds* line of cases is instructive not only for what they say about how the "one person, one vote" requirement protects voters, but what they do not

[23] 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 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).

say. For instance, *Moore* refers to a group of citizens being impermissibly granted "greater voting strength," not a "greater share of access to representation." *See* 394 U.S. at 819, 89 S.Ct. at 1496. *Hadley* requires that districts contain "equal numbers of voters [that] can vote for [a] proportionally equal number of officials," not that "equal numbers of residents receive access to proportionately equal representation." *See* 397 U.S. at 56, 90 S.Ct. at 795. *Lockport* states that when elected officials represent districts of unequal population, the Equal Protection Clause is violated because it "cannot tolerate the disparately in individual voting strength," not that it "cannot tolerate the disparity in access to representation." *See* 430 U.S. at 265, 97 S.Ct. at 1051-52. And *Connor* teaches that districts must be of nearly equal population "so that each person's vote may be given equal weight," not "so that each resident can have equal access to representation." *See* 431 U.S. at 416, 97 S.Ct. at 1834.

These cases make clear that, contrary to the premise of the court's conclusion in *Chen*, the Equal Protection Clause's "one person, one vote" requirement has nothing whatsoever to do with the rights of non-voters to equal representation. Instead, this requirement focuses solely and 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, 90 S.Ct. at 794 (emphasis added). 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.[24]

That is not to say that public policy goals – like ensuring voters and non-voters alike have more equal access to representation – cannot or should not be pursued by states. Moreover, the Constitution allows – and sometimes requires – states to observe other important principals in drawing districts, like avoiding improper gerrymandering or diluting the voting power of minority groups. Finally, there may be statutes – like the Voting Rights Act – which impose additional districting obligations on the states. Indeed, the City's Plan here was created as a means of complying with the Voting Rights Act. But complying with only one of these many constitutional or statutory requirements hardly means the rest can be ignored. For instance, just because a state equalizes the numbers of voters within its districts does not mean the state is then freed to draw those districts in a way that dilutes the voting power of minority groups. Similarly, just because Irving has equalized total population among its districts in an effort to secure representational

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[24] *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.

equality does not mean that Irving is then freed to distribute voters unequally throughout these districts. Cities like Irving can and should pursue constitutional, statutory and public policy principles when creating districts, but these principles must be pursued in concert with – not to the exclusion of – this "most precious" of all constitutional rights: the right to an undiluted vote.[25]

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

It is true that 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 courts in *Chen* and *Garza v. County of Los Angeles* devoted a good deal of attention to this issue. *Chen* 206 F.3d at 524-26; *Garza v. County of Los Angeles*, 918 F.2d 763, 781-83 (9th Cir. 1990) (Kozinski, J., dissenting). After reviewing the Supreme Court's interchangeable use of these terms, the Court in *Chen* 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 *Chen* Court's analysis, however, ignores the context in which the Supreme Court used these terms and conflates the Supreme Court's discussion of acceptable

[25] This means, of course, that should Irving decide that it wishes to create districts that equalize access to representation by equally distributing residents among them, it is free to do so, provided it also ensures that voters are equally distributed among those districts. There is no evidence here that Irving could not have accomplished both of these ends had it chosen to do so.

means to an end (which apportionment base to use to equalize voters among districts) with the end itself (creating districts of equal voter population).

The reason the Supreme Court has, from time to time, used the terms total population and voter population interchangeably in referring to district apportionment bases is because, historically speaking, total population has been an effective proxy for determining voter population. Even *Chen* recognized this fact. *See Chen*, 206 F.3d at 525 (noting that the Supreme 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.

c. Districts Containing Equalized Total Population Comply with the "One Person, One Vote" Requirement Only if Voters are Also Equally Distributed.

"State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment." *Gaffney v. Cummings*, 412 U.S. 735, 751-52, 93 S.Ct. 2321, 2330-31 (1973). For example, a plan based on total population "may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote." *Id.* at 751, 93 S.Ct. at 2330 (*citing Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960)). Or, "a districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Gaffney*, 412 U.S. at 751, 93 S.Ct. 2330-31 (*citing Fortson v. Dorsey*, 379 U.S. 433, 439, 85 S.Ct. 498, 501 (1965); *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858 (1971); *Abate v. Mundt*, 403 U.S. 182, 184 n. 2, 91 S.Ct. 1904, 1906; *Burns*, 384 U.S. at 88-89, 86 S.Ct. at 1294-95).

Similarly, the use of total population does not automatically satisfy the "one person, one vote" requirement at the heart of the Equal Protection Clause. *See Reynolds*, 377 U.S. at 579, 84 S.Ct. at 1390. Instead, the Supreme Court has made it clear that, whatever demographic base or representational theory a state political

unit uses to equalize populations among districts, the resulting plan must be one in which "equal numbers of voters can vote for proportionally equal numbers of officials." *See Hadley*, 397 U.S. at 56, 90 S.Ct at 795. The Court articulated this view in *Reynolds* and re-emphasized it in *Burns*:

> *Unless a choice is 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. *Thus we spoke of '(t)he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens.*'

Burns, 384 U.S. at 92, 86 S.Ct. at 1297 (citing *Reynolds*, 377 U.S. at 576, 84 S.Ct. at 1389) (emphasis added).

This is why, when the Supreme Court does discuss equalizing population among the districts, it makes clear that such a process is merely an acceptable means to an end – specifically, voter equality – and not an end in itself. In *Burns*, for instance, the Court taught:

> (T)he overriding objective must be substantial equality of population among the various districts, *so 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 , 86 S.Ct. at 1297 (citing *Reynolds*, 377 U.S. at 579, 84 S.Ct. at 1390) (emphasis added). The Courts' use of the causal phrase "so that" underscores the fact that in "one person, one vote" cases, the Court views total population equalization as a means and not an end. And that is precisely why, in

Burns, the Court upheld a districting scheme based on equalizing registered voters – another acceptable means for obtaining the end of voter equality. *Burns*, 384 U.S. at 95, 86 S.Ct. at 1298.

3. *Chen* Improperly Grants States and Cities a Free License to Dilute the Weight of its Voters' Votes to Any Extreme Degree they Desire.

According to the district court, *Chen* stands for the proposition that a city has the "political choice" to choose to construct voting districts using total population while ignoring voter equality. In Irving, that approach led to the devaluation of a voter's vote by almost 50%. This result is already pernicious enough. But, if *Chen's* "political choice" 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 scores 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, 90 S.Ct. at 793; *Board of Estimate*, 489 U.S. at 701, 109 S.Ct. at 1442.

Nor can *Chen's* "political choice" doctrine be squared with the primacy of the right to vote in the hierarchy of constitutional rights. *See Wesberry*, 376 U.S. at 17, 84 S.Ct. at 535 (observing that "no right is more precious in a free country" than the right to vote). Interferences with this "precious" right are hardly ameliorated by the fact that a city or state is pursuing some other, lesser constitutional or statutory right or public policy goal. As the Court noted in *Wesberry*, "other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* This Court should therefore reverse the district court's summary judgment order, render judgment for the Appellants, and enjoin the City's use of the Plan.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court reverse the district court's summary judgment order, render judgment for the Appellants, and enjoin the City of Irving's use of the Plan. Appellants further request such additional relief as is necessary and just, whether in equity or at law, including but not limited to the recovery of attorneys fees and costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served by certified mail on counsel of record below on April 12, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

9134 words.

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

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