

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

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

Plaintiffs, §

v. §

CITY OF IRVING, TEXAS, §

Defendant. §

C.A. NO. 3:10-cv-00277-P

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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>3</b>
<b>II.</b>	<b>FACTS .....</b>	<b>4</b>
<b>III.</b>	<b>ARGUMENTS AND AUTHORITIES.....</b>	<b>9</b>
	1. <b>The Plan Violates the Constitution.....</b>	<b>10</b>
	2. <b>The “One Person, One Vote” Requirement is Premised on the Principle of Electoral Equality. ....</b>	<b>11</b>
	3. <b>The “Persons” Protected by the “One Person, One Vote” Requirement Are Citizen-Voters, Not Non-Voting Residents.....</b>	<b>12</b>
	4. <b>In Resolving this Summary Judgment, this Court Should Issue a Final Appealable Judgment on Plaintiff’s Claim. ....</b>	<b>16</b>
<b>IV.</b>	<b>ATTORNEY’S FEES .....</b>	<b>16</b>
<b>V.</b>	<b>PRAYER.....</b>	<b>17</b>

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. Liberty Lobby, Inc.*,  
447 U.S. 242, 248 (1986)..... 10

*Baton Rouge Oil & Chem. Workers Un. v. ExxonMobil Corp.*,  
289 F.3d 373, 375 (5th Cir. 2002)..... 10

*Board of Estimate v. Morris*,  
489 U.S. 688 (1989)..... 3, 10, 11

*Celotex Corp. v. Catrett*,  
477 U.S. 317, 322 (1986)..... 10

*Chen v. City of Houston*,  
206 F.3d 502 (5th Cir. 2000) ..... 15, 16

*Connor v. Finch*,  
431 U.S. 407, 416 (1977)..... 14, 15

*Edwards v. Aguillard*,  
482 U.S. 578, 595-96 (1987) ..... 10

*Hadley v. Junior College Dist.*,  
397 U.S. 50, 56 (1970)..... 3, 10, 11, 12, 14, 15, 16

*Lockport v. Citizens for Community Action*,  
430 U.S. 259, 265 (1977)..... 14, 15

*Moore v. Ogilvie*,  
394 U.S. 814, 819 (1969)..... 13, 14, 15

*Reynolds v. Sims*,  
377 U.S. 533, 563 (1964)..... 3, 4, 9, 10, 11, 12, 13, 14

*Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)..... 11, 14

*Wyche v. Madison Parish Police Jury*,  
635 F.2d 1151 (5th Cir. 1981) ..... 15

**Statutes**

28 U.S.C. § 1292(b) ..... 16

42 U.S.C. §1973l(e) ..... 16

42 U.S.C. §1983..... 16

42 U.S.C. §1988..... 16

**Rules**

Fed. R. Civ. P. 56..... 10, 16

TO THE HONORABLE COURT:

Plaintiffs Keith A. Lepak, Marvin Randle, Dan Clements, Dana Bailey, Kensley Stewart, Crystal Main, David Tate, Vicki Tate, Morgan McComb, and Jacqualea Cooley, (collectively “Plaintiffs”) file this Brief in Support of Motion for Summary Judgment against Defendant City of Irving, Texas (“Irving” or the “City”), and in support thereof would respectfully show the Court as follows:

## I. INTRODUCTION

“[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 (1964).

A districting plan that gives different voting power to voters in different districts of the same city violates the Constitution’s “one person, one vote” requirement even though district total population figures are roughly equal. Indeed, the “one person, one vote” requirement — enshrined in the Equal Protection Clause — demands that state political subdivisions like cities establish districts where “equal numbers of voters can vote for proportionally equal numbers of officials.” *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970). Because “weighting the votes of citizens different, by any method or means, merely because of where they happen to reside, hardly seems justifiable,” the Constitution requires that the population of citizen-voters within a political subdivision be “equally distributed” among the electoral districts within that subdivision. *See Reynolds*, 377 U.S. at 563, 566; *Board of Estimate v. Morris*, 489 U.S. 688 (1989). Any unequal distribution of citizen-voters would result in the debasement or dilution of a weight of a citizen’s vote, something the Supreme Court has described as tantamount to “prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555.

This motion and this case asks the Court to enforce this “one person, one vote” requirement. The City of Irving, as a result of a suit brought by one of its citizens, abandoned an at-large electoral plan in favor of a voting scheme that blatantly violates this requirement. It is undisputed that the current Plan bases the districts’ sizes on total population rather than on the citizens-of-voting-age population (“CVAP”).<sup>1</sup> District 1 has approximately half the CVAP as at least two other districts. Consequently, the council member from District 1 can be elected on the basis of approximately half as many votes as the council members from the remaining districts. Put differently, the vote of a citizen residing in District 1 receives nearly twice as much weight as the vote of a citizen in another district only a block away.

Thus, although the districts in the City of Irving’s current electoral scheme are roughly equal in terms of total population, they fail to meet the Equal Protection Clause’s “one person, one vote” requirement. This is because, by giving the citizen-voters in District 1 nearly twice as much voting power as citizens in the remaining districts, the City of Irving impermissibly weights the votes of citizens differently “merely because of where they reside....” *See Reynolds*, 377 U.S. at 563. In so doing, the City of Irving’s electoral 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. Based on these clear constitutional violations, Plaintiffs move for summary judgment and ask the Court to permanently enjoin the City of Irving’s use of its unconstitutional electoral Plan.

## II. FACTS

On November 6, 2007, Manuel A. Benavidez brought suit against the City of Irving, its mayor, and its city council members challenging the legality of Irving’s at-large electoral system

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<sup>1</sup> The “Plan” refers to the current electoral voting system that Irving uses to elect its city council members. App. 001-057 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1).

under Section 2 of the Voting Rights Act. *Benavidez v. City of Irving*, No. 3:07-CV-01850-P, 2009 WL 2060123 at \*1 (N.D. Tex. July 15, 2009). Benavidez alleged that the at-large electoral system had the effect of diluting the voting power of the Hispanic voters, and, consequently, denied them an opportunity to elect a representative of their choice. *Id.*

As a result of Benavidez's suit, an electoral plan was offered as a settlement plan to the Court.<sup>2</sup> 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.<sup>3</sup> The proposed scheme also specifically designed one of these single-member districts, District 1, as a majority-Hispanic district.<sup>4</sup>

The City of Irving vigorously resisted Benavidez's claims.<sup>5</sup> 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 districts. *Benavidez*, 2009 WL 2060123 at \*4. 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*. *Id.*

Irving also argued that the demographic statistics relied upon by Benavidez were unreliable and inaccurate. *Benavidez*, 2009 WL 2060123 at \*9-\*10. Specifically, Irving contended that Benavidez's data source for calculating the CVAP in the districts – a US Census Bureau survey called the American Community Survey (“ACS”) – was fundamentally flawed due to the small sample size, leading to an unacceptably high statistical margin of error. *Id.* To back up this contention, the City engaged an expert witness named Dr. Norfleet Rives. *Id.* at \*3,

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<sup>2</sup> App. 001-057 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1).

<sup>3</sup> Defendants' Original Answer at ¶ 11.

<sup>4</sup> *Id.* at ¶¶ 11, 14.

<sup>5</sup> *Id.* at ¶ 12.

\*9-\*10. This expert testified at the resulting bench trial. *See id.* After considering Mr. Rives' testimony, the testimony of Benavidez's expert, and reviewing the other evidence before it, the Court expressly rejected Irving's argument. *Id.* at \*9-\*10, \*19. In its opinion, the Court specifically found that the ACS data set relied upon by Benavidez to calculate district CVAP populations in Irving was "accurate and reliable." *Benavidez*, 2009 WL 2060123 at \*9.

Having disposed of these arguments, the Court ultimately found that Irving's at-large electoral system violated the Voting Rights Act. *Id.* 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.<sup>6</sup> The United States Department of Justice subsequently approved the Plan, and it was used in the recent Irving city-council member elections.<sup>7</sup>

The Plan divides the City of Irving into six districts that are "relativ[e] in total population."<sup>8</sup> The City relied on the total population numbers from the "2000 Census 100 percent count" to calculate and equalize total population among the districts.<sup>9</sup> The CVAP totals between the districts, however, were substantially unequal. In its discovery responses, the City provided a CVAP breakdown for each of the Districts. These calculated CVAP totals were based on the "Special Tabulation 56" data obtained from the US Bureau of the Census and derived from the 2000 Census "long form" data.<sup>10</sup> They are reproduced verbatim below.

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<sup>6</sup> Defendants' Original Answer at ¶ 13.

<sup>7</sup> Defendants' Original Answer at ¶ 13.

<sup>8</sup> App. 058-069 (Def. City of Irving's Resp. to Pl.'s Interrogs. at No. 1-6).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* The City of Irving submitted an expert report challenging the accuracy and reliability of ACS data. The expert's challenge is inapt, as the current Plan is not based on ACS data, but was derived from the 2000 Census "long form" data, as noted above. Regardless, even ignoring collateral estoppel issues, the expert's argument is immaterial to the analysis. *See* App. 070-074 (Gaddie Affidavit).

<b>City of Irving</b>							
<b>Settlement 6-2-1 Plan</b>							
2000 Census Total and Voting Age Population/Special Tabulation 56 Derived Citizenship Data							
<b>Plan 6-2-1</b>	<b>Total Population</b>	<b>Total VAP**</b>	<b>Total CVAP***</b>	<b>Hispanic CVAP</b>	<b>Anglo CVAP</b>	<b>Black CVAP</b>	<b>Other* CVAP</b>
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
<b>Totals</b>	191,613	143,395	108,387	16,507	73,678	12,217	5,985
<b>Data Source</b>	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 <sup>11</sup>							

Consistent with Benavidez's suit, District 1 was specifically designed to be a majority-Hispanic district.<sup>12</sup> Yet, while the total population numbers are roughly equal between districts, the Plan features conspicuously significant disparities between CVAP totals in District 1 compared to the remaining districts.

<sup>11</sup> App. 058-069 (Def. City of Irving's Resp. to Pl.'s Interrogs., Exhibit 1).

<sup>12</sup> Defendants' Original Answer at ¶¶ 11, 14.

The greatest CVAP disparity exists when comparing District 1 with District 3 and District 6. District 1 contains 11,231 citizens of voting age. In contrast, the total number of citizens of voting age in Districts 3 and 6 are almost double: 20,617 and 19,920 respectively.<sup>13</sup> This disparity reflects a substantial dilution of the votes of Irving citizens in District 3 and District 6, votes which are now weighted differently depending solely upon where the citizen-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 citizen in District 1 compared to votes by citizens in the remaining districts.<sup>14</sup>

District	Total Votes Needed to Elect a Council Member	Ratio of Weight of Vote 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

Thus, the Plan substantially dilutes the votes of Irving's citizens, weighting each one differently based solely upon where he or she lives. Indeed, the votes of citizens living in

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<sup>13</sup> *Id.*

<sup>14</sup> *See id.* This illustration is based upon the highly unlikely assumption of full voter turnout. The recent 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 this election held on May 9, 2010 election — the first to utilize Irving's new Plan — the total number of citizens casting a vote in District 1 was 449. App. 164-177 at 4 (May 8, 2010 Irving Election Results). In contrast, the total number of citizens casting a vote in District 7 was 1,556. *Id.* at 5. Thus, to win a seat in District 7, a candidate would need over three times as many votes as a candidate in District 1. *See id.* In addition to the single member contests, Irving also elected a candidate from the at-large district. *See id.* Ironically, the winning at-large candidate was Hispanic. *See id.* Meanwhile, the Hispanic candidate running in the specially-created "Hispanic majority" district lost. *See id.* at 4. Thus, the Plan is not only unconstitutional; it also proved to be ineffective.

District 1 are worth nearly twice as much as the votes of citizens residing in Districts 3, 5, and 6 and over one-and-a-half times as much as the citizen-voters in Districts 4 and 7. What is more, these differences in the weight of a citizen's vote depend upon nothing more than where a particular citizen-voter happens to live. The geographical arbitrariness of this weight imbalance is most conspicuous in District 1 and District 6, which border one another. In those districts, there are streets where, on the District 1 side, a citizen'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.

### III. ARGUMENTS AND AUTHORITIES

The City of Irving's districting Plan directly violates the "one-person, one-vote" equal protection principal at the heart of the Fourteenth Amendment. As the Supreme Court has observed, "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.*" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (emphasis added). The City's Plan, however, gives voters in District 1 a significantly stronger voice at the ballot box than voters in neighboring districts. "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." *Id.* at 563. Because it is undisputed that the Irving Plan unequally weights the votes of citizens based solely on where they "happen to reside," this Court should grant summary judgment and enjoin the City's use of this unconstitutional electoral Plan.

**1. The Plan Violates the Constitution.**<sup>15</sup>

There are no material facts in dispute in this case. None of the district-by-district CVAP numbers referenced in this motion are disputed by Irving. Indeed, these numbers are taken verbatim from Irving's responses to Plaintiffs' interrogatories seeking such information.<sup>16</sup> Thus, the sole issue before this Court on summary judgment is a purely legal one: Does an electoral scheme in which the votes of citizens in one district are worth nearly twice as much as the votes of citizens in the remaining districts violate the Constitution's prohibition on "weighting the votes of citizens differently . . . merely because of where they happen to reside." *Reynolds*, 377 U.S. at 563.

The answer is clearly "Yes." The Supreme Court has unequivocally held 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. Thus, "[i]n 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.'*" *Morris*, 489 U.S. at 701. Because there is no dispute that the votes of citizens in District 1 receive significantly more weight than citizens in any other district, summary judgment is proper.

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<sup>15</sup> The summary judgment standard is well-established. Summary judgment is proper if the pleadings, the discovery, and the disclosure materials on file show that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 375 (5th Cir. 2002). A "material" fact is one that can affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When there are no material facts in dispute and all that remains is a question of Constitutional interpretation, that question (and the case) can be appropriately resolved by summary judgment. See *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987).

<sup>16</sup> App. 058-069 (Def. City of Irving's Resp. to Pl.'s Interrogs., Exhibit 1).

2. **The “One Person, One Vote” Requirement is Premised on the Principle of Electoral Equality.**

At its core, the “one person, one vote” requirement is a principle of electoral equality. “The 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 [political subdivision].” *Reynolds*, 377 U.S. at 579 (emphasis added). Thus, in order to prevent vote dilution, the “one person, one vote” doctrine requires that a state political subdivision “equally distribute” citizen voters among its districts. *See Reynolds*, 377 U.S. at 563. “The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, 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.*” *Morris*, 489 U.S. at 698.

The United States Supreme Court has referred to a citizen’s right to have his vote equally weighted as one of the “fundamental ideas of democratic government.” *See Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). Thus, in *Hadley v. Junior College District*, the Court held that, “[T]he 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. The Court explained, “[A] *qualified voter* has a constitutional right to vote in elections without having his vote wrongfully 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. “[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. (quotations and citations omitted).

The Supreme Court has even gone so far as to suggest that diluting the weight of a citizen’s vote deprives that person of their fundamental right to suffrage, taking from him part of his citizenship: “And the 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.” *Reynolds*, 377 U.S. at 555. “To the extent that a citizen’s right to vote is debased, *he is that much less a citizen.” Id.* at 567.

Here, Irving chose the class of voters and specified their qualifications, but then unconstitutionally diluted the weight of those citizens’ votes by unequally distributing those citizens among the districts. Indeed, it is undisputed that District 1 has approximately half the CVAP as does at least two other districts. By diluting the weight of the vote of citizens in Districts 3, 4, 5, 6, and 7, Irving is, in the words of the Supreme Court, denying these citizens “their right of suffrage,” making them “that much less a citizen.” *Id.* at 555, 567. Because it is undisputed that Irving’s current electoral scheme weights the votes of citizens differently “merely because of where they reside,” this Court should grant summary judgment and permanently enjoin the City of Irving’s use of this unconstitutional electoral Plan.

**3. The “Persons” Protected by the “One Person, One Vote” Requirement Are Citizen-Voters, Not Non-Voting Residents.**

The City of Irving equalized the districts in its current electoral Plan on the basis of total population.<sup>17</sup> Although using total population as a proxy for citizens of voting age may – in the substantial majority of cases – produce voting districts where citizens’ votes are equally weighted, it plainly did not do so here. To the contrary, because of the high percentage of non-

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<sup>17</sup> App. 001-057 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1).

citizen residents residing in District 1, the City's use of total population here to draw district boundaries resulted in fundamentally unequal weight being given to the votes of citizens, depending solely on whether they reside inside or outside District 1's arbitrary geographical boundaries. When the use of total population leads to this outcome, it is constitutionally impermissible. As the Supreme Court made clear beginning with the landmark case *Reynolds v. Sims* and reaffirmed in every "one person, one vote" case it has resolved since then, the "person" being protected by the Fourteenth Amendment's "one person, one vote" requirement is the citizen-voter, not the non-voting resident. This is implicit in the very description of the doctrine. It is the "one person, one vote" doctrine, not the "one resident, one equal share of access to representative" doctrine. *See e.g. Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) (characterizing the "**one man, one vote**" doctrine as the "basis of our representative government.").

In *Reynolds*, Chief Justice Warren emphatically stressed that citizen-voters are entitled to equally weighted votes regardless of where a voter resides. Throughout the opinion, he repeatedly emphasized the bedrock principle that the "one person, one vote" doctrine requires that voting power – not access to representation – 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." 377 U.S. at 563.
- "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 (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 (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 (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 (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” doctrine is the citizen-voter. *See Wesberry*, 376 U.S. at 8 (“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 citizen-voter. In *Moore*, 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.” 394 U.S. at 819 (emphasis added). Similarly, in *Hadley v. Junior College District*, the court taught 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.” 397 U.S. at 56; *see also Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (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 (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).

The *Reynolds*' line of cases are instructive not only for what they do say about how the "one person, one vote" doctrine protects citizen-voters, but what they do not say. For instance, *Moore* refers to a group of citizens being impermissibly granted "greater voting strength," not a "greater share of access to representation." 394 U.S. at 819. *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." 397 U.S. at 56. *Lockport* states that when elected officials represent districts of unequal population, the Equal Protection Clause is violated because it "cannot tolerate the disparity in individual voting strength," not that it "cannot tolerate the disparity in access to representation." 430 U.S. at 265. 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." 431 U.S. at 416.

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 citizens 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).<sup>18</sup>

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<sup>18</sup> At first glance, it may appear that the Fifth Circuit's decision in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) sanctions a departure from the Supreme Court's focus on protecting the citizen-voter in its *Reynolds*' line of cases. But closer analysis reveals the holding in *Chen* to be exceedingly narrow and not applicable to this case. In *Chen*, the plaintiffs had brought a "one person, one vote" challenge to an electoral scheme by the City of Houston in which the districts contained disparate CVAP numbers. Notably, however, in *Chen*, the City of Houston had not diluted the vote of citizens by approximately half, as the City of Irving has done here. Rather, the *Chen* Court simply noted that the "maximum variance" of CVAP between the City of Houston's districts "exceeds [a] ten percent threshold." *Id.* at 523. Calling the issue presented "extremely close and difficult," the Court rejected the plaintiffs' "one person, one vote" challenge, but on the narrowest of terms, holding only that "the use of total

Because the current Plan does not contain districts in which “equal numbers of voters can vote for proportionally equal numbers of officials,” it directly violates the “one person, one vote” requirement of the Equal Protection Clause. The Court should grant summary judgment on Plaintiffs’ claims and enjoin the City’s use of this unconstitutional Plan.

**4. In Resolving this Summary Judgment, this Court Should Issue a Final Appealable Judgment on Plaintiff’s Claim.**

Plaintiffs’ claims in this case present a question of constitutional interpretation for the Court to resolve. The only fact necessary to resolve this constitutional question – the relative CVAP numbers in each of the City’s districts – is not in dispute. As such, the sole issue before the Court in this case involves a controlling question of law: Whether the City’s undisputed dilution of the weights of its citizens’ votes violates the “one person, one vote” requirement of the Fourteenth Amendment. Accordingly, whether the Court grants or denies Plaintiffs’ motion for summary judgment, Plaintiffs request that the Court enter a final appealable judgment on Plaintiffs’ claim. *See* Fed. R. Civ. P. 56; 28 U.S.C. § 1292(b).

**IV. ATTORNEY’S FEES**

This Court may award a party attorneys’ fees and costs of suit incurred in any action or proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. *See* 42 U.S.C. §1983, 42 U.S.C. §1988, and 42 U.S.C. §1973l(e). Plaintiffs brought the present action to enforce voting guarantees under the Fourteenth Amendment. Plaintiffs have incurred reasonable and necessary attorney’s fees in the amount of \$52,345.00.<sup>19</sup>

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population to track the size of the districts does not, *under these circumstances*, violate the Equal Protection Clause.” *Chen*, 206 F.3d at 505 (emphasis added). Reading *Chen* to sanction the extreme vote dilution that exists here is thus not supported by the narrow language of *Chen*, which expressly only applied to the specific circumstances of that case. More importantly, to read *Chen* as broadly concluding that a city may dilute the votes of its citizens to whatever level it desires simply cannot be squared with the Supreme Court’s express instruction that “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.

<sup>19</sup> App. 178-181 (Affidavit of Jeremy A. Fielding).

**V. PRAYER**

The City's Plan unconstitutionally deprives the citizens of Irving their right to have their votes weighted equally to that of other citizens. The Plan is thus a clear violation of the Equal Protection Clause. Plaintiffs respectfully request that the Court grant this Motion for Summary Judgment, permanently enjoin the City from using their newly adopted Plan, and award \$52,345.00 in attorney's fees, costs of court, and such other and further relief in law or equity to which Plaintiffs may show themselves justly entitled.

DATE: September 27, 2010

Respectfully submitted,

/s/ Kent D. Krabill

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of September, 2010, a true copy of the foregoing was served by the Court's ECF system to all counsel of record in this case.

*/s/ Kent D. Krabill*

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Kent D. Krabill

4830-6671-9495, v. 44830-6671-9495, v. 4