No. 12-

IN THE

Supreme Court of the United States

KEITH A. LEPAK, *ET AL.*,

Petitioners,

v.

CITY OF IRVING, TEXAS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a city violates the "one-person, one-vote" principle of the Fourteenth Amendment when it creates city council districts that, while roughly equal in total population, are grossly malapportioned with regard to eligible voters.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Keith A. Lepak, Marvin Randle, Dan Clements, Dana Bailey, Kensley Stewart, Crystal Main, David Tate, Vicki Tate, Morgan McComb, and Jacqualea Cooley.

Respondents are City of Irving, Texas, Robert Moon, Rachel Torrez Moon, Michael Moore, Guillermo Ornelaz, Gilbert Ornelaz, and Aurora Lopez.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Keith A. Lepak, et al. ("Petitioners") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported but is available at 453 Fed. App'x 522 and is reprinted in the Appendix ("App.") at 1a-3a. The opinion of the United States District Court for the Northern District of Texas is unreported but is available at 2011 WL 554155 and is reprinted at App. 4a-10a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision on December 14, 2011. App. 1a. The Fifth Circuit denied a petition for rehearing en banc on September 24, 2012. App. 11a-12a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution is reprinted in the Appendix.

INTRODUCTION

For the express purpose of forming a majority-Hispanic district, the City of Irving, Texas ("City")

created city council districts that, while roughly equal in total population, are remarkably malapportioned with regard to eligible voters. The district in question (District 1) has approximately *half* the number of voters of at least two other districts in the City (District 3 and District 6). The vote of those in District 1 who are eligible to cast a ballot is thus worth *twice* as much as those of voters residing elsewhere in the City. The court of appeals nevertheless held that "equalizing total population, but not [voter] population of each district, does not violate the Equal Protection Clause." App. 2a.

This petition thus presents an important question that remains undecided. Nearly fifty years ago, the Court held that the Equal Protection Clause of the Fourteenth Amendment guarantees all electors—regardless of where they may reside—an equally weighted vote. *Reynolds v. Sims*, 377 U.S. 533 (1964). As the Court explained, "it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable." *Reynolds*, 377 U.S. at 562. Indeed, the massive population disparities created by the City's redistricting plan are *per se* unconstitutional if *voter* population is the appropriate benchmark for measuring vote dilution. *Mahan v. Howell*, 410 U.S. 315, 329 (1973). Thus, "[t]he one-person, one-vote principle may … be of little consequence if … each jurisdiction can choose its own measure of population." *Chen v. City of Houston*, 121 S. Ct. 2020 (2001) (Thomas, J., dissenting from denial of certiorari).

The Court should grant the petition and finally decide whether *total* population or *voter* population "should be used for determining whether the population is equally distributed among the districts." *Id.* As this case shows, the time has come to decide this important question. Changing immigration patterns and federal policies have converted a problem that once impacted only a few jurisdictions into a national concern. This issue now affects state and local jurisdictions spanning from New York, to Maryland, to North Carolina, to Illinois, to Texas, and to California. Further, it causes significant financial injury as billions of dollars of federal appropriations often shift away from rural communities to urban centers with high concentrations of residents who are ineligible to vote. Delaying resolution will exacerbate this growing problem and cause further harm.

Finally, the importance of this petition is only heightened by the conflict that using total population creates between the one-person, one-vote principle and Section 2 of the Voting Rights Act ("VRA"). In Section 2 cases, courts use Citizen Voting Age Population ("CVAP") to evaluate whether a majority-minority district should be formed. *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). Indeed, CVAP was used to form the district in dispute here even though that metric was simply ignored in evaluating the one-person, one-vote implications of the revised City districting plan. The Court has always understood the importance of avoiding such conflict, especially in the civil rights setting where federal statutes and the Fourteenth Amendment are supposed to work in tandem—not at cross-purposes. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900 (1995).

Granting the petition will have the added benefit of resolving a circuit split in which all three lower court cases were incorrectly decided. The Ninth Circuit, over Judge Kozinski's dissent, held that using total population was constitutionally *required* because drawing districts using voter-based statistics would overpopulate districts with high concentrations of non-voters, which would then violate those non-voters' right to petition under the First Amendment and their right of "access" to elected representatives under the Fourteenth Amendment. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1991). As Judge Kozinski persuasively explained, that conclusion finds no support in this Court's decisions. Under *Reynolds* and its progeny, the Constitution shields electors against dilution of their *vote*—not diluted access of non-voters to elected representatives.

The Fourth and Fifth Circuits rejected the *Garza* majority's rationale, but likewise declined to adopt Judge Kozinski's view. Instead, both held that the choice between total population and CVAP is committed to the political process and is thus judicially unreviewable. *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). But while declining to attribute constitutional significance to the choice between total population and eligible voters may sound appealing, it conflicts with *Baker v. Carr*, 369 U.S. 186, 193-94 (1962), and the many cases resolving one-person, one-vote challenges since then. Having "crossed the Rubicon," *Branch v. Smith*, 538 U.S. 254, 278 (2003), there is no warrant for retreating to the political-question doctrine when subsidiary issues need to be resolved. So long as the Court retains the one-person, one-vote principle, it

has "an obligation to explain to States and localities what it actually means." *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari).

In filing an amicus brief and seeking argument time in the court of appeals, the United States argued that this case raises "important questions regarding the appropriate population standard a locality should use when drawing its election districts in compliance with the Equal Protection Clause principles established in *Reynolds v. Sims*." *Amicus Curiae* Brief of the United States at 3 (May 23, 2011). The United States was correct. The Court should grant the Petition.

STATEMENT OF THE CASE

A. The One-Person, One-Vote Principle of the Fourteenth Amendment.

This Court has long held that the Equal Protection Clause includes a one-person, one-vote principle under which "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Reynolds*, 377 U.S. at 557-58 (citations and quotations omitted); *see also Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970) (explaining that the Equal Protection Clause "requires that each qualified voter must be given an equal opportunity to participate in that election"). Put simply, the one-person, one-vote principle guarantees an equal vote to all electors. *See Reynolds*, 377 U.S. at 562.

Thus, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley,* 397 U.S. at 56; *Reynolds*, 377 U.S. at 568. Although the Equal Protection Clause does not require that the population of each district be absolutely equal, *Brown v. Thomson*, 462 U.S. 835, 842 (1983), it does forbid "substantial variation" from this constitutional norm, *Avery v. Midland County*, 390 U.S. 474, 485 (1968). A population deviation between the largest and smallest districts of 10% or more is *prima facie* evidence of a one-person, one-vote violation triggering the government's duty to set forth a compelling justification for the deviation. *Brown*, 462 U.S. at 852; *White v. Regester*, 412 U.S. 755, 763 (1973); *Mahan*, 410 U.S. at 329. And a population deviation large enough can be deemed *per se* unconstitutional. *Id*. at 329.

B. Section 2 Litigation Over The Electoral System Of Irving, Texas

In 2007, Manuel A. Benavidez, a Hispanic citizen and resident sued the City, its mayor, and city council members challenging the City's electoral system as invalid under Section 2 of the VRA. *See* App. 13a-14a. The challenged electoral system provided that voters would choose the eight city council members and mayor through at-large elections.[1] In his complaint, Benavidez alleged that

1. Under the at-large system, "[e]very City Council candidate [ran] for a particular numbered position, designated as Places 1 to 8. Irving [was] divided into five districts, and candidates for Places 1 to 5 [needed to] reside in their respective district. Candidates for mayor and for Places 6 to 8 [needed to] reside in Irving, but they [were] not required to reside in any particular district." App. 15a.

because the City has substantially more White voters than Hispanic voters, the at-large electoral system violated the VRA by diluting the voting power of Hispanic voters and thus denying them an opportunity to elect a representative of their choice. *Id.*

Benavidez proposed replacing the at-large system with what he termed the "Plan 6-2-1," which divided the City into six single-member districts, two at-large districts, and a single mayor. The key attribute of Plan 6-2-1 was the creation of District 1—a district designed to be majority Hispanic. Only by proposing such a district could Benavidez meet his burden under Section 2 of the VRA of showing that eliminating the at-large system would result in the creation of a district where the citizen voting age population ("CVAP") of the minority group exceeds 50% of the relevant population. App. 55a-56a (citing *Gingles*, 478 U.S. at 50 n.17). That is, Benavidez needed to show—using CVAP data—that the district court could draw such a district in order to establish that the City's minority population would possess the voting power to elect its desired candidate of choice absent the at-large voting scheme. *Id.* (citation omitted).

The City objected to replacing the at-large system with the 6-2-1 Plan. Importantly, the City argued, *inter alia*, that because District 1 would contain a comparatively far fewer number of eligible voters, Benavidez's plan to create a majority-Hispanic district would dilute the votes of those eligible voters residing in the other five districts in violation of the Equal Protection Clause's one-person, one-vote principle. *Id.* 23a.

Relying on *Chen*, the district court rejected the City's one-person, one-vote argument. *Id.* at 714. Under *Chen*, as the district court explained, the choice between using total population or CVAP is a political question that is judicially unreviewable for purposes of compliance with the Fourteenth Amendment. *Id.* (citing *Chen*, 206 F.3d at 522-28). Thus, although the district court was *required* to use CVAP in determining whether Benavidez's proposal met the requirements of Section 2 of the VRA, *see, e.g.*, *Reyes v. City of Farmers Branch, Texas*, 586 F.3d 1019 (5th Cir. 2009), that very same inquiry was judicially unreviewable for purposes of determining whether Plan 6-2-1 complied with the Fourteenth Amendment's one-person, one-vote principle. App. 23a (citing *Chen*, 206 F.3d at 522-28). After also rejecting the City's other arguments, the district court held that the at-large system violated Section 2 of the VRA and granted judgment to Benavidez. *Id.* 65a.

The City declined to appeal. Instead, it agreed to a substantially similar version of Plan 6-2-1 (the "Plan"). The Plan later was precleared by the Department of Justice in accordance with Section 5 of the VRA. *See* United States Amicus Brief at PageID 796-97 (Doc. 41). The following chart shows the City's population breakdown—including total population, voting age population ("VAP"), and CVAP—for each of the six districts that the Plan created.[2]

2. The City provided these figures and they are not disputed. *See* Appendix to Mot. for S.J. at PageID 254 (Doc. 26).

City of Irving							
Population, Voting Age Population ("VAP"), and Citizen Voting Age Population ("CVAP") (2000)							
District	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

While each district's total population numbers are roughly equal, the Plan creates significant disparities in CVAP among districts. For example, while District 1 contains 11,231 citizens of voting age, District 3 (20,617) and District 6 (19,920) both have CVAP that is almost double that of District 1. Viewed another way, to be elected in District 1, a candidate needs only 5,616 votes to obtain a majority of the electorate, whereas a candidate in District 3 or District 6 needs almost twice that (10,309 and 9,961 votes, respectively). This disparity means that each vote by a District 1 voter is almost twice as powerful as each vote by a District 3 or District 6 voter.

Given the City's demographics, this stark disparity in voter population will persist so long as the City refuses to take citizenship into account when drawing its boundaries.

Indeed, according to recent Census figures, more than 55 percent of the City's voting-age Hispanics are non-citizens. *See* U.S. Census Bureau, 2006-2010 American Community Survey of Irving City, Texas, *available at* http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10_SF4/B05003/1600000US4837000/popgroup~400.

C. Proceedings Below

In February 2010, ten eligible voters ("Petitioners") residing in districts other than District 1 sued the City in the United States District Court for the Northern District of Texas, seeking to have the Plan declared unconstitutional. Specifically, Petitioners alleged that the Plan violated their one-person, one-vote right to have their vote weighted equally to that of other citizens. In opposing the lawsuit, the City sought summary judgment on the ground that whether to use CVAP or total population as the districting base is a policy choice "that is left to the discretion of the City" under *Chen* and "the City's decision regarding the apportionment base [was] a rational one." Irving Mot. for S.J. at PageID 389 (Doc. 28). Six Irving residents intervened to defend the Plan.

The United States was granted leave to file an amicus brief in support of the City. In the view of the United States, the litigation "raises an important issue concerning the appropriate population basis upon which to draw municipal districts in accordance with the Constitution's one-person, one-vote principle." United States Motion to File Amicus Brief at PageID 540 (Doc. 32). In its brief, the United States argued that total population—not CVAP—was the proper apportionment basis. *See* United States Amicus Brief at PageID 796-806 (Doc. 41).

The district court granted summary judgment to the City. App. 5a-10a. Adhering to *Chen*, the district court held that "the choice between using total population or CVAP should be left to the legislative body for determination." *Id.* 8a (citing *Chen*, 206 F.3d at 525). The district court thus held that Petitioners had "not demonstrated that, under these circumstances, the Fifth Circuit would require [it] to intervene in the political process and judicially mandate [the City] to track the size of the districts by CVAP instead of by [total] population." *Id.* 10a; *see Chen*, 206 F.3d at 505, 528 ("In [the] face of the lack of more definitive guidance from the Supreme Court, we conclude that this eminently political question has been left to the political process.").

Petitioners appealed. App. 1a-3a. The United States again filed an amicus brief and requested to participate in oral argument, arguing that "this case raises important questions regarding the appropriate population standard a locality should use when drawing its election districts in compliance with the Equal Protection Clause principles established in *Reynolds v. Sims*." *Amicus Curiae* Brief of the United States at 3 (May 23, 2011). Although it conceded that "[t]he citizen voting-age population in District 1 is substantially less than the citizen voting-age population in the other city council districts in Irving," *id.* at 5, the United States argued that "the City's choice to apportion based on total population rather than citizen voting-age population [was] one properly left to elected officials," *id.* at 10. The City and the Intervenors similarly argued that the districts created by the Plan did not run afoul of the Fourteenth Amendment's one-person, one-vote principle under *Chen*.

On December 14, 2011, the Fifth Circuit affirmed, holding that *Chen* controlled and, as such, "equalizing total population, but not CVAP, of each district, does not violate the Equal Protection Clause." App. 2a. On January 4, 2012, Petitioners sought rehearing en banc. *Id.* 11a-12a. Nine months later, on September 24, 2012, the Fifth Circuit denied the rehearing petition. *Id.*[3]

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Fifth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court" and did so in a way that conflicts "with the decision of another United States court of appeals on the same important matter." S. Ct. Rule 10.

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3. Every ten years the City must "rearrange [its] districts so as to make all districts as nearly equal in population as possible." Irving City Charter, art. IV, § 3(d). Consequently, the City recently "modified the [boundaries] set forth in the 6-2-1 Plan" to reflect the 2010 census. *See* Snapshot 2012, A Report on the State of the City Irving, Texas, *available at* http://cityofirving.org/planning/pdfs/2012_Snapshot_final_4_4_2012.pdf. Despite the City's large non-citizen population, *supra* at 9-10, the City made only slight modifications to the Plan and again refused to take citizenship into account in forming the districts. *Id.* Thus, Petitioner's one-person, one-vote claim concerning District 1 "also relate[s] to the superseding plan." *Growe v. Emison*, 507 U.S. 25, 39 (1993). In any event, because certain members of the City Council remain in office under the Plan, Petitioners are suffering its "continuing effects" and will continue to do so until constitutional boundaries are adopted. *Williams v. City of Dallas*, 734 F. Supp. 1317, 1413 (N.D. Tex. 1990).

I. This Petition Presents An Important Question That Has Divided The Circuits And That This Court Should Settle.

A. Whether States And Local Districts Must Be Drawn Based On Voter Population Is A Nationally Important Question.

The United States has acknowledged that this case raises "important questions regarding the appropriate population standard a locality should use when drawing its election districts in compliance with the Equal Protection Clause principles established in *Reynolds v. Sims*." *Amicus Curiae* Brief of the United States at 3 (May 23, 2011).[4] And for good reason. The right to vote is fundamental. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). A citizen thus "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.").

Under controlling precedent, this equal-protection right guarantees more than ballot access. It also includes a one-person, one-vote principle that ensures that the vote

4. The United States participates as an amicus in the courts of appeals only at the authorization of the Solicitor General, 28 C.F.R. § 0.20(c), and only in cases of great national importance.

of any one voter once cast is accorded equal weight relative to every other voter. *Reynolds*, 377 U.S. at 557-58. "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. "Simply stated, an individual's right to vote for state legislators 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. In short, "the weight of a citizen's vote cannot be made to depend on where he lives." *Id.* at 567.

But the Court has not yet decided "what measure of population should be used for determining whether the population is equally distributed among the districts." *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari). By not deciding the issue, the Court has "left a critical variable in the requirement undefined." *Id.* Indeed, "[t]he one-person, one-vote principle may, in the end, be of little consequence if [the Court] decide[s] that each jurisdiction can choose its own measure of population. But as long as [the Court] sustain[s] the one-person, one-vote principle, [it has] an obligation to explain to States and localities what it actually means." *Id.* For several reasons, the question is too important to remain undecided any longer. *See* Robert W. Bennett, *Should Parents Be Given Extra Votes On Account of Their Children?,* 94 Nw. U. L. Rev. 503, 516 (2000) ("Can it really be that equally populated districts are important in constitutional terms, but that the inclusion or exclusion from the count of population groups that may approach, or conceivably even exceed, half the total in some districts is of no constitutional moment?").

First, the issue has increasingly become a national concern. In the 1960s, when the Court first recognized the one-person, one-vote principle, *Reynolds*, 337 U.S. 533, the United States "enforced restrictive immigration policies and experienced relatively little in-migration and permanent settlement by illegal immigrants," Ronald Gaddie et al., *Seats, Votes, Citizens, and the One Person, One Vote Problem*, 23 Stan. L. & Pol'y Rev. 431, 453 (2012); *see also* Philip Martin, *Immigration: Shaping and Reshaping America*, Population Bulletin vol. 61, no. 4 (Dec. 2006). Under then-prevailing circumstances, the Court "might reasonably have expected that eliminating gross population disparities would result in districts within each state having roughly equal numbers of citizen adults." Gaddie, *supra*, 453.

But that expectation is no longer reasonable. "[T]he number of immigrants has increased dramatically, going from 9.6 million in 1970 to 35.7 million in 2005." Belinda I. Reyes, *The Impact of U.S. Immigration Policy on Mexican Unauthorized Immigration*, 2007 U. Chi. Legal F. 131, 135 (2007). Moreover, these immigrants "are spread more broadly than in the past into states where relatively few had settled two decades ago … [such as] Georgia, North Carolina, and other southeastern states."[5] As a result, "some of the most under-represented districts prior to the 1960s have now become, in terms of their numbers of voters, among the most over-represented." Gaddie, *supra*, 435. "Today the ballots of some voters still have several times the influence of the ballots cast in other parts of the same state." *Id.* at 435-36.

5. Jeffrey S. Passel, *A Portrait of Unauthorized Immigrants in the United States*, Pew Research Center, at 1-2 (Apr. 2009), *available at* http://www.pewhispanic.org/files/reports/107.pdf.

At the same time, immigrant populations have centralized in specific neighborhoods and localities within these states. *See* Albert Saiz, *Immigration and the Neighborhood*, 3 American Economic Journals: Policy 169-188 (May 2011). For example, "Orange County's Little Saigon—like any Little Italy, Chinatown, Little Tokyo, or Little Havana—is, for its own residents and for many outsiders, a symbol of the maturity of a distinct American immigrant experience, the carving out of a place of one's own[.]" Douglas M. Padgett, *Religion, Memory, and Imagination in Vietnamese California* 77 (2007). These immigrant population centers tend to cluster in a state's largest cities. *See* Passel, *supra*, 10. As a consequence, when jurisdictions make redistricting decisions based on total population, this centralization of non-citizens significantly increases the likelihood that states and localities will form districts with vastly disproportionate numbers of eligible voters.[6]

It should come as no surprise, then, that this issue has arisen across the country. *See, e.g.*, Jamin B. Raskin, *Legal Aliens, Local Citizens*, 141 U. Pa. L. Rev. 1391, 1463 (1993) (explaining that after Takoma Park, Maryland completed its redistricting process, "its new wards had equal numbers of *residents*, as required by law, but that some

6. This issue also arises in other contexts. Districts can be malapportioned on the basis of voting age population even without considering citizenship. *See Daly,* 93 F.3d at 1212; *see also* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. Rev. 1269, 1287 n.80 (2002) ("California's current District 29 contains only 13.9% population under the age of eighteen years, whereas more than a third (36.2%) of the population of District 37 … is under the age of [eighteen]."). How to treat such disparities is likewise an important issue. *See* Levinson, *supra*, 1288

wards had far more eligible *voters* than others because some contained a large alien population"); Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Pub. L. Rev. 97, 115 (2010) (analyzing the CVAP populations in Port Chester, New York, and concluding that "the one person, one vote standard was not satisfied if it is based on CVAP"); *Barnett v. City of Chicago,* 141 F.3d 699, 702 (noting that the citizenship issue was "important in this case, because more than 40 percent of the Latinos in Chicago are not U.S. citizens").

Second, the problem is especially pronounced in regions with the largest immigrant populations—and those circuits have all addressed the question presented. *Infra* at 21-25. The Fourth, Fifth, and Ninth Circuits together include more than half of the nation's non-citizen population. Of the 13 million legal permanent residents in the country, nearly 26% reside in California and nearly 10% reside in Texas.[7] And of the 11.5 million illegal aliens in the country, 25% reside in California and 16% reside in Texas.[8] Deciding this question, therefore, will affect those

7. *See* Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2011*, Department of Homeland Security, 4 (July 2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/ois_lpr_pe_2011.pdf.

8. *See* Michael Hoefer et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, Department of Homeland Security, 4 (March 2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf; *A Description of the Immigrant Population: An Update,* Congressional Budget Office, 17 (June 2, 2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12168/06-02-foreign-bornpopulation.pdf.

regions of the country where this important legal issue recurs most frequently.

Third, the issue has real-world consequences for voters who are forced into malapportioned districts by the use of total population data. The one-person, one-vote principle has "significantly altered the flow of state transfers to counties, diverting approximately $7 billion annually from formerly overrepresented to formerly underrepresented counties." Steve Ansolabehere, *Equal Votes, Equal Money: Court-Ordered Redistricting and the Distribution of Public Expenditures in the American States*, 96 Am. Pol. Sci. Rev. 767, 767 (2002); *see also* Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. of Pol. Sci. 388 (1988) (discussing "the reallocation of federal policy benefits from rural to nonrural Americans" that occurred as a result of the Court's one-person, one-vote decisions). Nearly fifty years after having entered "into [the] political thickets" of redistricting, *Reynolds*, 377 U.S. at 566, the Court should now resolve this issue given the detrimental impact its silence is having on the lives of millions of voters burdened by the equalization of districts without consideration of voter population.

Last, the Court should decide this issue given the tension it creates between the one-person, one-vote principle and Section 2 of the VRA. As noted above, to prevail in a Section 2 vote dilution case, a minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. This showing is necessary under Section 2 because "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure

or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17.

Courts thus use CVAP to evaluate whether a minority constituency possesses electoral power in a particular geographic area. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) (analyzing Section 2 claim through CVAP data); *Bartlett v. Strickland*, 129 S.Ct. 1231, 1249 (2009) (same); *Reyes*, 586 F.3d 1019; *Barnett*, 141 F.3d 699. This is the only sensible way to approach the inquiry. "Because non-citizens by definition cannot vote, it makes little sense to consider them for the purposes of determining whether the particular remedial scheme proffered by [the minority group] would adequately remedy the alleged vote dilution." *Meza v. Galvin*, 322 F. Supp. 2d 52, 60 (D. Mass. 2004).

Using CVAP instead of total population vindicates important statutory and constitutional principles:

> Neither the census nor any other policy or practice suggests that Congress wants noncitizens to participate in the electoral system as fully as the concept of virtual representation [of noncitizens by citizens] would allow.... The right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens.

Barnett, 141 F.3d at 704.

Using total population for one-person, one-vote purposes but CVAP for the purpose of analyzing Section 2 thus creates intolerable conflict between the Fourteenth Amendment and an important federal statute—Section 2 of the VRA—that is supposed to enforce that Amendment. It cannot be the case that courts must look to CVAP figures in finding a Section 2 violation, but may (or, worse, must) ignore CVAP figures entirely in assessing whether the new districts they are creating comply with the one-person, one-vote requirement. A new district drawn as a remedy for a Section 2 violation must of course comply with the Fourteenth Amendment. *Perry v. Perez*, 132 S. Ct. 934, 941-42 (2012). The Court has endeavored to avoid this type of confrontation between statutory and constitutional standards if possible, and it should likewise do so here. *Miller v. Johnson*, 515 U.S. 900 (1995); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

This case illustrates the concern and potential for abuse. In the Section 2 litigation, Benavidez successfully used CVAP figures to invalidate the City's at-large electoral system. Yet the *Chen* decision precluded the district court from using those same figures to ensure that Benavidez's proposed plan did not violate the equal-protection rights of those voters who would reside in the other newly created districts. Courts should not adopt a rule that permits litigants to rely on CVAP statistics to form majority-minority districts and simultaneously use total population figures to shield those districts from constitutional challenge. This is a recurring problem of national significance that the Court should address. *See, e.g.*, *Meza*, 322 F. Supp. 2d at 61 n.11; *United States v. Port Chester*, 704 F. Supp. 2d 411, 421 (S.D.N.Y. 2010).

This case—in which the choice between voter population and total population as a districting base is outcome determinative—is an ideal vehicle for deciding the question.

B. The Circuits Are Divided On The Proper Resolution Of The Question Presented.

Although this Court has not considered the issue, several appellate courts have squarely addressed it. *Garza*, 918 F.2d 763; *Daly*, 93 F.3d 1212; *Chen*, 206 F.3d 502. Not only are these cases wrongly decided, *infra* at 26-31, but the discord among them illustrates the danger in leaving this important issue unresolved.

In *Garza*, the plaintiffs claimed the apportionment of the Los Angeles County Board of Supervisors violated Section 2 of the VRA by splintering the County's Hispanic population. 918 F.2d at 765. Siding with the plaintiffs, the district court "remedied" the problem by imposing on the County a new map that created districts with virtually equal total population, but a 39.92% deviation in CVAP. *Id.* at 773 nn.4-5. The district court rejected the County's argument that CVAP—not total population—is the proper measure of population equality because "many Hispanics in the County are noncitizens" and thus the creation of a majority-Hispanic district "unconstitutionally weight[ed] the votes of citizens in that district more heavily than those in other districts." *Id.* at 773.

The Ninth Circuit affirmed. In its view, there was no precedent "requir[ing]" state and local governments to consider the distribution of eligible voter population for purposes of compliance with the one-person, one-vote

principle. *Id.* at 774. Rather, the court concluded that because "the government should represent all the people," *Reynolds* and its progeny "recognized that the people, including those who are ineligible to vote, form the basis for representative government." *Id.* The Ninth Circuit thus held that total population was the "appropriate basis for state legislative apportionment." *Id.* It found that using voter population instead of total population to equalize voting districts would cause "serious population inequalities across districts," which, in turn, would result in "[r]esidents of the more populous districts [having] less access to their elected representative" in violation of the Equal Protection Clause. *Id.* at 774. The court also concluded that using voter population would violate the Petition Clause of the First Amendment by denying non-voters fair access to elected officials. *See id.* at 775 ("Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government."). In the Ninth Circuit, then, states and localities *must* use total population.

Judge Kozinski dissented. In his view, the majority's rationale not only turned *Reynolds* on its head, but adopted an unsustainable conception of the Fourteenth Amendment under which the purported right of "access" to elected officials by non-voters trumps the equal-protection rights of eligible voters. *Id.* at 781-85 (Kozinski, J., concurring in part and dissenting in part). He concluded that the Fourteenth Amendment protected the rights of voters. *Id.* at 782 ("[T]he name by which the Court has consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not

two, five, or ten, or one-half.") (internal citation omitted). "References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity." *Id*. Indeed, "a careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality." *Id*. at 783.

Judge Kozinski thus concluded that the theory "at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id*. at 782. The right to vote "is an important power reserved only to certain members of society; states are not required to bestow it upon aliens, transients, short-term residents, persons convicted of crime[s], or those considered too young." *Id*. at 781 (citation omitted). The one-person, one-vote principle "assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location." *Id*. at 782. The Fourteenth Amendment "protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned." *Id*.

Five years later, the issue arose in Mecklenburg County, North Carolina. *Daly v. Hunt*, 881 F. Supp. 218 (W.D.N.C. 1995). In *Daly*, the plaintiffs challenged the method of dividing Mecklenburg County into districts for the election of County Commissioners and School Board members. The plaintiffs claimed that dividing the county into districts based on total population unconstitutionally weighted the votes of citizens in districts that have

fewer eligible voters. The district court agreed. While noting that the Supreme Court had "flung the courts into the redistricting thicket" with "no clear precedent and language … supporting both sides of the issue," the court adopted the reasoning of Judge Kozinski's *Garza* dissent. *Id.* at 221 ("*Reynolds* implies that the overriding concern of the Court was that every person's vote count equally."). In that case, by "[u]sing voting age population, the deviation between districts [was] 16.17%," which created a "variance [that] is well in excess of 10% and is unacceptably and unconstitutionally large." *Id.* at 223. The court thus declared the county's plan unconstitutional under the Fourteenth Amendment.

The Fourth Circuit reversed. *Daly*, 93 F.3d at 1227. The court concluded that there was no authority to "suggest that the principle of electoral equality is superior to the principle of representational equality." *Id.* at 1223; *id.* at 1226-27 ("[W]hen all of the aspects of equal representation are considered as a whole, it becomes clear that representational equality is at least as important as electoral equality in a representative democracy."). "Even if electoral equality were the paramount concern of the one person, one vote principle," moreover, the court concluded that resolving the issue "would lead federal courts too far into the 'political thicket.'" *Id.* at 1227 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring)). The Fourth Circuit therefore held that "the decision to use an apportionment base other than total population is up to the state," *id.* at 1225, and it upheld the county's use of total population as an unreviewable political question, *id.* at 1227.

In *Chen*, the Fifth Circuit reached the same basic conclusion. While chiding the Supreme Court for being "somewhat evasive in regard to which population must be equalized," the court found that the pertinent decisions "indicated with some clarity that the choice has political overtones that caution against judicial intrusion." *Chen*, 206 F.3d at 524. The court agreed with Judge Kozinski that Supreme Court precedent refuted the *Garza* majority's conclusion that use of total population was constitutionally required. *Id.* at 528. But the Fifth Circuit found "no justification to depart from the position of *Daly*." *Id.* It declined to interpret "the Equal Protection Clause to require the adoption of a particular theory of political equality." *Id.* at 527. Like the Fourth Circuit, the Fifth Circuit held that "the choice of population figures is a choice left to the political process." *Id.* at 523.

There can be no question that the circuits are divided. On the one hand, the Ninth Circuit *requires* state and localities within its jurisdiction to use total population for purposes of one-person, one-vote compliance. On the other hand, the Fourth Circuit and Fifth Circuit allow states and localities to choose either total population or a voter-based approach without any judicial check as to whether that choice complies with the Constitution. The only thing these circuits appear to agree upon is the need for further guidance from this Court. *Daly*, 93 F.3d at 1222; *Chen*, 206 F.3d at 524; *Daly*, 881 F. Supp. at 221; *Garza*, 918 F.2d at 785 (Kozinski, J.). The Court can—and should—provide that guidance by granting this Petition. Indeed, the fact that *none* of these circuits have adopted an interpretation of the one-person, one-vote principle that is faithful to the Constitution and precedent makes the need for this Court's guidance all that more urgent.

II. Review Is Required Because The Fifth Circuit Incorrectly Decided This Important And Unsettled Question.

A. The Fourteenth Amendment's One-Person, One-Vote Principle Secures The Rights Of Voters.

The Fourteenth Amendment protects "the right of all qualified citizens to *vote*." *Reynolds*, 377 U.S. at 554 (emphasis added). Because that right "guarantees the opportunity for equal participation by all *voters* in the election of state legislators," *id.* at 566 (emphasis added), "the weight of a citizen's *vote* cannot be made to depend on where he lives," *id.* at 567 (emphasis added); *id.* at 568 ("[A]n individual's *right to vote* for state legislators 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.") (emphasis added); *id.* at 561 ("[T]he judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected *right to vote*."); *id.* at 563 ("Weighting the *votes* of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.") (emphasis added). The point of *Reynolds* and its progeny could not be more clear: the Fourteenth Amendment's one-person, one-vote principle secures the rights of *voters*—not the population writ large. *See, e.g.*, *Hadley*, 397 U.S. at 52, 56; *Chapman v. Meier*, 420 U.S. 1, 25 (1975); *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989).

Importantly, then, the Fourteenth Amendment does not create a freestanding right to equally populated voting districts. "[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," *Reynolds*, 377 U.S. at 568, to secure the equal-protection rights of voters, *id.* at 579. "[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*." *Id.* (emphasis added); *see Connor v. Finch*, 421 U.S. 407, 416 (1977) ("The 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). Population equality is not an end—it is a means of protecting electors from having their votes diluted in the redistricting process. In those cases where the difference is material, using total population to equalize voting districts is irreconcilable with that objective.

Indeed, protecting eligible voters from vote dilution is the foundation on which the Court's one-person, one-vote jurisprudence is built. In *Baker v. Carr*, which was the first case to find a challenge to a legislative apportionment claim justiciable under the Equal Protection Clause, the plaintiffs were eligible voters claiming that they had been "denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes." 369 U.S. 186, 188 (1962) (internal quotation omitted). The Court found that the plaintiffs had standing as "voters of the State of Tennessee," *id.* at 204, and that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," *id.* at 206.

In fact, the Court specifically characterized the plaintiffs' claim as alleging that Tennessee had "effect[ed] a gross disproportion of representation to [the] voting population. The injury which [they] assert is that this classification disfavors the *voters* in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis *voters* in irrationally favored counties." *Id.* at 207-08 (emphasis added). The vote-dilution claim was justiciable *only* because a "citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution[.]" *Id.* at 208. It was the plaintiffs' status as *voters* that afforded them Article III standing and it was their right to an undiluted *vote* under the Equal Protection Clause that made the claim justiciable. Absent those features, there is no reason to believe that this Court would have declared a judicially-enforceable constitutional right to population equality in the first place.

The outcome of *Burns v. Richardson*, 384 U.S. 73 (1966), likewise depends on the understanding that the one-person, one-vote principle protects *voters*. In *Burns*, the island of Oahu, Hawaii contained a large population of military personnel and other transients who were counted in the census but were not registered to vote in Hawaii. *Id.* at 90-91. Hawaii's redistricting plan assigned 37 of 51 state house seats to Oahu based on voter registration statistics from the 1964 general election. *Id.* at 90. Had redistricting been based on total population, Oahu would have been entitled to three additional seats. *Id.* Although the plan created deviations between districts of over 100% with respect to total population, it had only minor population deviations in terms of registered voters. *Id.* at 90-91 & n.18. Not only did the Court hold "that the

present apportionment satisfies the Equal Protection Clause," *id.* at 93, but that using total population, in light of the high concentration of military and other transient persons on Oahu, would have been "grossly absurd and disastrous," *id.* at 94 (quotation omitted). *Burns* is only explainable as rejecting total population as a mandatory basis for redistricting.

At base, reliance on total population as the starting point for reapportionment is plainly unconstitutional when it leads to a grossly unequal distribution of eligible voters. In many cases, the use of total population will sufficiently protect the Fourteenth Amendment rights of voters as "eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525. But where, as here, large numbers of persons ineligible to vote are concentrated in certain geographic locations, *supra* at 9-10, the use of total population does not fairly protect the voters' right to an equally weighted vote. *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) ("[I]f it is the weight of a person's vote that matters, total population … may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters.").

In *Chen*, which the lower court was bound to follow in this case, the Fifth Circuit sought to avoid this issue by concluding that the choice between total population and eligible voters is a political question that is therefore judicially unreviewable. *Chen*, 206 F.3d at 525. But the Fifth Circuit's political-process approach is no more viable than the "access" theory that currently reigns in the Ninth Circuit. This question has been settled for more than 50 years. As noted above, *Baker* held that the

Tennessee voters' dilution challenge to apportionment was "justiciable, and if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." 369 U.S. at 209-10 (citation and internal quotations omitted); *Reynolds*, 377 U.S. at 556 (reaffirming *Baker*).

Moreover, *Reynolds* squarely rejected the very reasoning that the Fifth Circuit adopted in *Chen*:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

Id. at 566.

Accordingly, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562; *Connor*, 431 U.S. at 416 ("The 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. It was recognition of that fundamental tenet that motivated judicial involvement in the first place in what had been called the 'political thicket' of legislative apportionment.") (citations omitted)).

This Court long ago determined in *Baker* and *Reynolds* that the Fourteenth Amendment includes a one-person, one-vote principle requiring States to equalize the electoral power of each vote, and the judiciary now has an obligation to enforce that rule. Those seminal decisions were subject to substantial challenge at the time. *Baker*, 369 U.S. at 267-330 (Frankfurter, J., dissenting); *Reynolds*, 377 U.S. at 589-625 (Harlan, J., dissenting). If the Court is inclined to overrule them, it should do so forthrightly, not by converting subsidiary issues into unreviewable political questions. *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari); *Garza*, 918 F.2d at 784 (Kozinski, J.). But "as long as [the Court] sustain[s] the one-person, one-vote principle, [it has] an obligation to explain to States and localities what it actually means." *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting in the denial of certiorari).

B. The City's Plan *Per Se* Violates The One-Person, One-Vote Principle.

The resolution of the question presented is decisive in this case. If the City is required to equalize the voter population, the Plan is patently unconstitutional. As CVAP statistics demonstrate, the Plan apportions city council members across voting districts in an obviously unequal way, as the votes of electors in District 1 carry almost twice the weight of those in other districts. No map with such a massive disparity can withstand any level of constitutional scrutiny.

Under the Plan, as noted above, District 1 has the lowest CVAP with only 11,231 citizens of voting age, while District 3 has a CVAP of 20,617. *Supra* at 9-10. There are, therefore, 1.83 citizens of voting age in District 3 for every citizen of voting age in District 1. District 3 contains 14.13% more citizens of voting age than the ideal district. As a result, there is a 51.96% CVAP deviation between the largest and smallest districts under the Plan.

These CVAP deviations are clearly unconstitutional. A population deviation between the largest and smallest districts (as a percentage of the ideal district) of 10% or more is *prima facie* evidence of a one-person, one-vote violation that triggers the State's obligation to set forth a compelling justification for the deviation. *Brown*, 462 at 852; *see, e.g., Gaffney*, 412 U.S. at 750-51 (concluding that a 7.83% deviation was permissible); *White*, 412 U.S. at 763 (1973) (permitting a maximum deviation of 9.9%). But, importantly, if the population discrepancy is large enough, the plan is *per se* unconstitutional. *Mahan*, 410 U.S. at 329 (concluding that a 16.4% discrepancy "may well approach tolerable limits" the Court was willing to accept irrespective of the State's justification).

There can be no doubt that the Plan's deviation of 51.96%, in which the votes of electors in one district carry almost twice the weight of voters in another district is *per se* unconstitutional:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to

> vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.

Reynolds, 377 U.S. at 562; *Morris*, 489 U.S. at 698 ("[A] citizen is … shortchanged if … he may vote for one representative and the voters in another district half the size also elect one representative.").

Yet this is precisely what the Plan imposes. As noted above, the Court indicated in *Mahan* that a 16.4% deviation approached the constitutional limit, even assuming that the State might have a compelling interest in drawing districts with such wide deviations. But this case exceeds the deviations found barely tolerable in *Mahan* by an order of magnitude. If the one-person, one-vote principle has any value, such deviations are clearly unconstitutional.

In any event, even if the Plan is not *per se* unconstitutional, there can be no compelling state interest in making the votes of certain citizens worth half the votes of others. The only two policy goals that this Court has identified as possibly justifying deviations

slightly larger than 9.9%—preservation of the integrity of political subdivisions and maintenance of compactness and contiguity—are clearly not driving the gross disparities present in this case. *Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Swann v. Adams*, 385 U.S. 440, 444 (1967); *Reynolds*, 377 U.S. at 578-79. Instead, the disparities here are the result of the City's interpretation of its Charter's requirement that "districts [be drawn] as nearly equal in population as possible," Irving City Charter, art IV, § 3(d)—irrespective of whether this measure preserves the one-person, one-vote rights of the people who will actually be voting in the elections—and the Fifth Circuit's *Chen* decision, which allows such a result to occur.

This Court has not hesitated to strike down apportionment plans that violate the one-person, one-vote principle. *Supra* at 5-6. Nor should it here. *Reynolds* and its progeny require population equalization in order to secure the equal-protection rights of the voter. And given the City's demographics of large, concentrated groups of non-citizens, *id* at 9-10, CVAP is the proper metric for making that determination. Under that standard, there can be no question that the City's Plan is *per se* unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 21, 2012

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, FILED DECEMBER 14, 2011

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 11-10194

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

Plaintiffs-Appellants

v.

CITY OF IRVING TEXAS,

Defendant-Appellee

ROBERT MOON; RACHEL TORREZ MOON; MICHAEL MOORE; GUILLERMO ORNELAZ; GILBERT ORNELAZ; AURORA LOPEZ,

Intervenor Defendants-Appellees

December 14, 2011

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

Appendix A

PER CURIAM: *

This case presents the question of whether the "one person, one vote" principle embodied in the Fourteenth Amendment's Equal Protection Clause requires the City of Irving, Texas, to apportion its city council election districts to equalize the citizen voting age population ("CVAP"), as opposed to equalizing the total population of each district. The plaintiffs contend that the constitutionally mandated measure is CVAP, and thus, the City's current apportionment plan, which was drawn with districts of relatively equal total population, but unequal CVAP, is unconstitutional.

We confronted this exact argument in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), and held that equalizing total population, but not CVAP, of each district, does not violate the Equal Protection Clause. *Id.* at 505; *see also id.* at 528. The Appellants do not attempt to distinguish *Chen*, nor do they argue that there has been any intervening contrary or superseding decision of the Supreme Court or this court sitting en banc. Instead, they merely argue that *Chen* was wrongly decided. However, we are not at liberty to overrule *Chen* as the Appellants desire. *See, e.g., Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

States Supreme Court, a panel cannot overrule a prior panel's decision." (citing *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir. 1998))). Accordingly, we AFFIRM the district court's grant of the City's motion for summary judgment.[1]

1. We disagree with the Intervenors' arguments that this appeal is not justiciable under Article III of the Constitution. *See Reno v. Bossier Parish School Board*, 528 U.S. 320, 327-28, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) (holding that even though the challenged apportionment plan would almost certainly be superseded by a new plan before the next election, the case nonetheless presented a live Article III case or controversy because the challenged plan "will serve as the baseline against which [the] next voting plan will be evaluated for the purposes of [§ 5] preclearance"); *Baker v. Carr*, 369 U.S. 186, 204-08, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (holding that the alleged dilution of an individual voter's power to elect representatives provides that voter with standing). Because there are plaintiffs with standing, and they seek only injunctive relief, we need not address the Intervenors' argument that Appellants who reside in Districts 4 and 7 lack standing. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) ("We . . . agree with the unanimous view of [the Seventh Circuit] that [some of the petitioners] have standing to challenge the validity of [the state law requiring voters to present photo identification] and that there is no need to decide whether the other petitioners also have standing."), *aff'g* 472 F.3d 949, 951 (7th Cir. 2007) ("Only injunctive relief is sought, and for that only one plaintiff with standing is required . . . ." (citing *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 585-86 (5th Cir. 2006))).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED FEBRUARY 11, 2011

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-0277-P

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,

v.

ROBERT MOON, RACHEL TORREZ-MOON, MICHAEL MOORE, GUILLERMO ORNELAZ, GILBERT ORNELAZ and AURORA LOPEZ,

Defendant-Intervenors.

Appendix B

February 11, 2011

JORGE A. SOLIS, District Judge

MEMORANDUM OPINION AND ORDER

Now before the Court are (1) Plaintiffs' motion for summary judgment (Docket # 25); (2) City of Irving's motion for summary judgment (Docket # 29); (3) Defendant-Intervenors' motion for summary judgment (Docket # 35); and (4) the United States's brief as amicus curaie (Docket # 41). After careful consideration of the facts, briefing and applicable law, the Court hereby GRANTS the City of Irving's motion for summary judgment.

BACKGROUND

After conducting a bench trial in *Benavidez v. City of Irving*, this Court held that the City of Irving ("City" or "Irving") violated Section 2 of the Voting Rights Act by electing its city council members on an at-large basis. The Court found the City's at-large system effectively denied Hispanic voters an equal opportunity to elect representatives of their choice. *See City of Irving v. Benavidez*, 638 F. Supp. 2d 709, 732 (N.D. Tex. 2009). As a result of the ruling, the parties agreed on a new election plan (the "Plan") that divided the City into six single-member districts, two at-large districts, and a single mayor. The Plan divides the City into six districts that are relative in total population. However, while the total

population numbers are roughly equal between districts, the CVAP (citizen voting age population) in District 1 is much less than the CVAP in the other districts.

DISCUSSION

According to Plaintiffs, the Plan substantially dilutes the votes of Irving's citizens by weighing votes differently depending on where a person lives. They argue the Plan violates the "one-person, one-vote" equal protection principle of the Fourteenth Amendment because the districts' sizes are based on total population rather than on CVAP. Plaintiffs explain that because District 3 has approximately half the CVAP as at least two other districts, the council member from District 1 can be elected with approximately half as many votes as the council members of the other districts. Plaintiffs conclude that because the voters in District 1 have nearly twice as much voting power as the voters in the other districts, the City is impermissibly weighing the votes of citizens differently merely because of where they reside. At the core of this dispute is whether the City is constitutionally permitted to draw districts based on equal populations as opposed to equal numbers of voters.

In their briefing. Plaintiffs repeatedly cite to *Reynolds v. Sims* for the principle that "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." 377 U.S. 533, 565, 84 S. Ct. 1362,

12 L. Ed. 2d 506 (1964).[1] From this passage, Plaintiffs conclude districts must be drawn to contain equal numbers of citizens with the ability to vote. They insist that the Court has unequivocally held the one-person, one-vote requirement is premised on the principle of electoral equality. (Docket # 25 at 11.)

The United States, as *amicus curiae*, argues the Supreme Court also recognized in *Reynolds v. Sims* that total population is an appropriate baseline to use and satisfies the one-person, one-vote principle. (Docket # 32-1 at 2-3 citing 377 U.S. at 542 n.7 & 545-46.) Reynolds states that "[a]s a basic constitutional standard, the Equal Protection Clause requires that the [seats] must be apportioned on a population basis." *Reynolds* 377 U.S. at 568. The United States further explains that each and every jurisdiction in Texas, some 340 state, county, and municipality, that has applied for preclearance to the Department of Justice under Section 5 of the Voting Rights Act. uses total population in the districting process as the basis for determining whether population is equal among districts. (Docket # 32-2.)

The *Reynolds* court and others like it that have used the terms "citizens" and "persons" interchangeably were not dealing with whether the one-person, one-vote principle requires citizen-voter equality or representational equality. Rather, they were "dealing with situations in

1. Plaintiffs also quote the *Reynolds* passage: "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." 377 U.S. at 567.

which total population was presumptively an acceptable proxy for potentially eligible voters." *Chen v. City of Houston*, 206 F.3d at 525 (5th Cir. 2000).

One case that has addressed this precise issue is the Fifth Circuit case of *Chen v. City of Houston*, in which the plaintiffs argued the city violated the "one-person, one-vote" requirement when it designed its districts to equalize total population instead of CVAP and when the city knew certain districts had extremely high ratios of noncitizens. *Chen*, 206 F.3d 502, 522. The Fifth Circuit recognized the "Supreme Court has been somewhat evasive in regard to which population must be equalized." *Chen*, 206 F.3d at 524. The court acknowledged there is "ample language in the [Supreme Court] opinions that strongly implies that it is the right of the individual potential voter that must be protected." *Id.* at 525. "But, . . . other language can be found that implies that representational equality is the ideal." *Id.* After conducting an in-depth analysis of the laws and legislative history governing the case, the *Chen* court held that the choice between using total population or CVAP should be left to the legislative body for determination.

The Fourth and Ninth Circuits have also addressed the issue, with the same outcome. The Ninth Circuit found that total population is a permissible method for measuring population when known significant concentrations of those not eligible to vote exist. *See Garza v. County of Los Angeles*, 918 F.2d 763, 775-76 (9th Cir. 1990). The Fourth Circuit, when dealing with the analogous issue of districting when people below the voting age were unevenly distributed, stated that the choice between total

population or a measurement of potential voters must be left to the legislative body. *See Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996).

Plaintiffs try to distinguish *Chen* from this case by arguing in a footnote that the variance between population and voters in *Chen* is considerably less than the variance in this case. They contend 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.'" (Docket # 25 at 15 n. 18.) Plaintiffs infer the City of Houston's variance between population and eligible voters was just slightly more than ten percent, whereas here, the variance is considerably higher. Plaintiffs then contend the *Chen* court called the CVAP vote dilution claim "extremely close and difficult." (Docket # 25 at 15 n. 18.)

First, the inference Plaintiffs make -- that the maximum variance in *Chen* was close to ten percent -- is not supported by the actual evidence. The petition for writ of certiorari in *Chen* states that, when measured by CVAP, the maximum deviation between districts in the challenged Houston plan was 32.5%. Appellate Pet. *Chen v. City of Houston* 532 U.S. 1046, 121 S. Ct. 2020, 149 L. Ed. 2d 1017, 2000 WL 34014393 at *3.

Second, the Fifth Circuit did not characterize its CVAP decision as a close call. It described the racial gerrymandering claim (*Shaw* claim) as "extremely close and difficult." *Chen*, 206 F.3d at 505. Later in the opinion,

the court does acknowledge that "while this [CVAP] issue is a close question, we find that the choice of population figures is a choice left to the political process." *Id.* at 523. However, the "close question" was not whether the amount of vote dilution was extreme enough to warrant judicial intervention. The "close question" referred to whether the courts should intervene in the selection of a population baseline. The Fifth Circuit held they should not. *Id.*

The Court also rejects Plaintiffs' attempt to limit the *Chen* holding to "the specific circumstances of that case." (Docket # 25 n. 18.) Though the court does state at the beginning of its opinion that "the use of total population to track the size of the districts does not, under these circumstances, violate the Equal Protection Clause," it concludes its opinion with the following language, "But in [the] face of the lack of more definitive guidance from the Supreme Court, we conclude that this eminently political question has been left to the political process." *Chen*, 206 F.3d at 505, 528. Plaintiffs have 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.

For these reasons, the Court hereby GRANTS summary judgment for the City of Irving, DENIES summary judgment for Plaintiffs, and DENIES Defendant-Intervenors' motion for summary judgment as MOOT.

It is SO ORDERED.

APPENDIX C — ORDER DENYING PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 24, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10194

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

Plaintiffs - Appellants

v.

CITY OF IRVING TEXAS,

Defendant - Appellee

ROBERT MOON; RACHEL TORREZ MOON; MICHAEL MOORE; GUILLERMO ORNELAZ; GILBERT ORNELAZ; AURORA LOPEZ,

Intervenor Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas, Dallas

Appendix C

ON PETITION FOR REHEARING EN BANC

(Opinion December 14, 2011, 5 Cir., No. 11-10194, 453 F.App'x 522)

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Bane as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requestedthat the court be polled on Rehearing En Bane (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Bane is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, N.D. TEXAS, DALLAS DIVISION, DATED JULY 15, 2009

United States District Court,
N.D. Texas,
Dallas Division.

No. 3:07-CV-01850-P.
July 15, 2009.

Manuel A. BENAVIDEZ,

Plaintiff,

v.

The CITY OF IRVING, TEXAS and Herbert A. Gears, Thomas D. Spink, Elizabeth (Beth) Van Duyne, Allan E. Meagher, Lewis Patrick, Rose Cannady, Rick Stopper, Sam Smith, and Joe Phillip, in their official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

JORGE A. SOLIS, District Judge.

On November 6, 2007, Manuel A. Benavidez ("Plaintiff") brought this suit against the City of Irving ("City" or "Irving"), its mayor, and its city council members (collectively, "Defendants"), challenging the legality of

Irving's at-large electoral system under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Plaintiff maintains that Irving's at-large electoral system has the effect of diluting the voting power of Irving's Hispanic voters, and thus denies them the opportunity to elect representatives of their choice. (Am. Compl. 8.) Plaintiff requests that this Court enjoin Irving from holding elections under the present at-large system, and order the implementation of a plan to remedy the alleged Section 2 violations. (*Id.* at 9.) After the Court denied Defendants' Motion for Summary Judgment on Plaintiff's standing to bring this action, the parties proceeded to a four day bench trial that concluded on February 20, 2009. This Order sets forth the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).[1]

I. BACKGROUND

A. *The Parties*

The 2000 Census reported that Irving had a population of 191,613, of whom 143,395 were of voting age. (Joint Pretrial Order 31.) Hispanics made up 31.2% of the City's population and 27.2% of the voting-age population. (*Id.*) The 2006 American Community Survey ("ACS") reflects an increase in the Hispanic population of Irving to 41.7% and 37.9% of the voting-age population. (Def.'s Ex. 1, at 8.) Highway 183 divides the northern and southern halves

1. Any finding of fact that is more properly construed as a conclusion of law shall be so construed. Likewise, any conclusion of law that is more properly construed as a finding of fact shall be so construed.

of Irving, and a majority of Irving's Hispanic population resides in the southern half of the City. (*See* Joint Pretrial Order 31-32.)

Manuel Benavidez, a Hispanic citizen, is a 37-year resident of Irving. He resides in Irving's District 4, and is part of the electorate for each of the members of City Council. (*Id.*)

B. *Electoral System*

Irving conducts an at-large election for each of its eight City Council members and its mayor, who also votes as a member of City Council. (*Id.* at 29.) This electoral system allows all Irving voters to vote for candidates running for each of the City Council positions and for mayor. Every City Council candidate must run for a particular numbered position, designated as Places 1 to 8. Irving is divided into five districts, and candidates for Places 1 to 5 must reside in their respective district. (*Id.*) Candidates for mayor and for Places 6 to 8 must reside in Irving, but they are not required to reside in any particular district. (*Id.*) Irving's electoral system requires run-off elections when no candidate receives a majority of the vote. None of Irving's eight current City Council members are Hispanic, and over the last twenty years only one Hispanic candidate has succeeded in a bid for Irving's City Council. (*Id.* at 30.)

In 2004, the City Council formed a Charter Review Committee comprised of appointed citizens to review the City Charter and recommend changes to, among

other things, the at-large electoral scheme. (*Id.*) Irving's Hispanic Chamber of Commerce prepared and presented a report to the Charter Review Committee recommending that City Council Places 1-5 be converted from the at-large to single-member systems. (*Id.*; PL's Ex. 46.) The Charter Review Committee, however, did not recommend this proposed change, and the City Council did not place this proposed change on the ballot. (Joint Pretrial Order 30.) Ultimately, no relevant conclusions or proposed amendments arose from the Charter Review Committee to address the City's demographic changes.

II. LEGAL FRAMEWORK

A. *Section 2 of the Voting Rights Act*

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, provides that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political

> processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

B. *Gingles Requirements*

In *Thornburg v. Gingles,* the Supreme Court identified three threshold conditions for establishing a § 2 violation:

> (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district;
>
> (2) the minority group is politically cohesive; and
>
> (3) the majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority group's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Failure to establish any one of the *Gingles* factors by a preponderance of the evidence precludes a finding of vote dilution, because "[t]hese circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice." *Id.* at 50, 106 S.Ct. 2752.

C. *Totality of the Circumstances*

If all three *Gingles* requirements are established, a court must next consider the "totality of circumstances" to determine whether members of a racial group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 425-26, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) ("*LULAC*"). The Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act identifies factors relevant to this inquiry. *See* S.Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177. This list of factors, however, is "neither comprehensive nor exclusive." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752. The "Senate factors" include:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of members of the minority group to register, vote, or otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder the ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals; and

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

The Fifth Circuit has noted that "it will be only the very unusual case in which the Plaintiffs can establish the existence of the three *Gingles* factors but still have

failed to establish a violation of § 2 under the totality of the circumstances." *Clark v. Calhoun County, Miss.,* 88 F.3d 1393, 1396 (5th Cir.1996.)

III. FINDINGS OF FACT

A. *Expert Witnesses*

This case essentially turns on expert opinions, and expert testimony predominated at trial. Plaintiff presented the testimony of Mr. David Ely[2] and Dr. Richard Engstrom.[3] Defendants offered testimony from Dr. John

2. Mr. Ely is the founder of Compass Demographics, a consulting and database management firm specializing in projects involving Census and election data. (PL's Ex. 16.) He has a B.S. in Mechanical Engineering and Social Sciences. Mr. Ely has served as an expert witness in a number of voting rights cases, and since 1987 he has regularly acted as a consultant in the redistricting and reapportionment of major cities across the country.

3. Dr. Engstrom is a Visiting Research Professor of Political Science and Visiting Research Fellow at the Center for the Study of Race, Ethnicity, and Gender in the Social Sciences at Duke University. (PL's Ex. 25.) He formerly served as a consultant at the Center for Civil Rights at the University of North Carolina and as a Research Professor of Political Science at the University of New Orleans. He has researched and published extensively on election systems, and three of his articles were cited with approval in *Thornburg v. Gingles.*

Alford[4] and Dr. Norfleet W. Rives.[5] The Court finds that the expert witnesses presented at trial are qualified, due to their education and experience, to give expert opinions regarding the *Gingles* factors and the factors considered by the Court in assessing the totality of circumstances.

B. *Gingles I*

1. Establishing a Hispanic Citizen-Voting-Age-Population Majority

Mr. Ely created, presented, and defended six illustrative districts[6] to demonstrate the feasibility of

4. Dr. Alford is an Associate Professor of Political Science at Rice University, and holds B.S., M.P.A., M.A., and Ph.D. degrees in Political Science. Dr. Alford has worked as a consultant in numerous voting rights cases.

5. Dr. Rives is a Senior Lecturer in the Department of Finance at the Fisher College of Business at Ohio State University. (Def's Ex. 4.) Dr. Rives holds A.B., M.A., and Ph.D. degrees in Economics, and studied demography and statistics as a research fellow with the Office of Population Research at The Woodrow Wilson School at Princeton University. Dr. Rives has worked as a research fellow with the U.S. Census Bureau and as a consultant in voting rights cases.

6. (1) The original (July 2008) Illustrative District had an estimated HCVAP in 2008 of 50.1%. (Pl.'s Trial Ex. 1, at 8.)

(2) The alternative (CVAP based) Illustrative District had an estimated HCVAP in 2008 of 53.1%. (*Id.* at Ex. 5, at 3.)

(3) The SSRV Illustrative District had an estimated HCVAP of 50.5% in 2008. (*Id.* at Ex. 5, at 2.)

complying with the Gingles I precondition-to show that a geographically compact district in which Hispanics will make up a majority of the eligible voters can be drawn in Irving.

a. *Criteria for Drawing Illustrative Districts*

Mr. Ely constructed the illustrative districts consistent with the traditional principles of drawing districts and well-established demographic considerations. (Trial Tr. vol. 1, 52-55, Feb. 17, 2009.) First, districts should generally have equal total population. For municipalities, the population size of each district should not deviate from the others by more than 10%. The illustrative districts created by Mr. Ely all contained within 1% of the ideal population based on the 2000 Census. (Pl.'s Pretrial Br. 11.) Second, districts must comply with legal requirements, such as the Equal Protection Clause. And third, districts should be drawn consistent with existing official political boundaries (along city or county lines) and informal geographic boundaries, such as neighborhoods or communities that share a common interest. Here, Mr. Ely constructed illustrative districts using undivided Census blocks and used recognizable boundaries such as streets. (Pl.'s Ex. 1, at 6.)

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(4) Illustrative District A had an estimated HCVAP in 2008 of 58.0%. (*Id.* at Ex. 5, at 4.)

(5) Illustrative District B had an estimated HCVAP in 2008 of 56.5%. (*Id.* at Ex. 8.)

(6) Illustrative District C had an estimated HCVAP in 2008 of 55.6%. (*Id.* at Exs. 15 and 17.)

Defendants' experts assert that Plaintiff's illustrative districts result in vote dilution by relying on total population for district size, rather than considering citizen-voting-age-population ("CVAP"). (Def.'s Ex. 4, at 12-13; *Id.* at Ex. 51, at 7-9.) They contend that Mr. Ely's illustrative districts contain an extremely high number of non-citizens, and this will result in the majority Hispanic district exercising voting power that is substantially magnified relative to Irving's other districts. (*See id.*; Trial Tr. vol. 1, 108, Feb. 19.) Dr. Alford testified at trial that "the fact that the other districts will contain much larger eligible populations means that their individual votes will count less. So this will devalue the votes in those districts ..." (Trial Tr. vol. 1, 110, Feb. 19.) However, as Dr. Alford acknowledges, total population (not CVAP) is generally accepted as a proper measure for equalizing the size of districts. (*Id.* at 112.) The Fifth Circuit addressed this complex issue in great detail in *Chen v. City of Houston* and concluded that the decision whether to rely on total population or the eligible-to-vote population in creating districts is a decision best left to the political process. *Chen v. City of Houston,* 206 F.3d 502, 522-28 (5th Cir.2000). Therefore, the Court concludes that applying the total population standard on the illustrative districts is entirely appropriate.

b. *Estimate Derived from Census and ACS Data*

In drawing the illustrative districts, Mr. Ely utilized data from the 2000 Census and from the 2006 ACS. (Trial Tr. vol. 1, 60-61, Feb. 17.) The 2000 Census was conducted by the Census Bureau and was composed of two parts: the

one-hundred percent count and the sample count. The one-hundred percent count is collected using the short form, which is-in theory-filled out by every household in the United States. The short form data provides information on total population, voting age population, Hispanic origin, and non-Hispanic origin populations. A sample survey component of the Census is collected through an additional long form, which is filled out by approximately one in eight households. The long form collects demographic information such as economic characteristics, primary language, and citizenship.

The ACS is another sample survey conducted by the Census Bureau. It is of relatively recent origin and is intended to replace the Census long form, but it is conducted annually with the results averaged over time periods to get the same level of statistical sampling as the long form. (*Id.* at 61.) Each year the ACS surveys approximately 1/1000 households. At the time that Mr. Ely performed his analysis for this case, the 2006 ACS data was the most current data that had been released by the Census Bureau.

Mr. Ely based his illustrative districts on his estimates of Irving's Hispanic CVAP ("HCVAP") in 2008. (*Id.*) He testified regarding why he chose to rely on those estimates and the method he used to calculate them. He initially used the ACS to ascertain whether the data from the 2000 Census long form remained generally accurate in 2006. Mr. Ely explained that in his opinion, the critical number is the ratio between the Hispanic and non-Hispanic share of CVAP, therefore he wanted to measure

the change in that ratio between 2000 and 2006. Thus, his analysis focused on the changes in the composition of the population, not in the size of the population. (*Id.* at 62.) To evaluate changes in the composition of Irving's population between 2000 and 2006, he compared the Hispanic and non-Hispanic share of CVAP for Irving as reported in the 2000 Census and the 2006 ACS. He found that the data examined indicated major changes-with an increase in total Hispanic population in Irving from 31.2% in 2000 to 41.7% in 2006. He also determined that the annual growth rate for Irving's HCVAP between 2000 to 2006 was 4.4% and the average annual rate for non-Hispanic CVAP was-2.2%. He therefore concluded that the 2000 Census data was no longer valid and determined that the 2006 ACS data far more accurately reflected current demographic conditions.

Mr. Ely then prepared estimates of the 2008 Hispanic and non-Hispanic percentages of CVAP for use in constructing his illustrative districts. (*Id.* at 62.) To do this, Mr. Ely computed growth rates for each of the component populations based on the 2000 Census and 2006 ACS city-wide data (4.4% for HCVAP and -2.2% for non-Hispanic CVAP). He used city-wide figures for ethnicity and age, and Census tract level information for citizenship status. (PL's Ex. 1, at 7.) He then extrapolated that growth rate until 2008, which was applied to the illustrative districts to arrive at an estimated percentage of HCVAP in the illustrative district in 2008. (*Id.* at 8.)

Mr. Ely did not use 2006 ACS data to estimate the actual, current population in the illustrative districts. In

his opinion that would not be possible because the ACS is a sample, similar to the long form, and a sample is not good at determining the scale of a population. (Trial Tr. vol. 1, 63-64, Feb. 17.) Rather, it is good for determining percentages or distributions within that population. In fact, in both the Census and the ACS, the total population numbers do not come from the survey; they come from a different method and the survey results are normalized or scaled to match those numbers. (*Id.* at 64.)

c. Tract Level v. Block Group Level Citizenship Rates

The Census Bureau employs a system of three geographic units to subdivide counties. The smallest unit in the hierarchy is the census block. Next is the block group ("BG"), which represents a collection of contiguous census blocks. Finally, the census tract represents a collection of contiguous BGs, and typically contains about 4,000 people. (Defs.' Ex. 7; Trial Tr. vol. 1, 66, Feb. 17.) Mr. Ely constructed the illustrative districts using undivided census blocks, which allows for the straightforward application of the 2000 Census data. Citizenship status is reported only at the tract level or through a special tabulation at the BG level, which is computed by the Census Bureau and must be specifically requested by an outside entity. (*Id.* at 67.) Therefore, calculating the HCVAP for illustrative districts composed of census blocks necessarily requires some extrapolation and assumptions, because block level data on citizenship is not available. (Defs.' Ex. 4 at 3; Trial Tr. vol. 1, 70, Feb. 17.)

Mr. Ely endorsed the tract level method because, while there are advantages and disadvantages to both the tract

level method and the BG level method, he believes that the tract level method has higher statistical reliability. (PL's Ex. 1, at 7.) The tract level method estimates citizenship rates for the block level by applying data from the tract level to block level. (Trial Tr. vol. 1, 72-73, Feb. 17.) Dr. Rives, however, criticized the tract level method on the grounds that it relies on the assumption that the blocks within the tract are homogenous with respect to the rates of citizenship. In his opinion, heavily Hispanic areas of the City tend to have lower rates of citizenship. (Defs.' Ex. 4, at 12-13.)

Dr. Rives advocated the application of the BG level method. He asserted that because BGs are smaller than tracts, they are more likely to emulate the demographic features of the blocks they contain. Also, the BG level method may be more precise because BGs are smaller, and it is therefore easier to closely approximate the actual area included in the illustrative district. However, Mr. Ely critiqued the BG level method because in formulating a special tabulation for Hispanic citizenship rates at the BG level, the Census Bureau relies on two independently rounded numbers in order to preserve participant confidentiality, thus decreasing accuracy. (PL's Ex. 4, at 1.) Also, the smaller sampling size at the BG level increases the likelihood of sampling error. (*Id.* at 2.)

In his initial expert report, Mr. Ely constructed illustrative districts using citizenship information from the tract level. (PL's Ex. 1, at 7.) Applying this methodology to 2006 ACS data, Mr. Ely drew the original Illustrative District (July 7, 2008). (PL's Ex. 1 and 3.) As discussed above, Mr. Ely then extrapolated growth rates in order

to estimate the 2008 Hispanic CVAP in the Illustrative District: 50.1%. (*Id.*; PL's Pretrial Br. 12.) In his expert report, Dr. Rives criticized Mr. Ely's use of Census tract citizenship data rather than BG data from a special tabulation. He demonstrated that by utilizing the BG level method rather than the tract level method, the 2008 HCVAP in the original Illustrative District fell to 48.2%. In response to Dr. Rives' report, Mr. Ely used the special tabulation BG data to estimate HCVAP in three additional illustrative districts. Mr. Ely was able to create the alternative (CVAP based) Illustrative District and Illustrative Districts A and B, with estimated HCVAP in 2008 of 53.1%, 58.0%, and 56.5%, respectively. (PL's Ex. 5, 8.)

d. *Spanish Surname Registered Voters*

Dr. Rives obtained voter registration data for Irving from the Dallas County Elections Department, based on individual voter registration records as of May 1, 2008. Using that data, Dr. Rives then "geocoded" Spanish surname registered voters ("SSRV") to their Census block. (Defs.' Ex. 4, at 14; Ex. 35; Ex. 47.) The Spanish surname may be used as a proxy for Hispanic ethnicity when self-identification is not practical.[7] (Joint Pretrial

7. The parties agree that experts commonly use Spanish surname databases as the foundation for analysis in voting rights litigations, as well as to provide guidance to jurisdictions in the redistricting process. (Joint Pretrial Order 32.) The Census Bureau developed for use in the 1980 Census a Spanish surname list and rules for matching. (*Id.*). Mr. Ely testified that in his opinion, Spanish surname analysis tends to slightly underestimate

Order 32.) Dr. Rives treated this geocoded SSRV information as an indicator of HCVAP, and observed that the SSRV share of total registered voters was 35.6% within Mr. Ely's illustrative district, "quite close to the Hispanic share of total CVAP for the proposed district in 2000, before plaintiff's expert extrapolated the 2000 CVAP to 2008 at citywide growth rates." (Defs.' Ex. 4, at 14.) Dr. Rives appears to suggest that the 2008 SSRV numbers indicate little to no growth in HCVAP in the illustrative district between 2000-2008.

Mr. Ely responded by creating an illustrative district based on Dr. Rives' geocoded SSRV data that included additional areas of high SSRV concentration. (PL's Ex. 5, at 2.) He again used BG citizenship rates and projected forward to arrive at a 2008 estimate, as in his earlier illustrative districts. (*Id.*) The estimated HCVAP for the SSRV based district is 50.5%, and the SSRV share of total registered voters is 40.9%. (*Id.*) Mr. Ely also noted that SSRV in Irving had nearly doubled between the 2005 and 2008 elections (497 and 957, respectively), while total voters increased by a proportionately more moderate amount (9,014 and 9,823, respectively). (Pl.'s Ex 1, at 5.)

The Fifth Circuit has stated that without a strict showing of probativeness, Spanish surname data are disfavored, and Census data based upon self-identification provide the proper basis for analyzing claims that the

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Hispanic ethnicity, except in groups with significant Filipino populations. (PL's Ex. 1, at 4.) Irving has a minimal Filipino population, therefore he considers Spanish surname results to be generally reliable.

votes of Hispanics have been diluted in violation of Section 2. *Rodriguez v. Bexar County, Tex.,* 385 F.3d 853, 867 n. 18 (5th Cir.2004). Additionally, Dr. Rives' analysis neglects a number of critical factors that would tend to depress Hispanic voter registration rates. For example, Dr. Rives fails to consider that low registration rates may be the result of non-representative or dilutive election systems, and that low registration rates are often associated with low income populations. (PL's Ex. 4, at 5; Trial Tr. vol. 1, 4, Feb. 18.) Additionally, low voter registration rates are frequently associated with younger populations-especially relevant here, where 50% of Hispanic citizens in Irving were under age 18 in 2000. (PL's Ex. 4, at 5.) Finally, changes in registration may lag behind changes in the population, as people often delay or fail to register when they become eligible upon moving into an area, turning 18, or becoming a citizen. (*Id.*) Therefore, the Court finds the SSRV data unpersuasive.

e. *Housing Stock Analysis*

In his expert report and testimony at trial, Dr. Rives critiqued Mr. Ely's application of city-wide growth rates to the illustrative districts. Dr. Rives claimed that "the growth of CVAP necessarily entails the growth of total population." (Defs.' Ex. 5, at 3; *see also* Defs.' Ex. 4, at 8-9 and Trial Tr. vol. 1, 84, Feb. 18.) He then questioned how the illustrative district could have absorbed this net increase in population. (Defs.' Ex. 4, at 8.) Dr. Rives used data from the Irving Planning Department to demonstrate that housing and land-use development in Irving for the 2000-2006 period largely occurred in the northern part of Irving, whereas the illustrative districts

are all situated in the southern part of Irving. (*Id.* at 8-10.) Dr. Rives argued that "the proposed district appears to be an isolated pocket of little post-censal development," which leads him to conclude that the illustrative districts did not grow at the average rate of the City with respect to total population or HCVAP. (*Id.* at 10.)

Dr. Rives also applied Dallas County tax appraisal data to Mr. Ely's illustrative districts, and argues that this data demonstrates that the illustrative districts do not have the "demographic carrying capacity"-the ability of a district's housing stock to support projected growth-to support the level of growth projected by Mr. Ely. (Defs.' Ex. 5, at 2; *Id.* at Ex. 35.) Dr. Rives started with the housing stock in 2000 and then, based on the tax appraisal data, determined the changes in the housing stock from 2000 to 2008 within the illustrative districts. He concluded that growth in housing stock in the illustrative districts during that period was negligible. (Trial Tr. vol. 1, 6, Feb. 19.) Dr. Rives then projected the total population of each of the illustrative districts forward from 2000 to 2008 using Mr. Ely's methodology. Although Mr. Ely restricted his projections to Hispanic and non-Hispanic CVAP, Dr. Rives believes if that component of the population grows then so must the rest of the population. (Trial Tr. vol. 1, 3, Feb. 19.) Dividing the projected total population of the illustrative districts for 2008 by their estimated number of housing units,[8] Dr. Rives concludes that the 2008

8. Dr. Rives applied a housing occupancy rate in the mid to high 90% range, which was the rate reported in the 2000 Census, and which he "assumed to approximate current occupancy levels reasonably well." (Defs.' Ex. 5, at 4.)

average household size ("AHS") would be 3.40-3.55 in the illustrative districts, higher than the 2000 Census average of 2.5 for Irving. (Defs.' Ex. 49.) The estimated 2008 AHS of 4.07-4.11 for a Hispanic household in the illustrative districts was also higher than the 2000 Census Hispanic household AHS of 3.65.[9] (*Id.*) Dr. Rives surmises that the larger-than-expected AHS values for all households and Hispanic households imply that Mr. Ely's ACS derived HCVAP growth rates are inflated. (Defs.' Ex. 5, at 5.)

In response to Dr. Rives, Mr. Ely defended his estimates by differentiating HCVAP growth from general population growth. Mr. Ely emphasized that the critical issue is the composition of the population in the illustrative districts, not any changes in the size of the total population, and that the pertinent analysis must therefore focus on ratios rather than absolute numbers. (Trial Tr. vol. 1, 5, Feb. 20.) He explained that the ACS survey data (or Census long form data) only provides percentages and ratios; the Census Bureau does not count all of the people who fall into the different categories. The surveys count a subset of the population and state what percentage of that subset fall in within the various categories. (*Id.* at 19.) He further explained that his methodology was designed to measure the relative size between two populations, and cannot reliably produce estimates of total population. (*Id.* at 6-10.) He urged the Court that Dr. Rives' conclusions are therefore invalid, because carrying capacity is relevant

9. Dr. Rives calculated Hispanic households based on households with a Hispanic head-of-household. A large percentage of Hispanic residents live with a Hispanic head-of-household. (Trial Tr. vol. 1, 14, Feb. 19; Defs.' Ex. 5, at 5.)

only for the projection of total population, not subgroups such as CVAP. The Court finds Mr. Ely's explanations sound, and therefore rejects Dr. Rives' carrying-capacity criticisms of Mr. Ely's methodology.

Mr. Ely and Dr. Rives also fundamentally disagree on the premise (embraced by Dr. Rives, rejected by Mr. Ely) that the growth of HCVAP necessarily entails the growth of total population. Mr. Ely argues that the most direct source of HCVAP growth, which would result in no corresponding increase in total population, could plausibly come from the aging of Hispanic citizens between 10-17 years of age. (PL's Ex. 4, at 4; Trial Tr. vol. 1, 4, Feb. 20.) Data from the 2000 Census Public Use Microdata Sample ("PUMS")[10] for Irving reports that in 2000 the population of Hispanic citizens between ages 10-17 was 4,912. (Defs.' Ex. 50.) And the numerical difference in HCVAP between the 2000 Census and the 2006 ACS is 4,860. (Trial Tr. vol. 1, 44, Feb. 19.) Mr. Ely posits that, based on the number of Hispanic citizens between ages 10-17 reported in the 2000 Census and HCVAP reported by the 2006 ACS, the normal aging process among Hispanic citizen children could theoretically explain all of the HCVAP growth in Irving over that period. (PL's Ex. 4, at 4.) Mr. Ely also reiterates that comparing the 2000 Census data to the 2006 ACS data reveals that the Hispanic percentage of the population has increased while the non-Hispanic share of the population has decreased. (Trial Tr. vol. 1, 6, Feb. 20.)

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10. PUMS data is a Census Bureau product. It is basically a 5% extract of the full sample detail file (the main Census database) for Irving from the 2000 Census, which includes both short and long form responses. (Trial Tr. vol. 1, 17, Feb. 19.)

Dr. Rives attempts to refute Mr. Ely's theory by arguing without support that the numbers are merely "fortuitous," and that considerations such as migration, naturalization, mortality, and immigration dictate that the aging of Hispanic children cannot be counted upon to raise the rate of citizenship among Hispanic adults. (Trial Tr. vol. 1, 45, Feb. 19; Defs.' Ex. 5, at 6.) While other demographic changes are undoubtedly at play, the Court finds Mr. Ely's explanations credible, and finds that the increase in HCVAP reflected in the estimates for Mr. Ely's various illustrative districts may plausibly be accounted for by factors other than significant growth in the total population-including the aging of Hispanic citizens under 18 years of age.

f. *City-wide Growth Rates*

Dr. Rives also argues on a more general level that applying city-wide growth rates to illustrative districts is not a reasonable assumption. (Defs.' Ex. 4, at 10.) Growth rates for local areas change over time. (*Id.*) Mr. Ely agrees that population growth across the City's districts has probably not been uniform, but states that he relies on this assumption because there's no evidence available as to how growth in population has varied across districts. In his opinion, it is reasonable to believe that the city-wide demographic changes relating to the Hispanic and non-Hispanic population were probably shared in by the area that has the most significant Hispanic population. (Trial Tr. vol. 1, 25, Feb. 20.) The Court concludes that the assumptions made by Mr. Ely are reasonable, to the extent that growth in HCVAP is likely to be equal to (or

greater than) the city-wide average in the districts that already have the heaviest concentrations of the Hispanic population.

2. Reliability of ACS Data

a. *Sampling Error*

Dr. Rives testified that the ACS data utilized by Mr. Ely cannot be considered highly accurate and should not be relied upon. (Trial Tr. vol. 1, 76-77, Feb. 18.) He first warns that ACS data can be subject to significant levels of sampling error because the sample sizes are small. (*Id.* at 78; Defs.' Ex. 4, at 11-12.) The one-year ACS survey samples approximately 1/1000 people, whereas the Census long form samples approximately 1/8 people. (Trial Tr. vol. 1, 129-130, Feb. 17.) Dr. Rives also contended that the Census Bureau cautions data users to consider ACS sampling errors when using ACS estimates by including a margin of error with each value in the ACS table. (Defs.' Ex. 4, at 11.)

Mr. Ely defends the ACS survey data, claiming that it is highly accurate. He argues that the ACS is conducted with a rigorously researched sampling frame and survey model, it is put together by an organization that knows the process, huge investment has been made in conducting it, everything is done according to normal statistical procedures, and it is ultimately the best available information about current demographic characteristics. (Trial Tr. vol. 1, 132, Feb. 17.) Additionally, Mr. Ely suggests that the fact that all the ACS data is reported

with sampling error actually makes the data more reliable, because the margin of error serves as a measure that can be applied to judge its statistical accuracy relative to other data sources. For the reasons enumerated by Mr. Ely as well as the Census Bureau's reliance on ACS data (as discussed *infra,* section III.B.2.d), the Court finds that ACS data is accurate and reliable.

b. *Discrepancy in 2006 and 2007 ACS Figures*

Dr. Rives also explained that the numbers provided in the ACS are "point estimates," which is the best single value provided by the Census Bureau for the characteristic in question (here, HCVAP). Every point estimate is subject to a margin of error that is always published by the Census Bureau along with the point estimate. (Trial Tr. vol. 1, 78, Feb. 18.) Adding and subtracting the margin of error from the point estimate provides a range. That range falls within a 90% confidence interval, *i.e.,* there is a 90% chance that the range surrounding the point estimate contains the truly accurate value. (*Id.*) The 2006 ACS lists the Hispanic population in Irving as 85,960 and the margin of error is 10,595. Thus, there is a 90% chance that the *actual* Hispanic population in Irving falls somewhere between 96,555 and 75,365. In 2007, the ACS point estimate for Irving's Hispanic population was 75,084 with a margin of error of 8,120. Comparing 2006 ACS data to 2007 ACS data, Dr. Rives argued, demonstrates that growth rates derived from ACS data should not be relied upon. Dr. Rives suggested that the 11,000 person change in the point estimate between 2006 and 2007 reflects significant sampling error in combination with a decline in the Hispanic population in Irving. (*Id.* at 79-80.)

Mr. Ely rejected Dr. Rives' position, claiming that the difference between the 2006 and 2007 ACS point estimates are not statistically significant because the difference in the point estimates falls within the range of the margin of error. (*Id.* at 12-14.) He claims that if he derived a growth rate using the 2007 ACS data, it would not be significantly different from the growth rate he got using the 2006 ACS data. (*Id.* at vol. 1, 137, Feb. 17.) Additionally, Mr. Ely points out that the 3-year averages of the 2005, 2006, and 2007 ACS data conform to his conclusions based on the 2006 data, confirming that the trend in HCVAP remains upward. (Trial Tr. vol. 1, 27, Feb. 20.) Defendants have presented no evidence to refute Mr. Ely's claim regarding the 3-year averages, and the Court finds that the 3-year averages disperse any doubts surrounding the significant change between 2006-2007.

c. *Point Estimates v. Confidence Intervals*

Next, Dr. Rives argued that instead of relying upon point estimates provided by the Census Bureau, an analysis of HCVAP levels should evaluate the probability that HCVAP numbers fall above 50% within the 90% confidence interval. (Defs.' Ex. 4, at 12.) In his expert report, he calculates that the 90% confidence interval for 2008 HCVAP in Plaintiff's original (July 2008) Illustrative District (calculated according to the BG level method) runs from 45.9% to 50.2%. The point estimate is 48.3%. Dr. Rives notes that almost all the confidence interval falls below the 50% mark. Therefore, the probability that the estimated HCVAP in the district exceeds 50% is relatively low. (*Id.*)

In his expert report, Mr. Ely interpreted Dr. Rives' report as suggesting that the 90% confidence level must lie entirely above 50% to justify concluding that there is a majority HCVAP in an illustrative district. (PL's Ex. 4, at 2-3.) Mr. Ely countered that a point estimate above 50% is the appropriate benchmark for current HCVAP in an illustrative district. (*Id.*) The Court agrees that the Census Bureau provides point estimates with the purpose that they may be relied upon and utilized, and finds it unnecessary to inject an additional level of probability calculations into the equation.

d. *Transition to ACS in 2010*

In the upcoming 2010 Census, the Census Bureau will no longer administer the long form. (Trial Tr. vol. 1, 86, Feb. 19.) The Census Bureau will instead rely on multi-year ACS averages for demographic information. The Court takes judicial notice of the Census Bureau's February 2009 publication "A Compass for Understanding and Using American Community Survey Data-What State and Local Governments Need to Know."[11] The mere issuance of such a publication by the Census Bureau, which provides detailed guidance on how ACS data should be interpreted and utilized by state and local governments, suggests that the Census Bureau considers ACS data reliable and intends for it to be relied upon in decisions such as Voting Rights Act compliance.

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11. Available at www.Census.gov/acs/www/Downloads/ACSstateLocal.pdf.

Appendix D

3. Compactness

The *Gingles* compactness requirement "refers to the compactness of the minority population, not to the compactness of the contested district." *LULAC,* 548 U.S. 399, 433, 126 S.Ct. 2594 (2006). In evaluating the compactness of the minority population, considerations of the dispersion of the territory of the district and the regularity or length of the perimeters of the district become subsidiary to considerations of the minority group's compactness. *See id.* ("In the equal protection context, compactness focuses on the contours of district lines ... Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations.").[12] In *LULAC,* the Supreme Court emphasized that "the enormous geographical distance" between the Austin-area and Mexican-border communities included in a Texas district, "coupled with the disparate needs and interests of these populations-not either factor alone-[rendered] District 25 noncompact for Section 2 purposes." *Id.* at 435, 126 S.Ct. 2594.

12. *See also* Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,* 92 Mich. L.Rev. 483, 549-557 (1993) (identifying dispersion of a district's territory, the regularity or length of a district's perimeters, and the regularity of the distribution of a district's population as the three quantitative measures of compactness), *cited in Vieth v. Jubelirer,* 541 U.S. 267, 348, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004).

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As Dr. Rives pointed out in his expert report, there is no unique measure to assess whether a plan definitely is or is not compact. (Defs.' Ex. 5, at 8.) He presented a number of different statistical measurements based on perimeter distances and various ratios derived from circumference, diameter, minimum spanning circle, etc. (Defs.' Ex. 31.) The different methods provide different rankings of the levels of compactness of the geographic boundaries of the plans, allegedly indicating a relatively low level of compactness. (Trial Tr. vol. 1, 63, Feb. 18.) The majority of the statistical measurements suggest that the initial July 2008 plan is the most compact and Illustrative District C is the least compact. (*Id.*)

However, *LULAC* requires addressing the illustrative districts in terms of the compactness of the minority population rather than dispersion of a district's territory or the regularity or length of a district's perimeters. *LULAC,* 548 U.S. at 433, 126 S.Ct. 2594. As discussed in the Court's January 29, 2009 Order denying Defendants' Motion for Summary Judgment, the illustrative districts include concentrations of HCVAP just adjacent to the area of primary HCVAP concentration. (Summ. J. Order 12.) While the illustrative districts undoubtedly "reach out to grab" pockets of Hispanic population, these pockets cannot be characterized as "small and apparently isolated minority communities." *See Bush v. Vera,* 517 U.S. 952, 977-79, 116 S.Ct. 1941, 135 L.Ed.2d 248 (noting that, in analyzing compactness in an Equal Protection claim, a "bizarrely shaped" district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact). Here the heavily Hispanic Census

blocks are, in fact, geographically very close to the nucleus of Hispanic concentration in south Irving. (*See e.g.,* PL's Exs. 6 and 7.) Therefore, the Court finds that the proposed districts are reasonably compact.

Dr. Rives argued that Illustrative District C in particular does not contain a geographically compact area of Hispanic citizens because the neighborhood of Benavidez's home is demographically different from the remainder the Hispanic areas included in the district. (Trial Tr. vol. 1, 66, Feb. 18.) He based his arguments on the higher rates of citizenship, higher levels of educational attainment, higher income levels, and the younger housing stock in Benavidez's neighborhood. (*Id.*)

But the district's "projections away from the core," which encompass Benavidez's residence for standing purposes, extend only approximately 1.5 miles from the edge of the primary area of Hispanic CVAP concentration. (*Id.* at 62; Defs.' Summ. J.App. 9.) Further, Illustrative District C includes a relatively large area of 30-40% Hispanic CVAP concentration and a small pocket of 50-100% Hispanic CVAP concentration, as well as Benavidez's residence. (*Id.* at 62; PL's Summ. J.App. 65; Defs.' Summ. J.App. 12.) Thus, while Benavidez's neighborhood is not part of the core of Hispanic concentration and although it may differ in some demographic characteristics from the core area, it is geographically close to that core and it contains a substantial Hispanic population. Therefore, the Court nonetheless considers Illustrative District C compact.

Appendix D

C. *Gingles II & III-Racial Polarization*

In assessing whether racially polarized voting exists in a designated political subdivision, courts generally begin with a statistical analysis of voting behavior. *Campos v. City of Baytown,* 840 F.2d 1240, 1244 (5th Cir.1988); *see also Monroe v. City of Woodville,* 897 F.2d 763, 764 (5th Cir.1990) ("Statistical proof of political cohesion is likely to be the most persuasive form of evidence, although other evidence may also establish this phenomenon.").

1. Probative Elections

To evaluate whether voting trends are racially polarized in Irving, the parties' experts analyzed the 2005 and 2008 Irving elections, in which voters had a choice between Hispanic and non-Hispanic candidates. (Trial Tr. vol. 1, 196, Feb. 17.) *See League of United Latin Am. Citizens, Council No. 4434 v. Clements,* 999 F.2d 831, 864 (5th Cir.1993) ("*Clements*") ("courts usually focus on those elections involving ... Hispanic candidates in examining whether ... Hispanic voters enjoy an equal opportunity to elect representatives of their choice"). The 2008 election involved the unsuccessful effort of Rigo Reza to win the office of mayor, and the likewise unsuccessful effort of Nancy Rivera to win the Place 3 seat on City Council. In 2005, Roland Medina unsuccessfully sought the Place 5 City Council position. (*Id.* at 196-97.) The experts were unable to analyze prior elections due to significant precinct reconfiguration. (*Id.* at 196.)

Appendix D

2. Gingles II: Political Cohesion of Hispanic Voters

a. *Methodologies: Homogeneous, Ecological Regression, and Ecological Inference*

Dr. Engstrom applied three accepted methods of statistical analysis to Irving's election data[13]-homogeneous precinct analysis ("HPA"), ecological regression ("ER"), and ecological inference ("EI")-to determine whether Hispanic voters vote cohesively. (Pl.'s Ex. 25, at 4.) HPA and ER were both approved in *Gingles* and have been utilized by numerous courts in Voting Rights Act cases. *Gingles,* 478 U.S. at 53 n. 20, 106 S.Ct. 2752. Recently, EI has been used to supplement evidence derived from HPA and ER. *See e.g., United States v. Village of Port Chester,* No. 06 Civ. 15173(SCR), 2008 WL 190502, at *11 (S.D.N.Y. Jan. 17, 2008); *United States v. City of Euclid,* 580 F.Supp.2d 584, 596 (N.D.Ohio 2008).

HPA simply reports the percentage of the votes received by a candidate withing the precincts in which a particular group constitutes over 90% of the people receiving ballots. (*Id.* at 5.) There are no homogenous Hispanic precincts in any of these elections in Irving, so

13. Both Dr. Engstrom and Dr. Alford utilized SSRV data, prepared by Mr. Ely based on precinct level election returns and lists of people who received ballots provided by the Dallas County Department of Elections, to analyze the candidate preferences of Hispanic and non-Hispanic voters. (Trial Tr. vol. 1, 200, Feb. 17.) Spanish surname matching is the norm for this type of analysis, and in Dr. Engstrom's opinion it is the best measure of the Hispanic voters in each voting precinct. (*Id.* at 201-02; PL's Ex. 25, at 4.)

this methodology cannot be applied to derive estimates of Hispanic voter's candidate preferences.

Unlike HPA, ER addresses mixed precincts-it takes into account the votes cast and the ethnic composition of all the precincts. (Trial Tr. vol. 1, 205, Feb. 17.) ER is essentially based on a scatter plot in which the horizontal axis reflects the Hispanic percentage of total voters (the percentage of voters that had Spanish surnames receiving ballots in each of the precincts) and the vertical axis shows the percent of the vote received by the Hispanic candidate. (*Id.* at 206.) A straight line, called the line of best fit, is plotted through the data points with the least possible deviation from the points. (*Id.*) But Dr. Engstrom criticizes what he calls the linearity assumption implicit in the line of best fit: ER in effect assumes that the behavior of Hispanic voters is the same throughout precincts, regardless of the composition of the precincts. (*Id.* at 208-09.) Additionally, this methodology in some cases may result in estimates that may go below zero or above 100 for a given precinct. (*Id.* at 209.)

Although HPA and ER were both approved in *Gingles* and have been utilized by numerous courts in Voting Rights Act cases, in Dr. Engstrom's opinion the EI method provides the best available tool for analysis where only one minority group is being examined. (Trial Tr. vol. 1, 212-14, Feb. 17.) This methodology was developed subsequent to the *Gingles* decision, and was designed specifically for the purpose of arriving at estimates in this type of case. (*Id.* at 209.) EI is similar to ER, but abandons the assumption of linearity that ER relies upon. (*Id.*) EI also applies a principle called the method of bounds to constrain

estimates to real limits, in that it does not allow estimates to go above 100 or below zero. (*Id.* at 210-11.)

Dr. Engstrom's application of ER and EI to SSRV data resulted in the following outcomes:

Election	**% of Hispanic Voters**
2008-Mayor	
Reza	
ER	87.6
EI	63.6
2008-Place 3	
Rivera	
ER	70.6
EI	99.5
2005-Place 5	
Medina	
ER	130.2
EI	99.4

(Pl.'s Ex. 26.) Dr. Engstrom's estimates applying ER and EI both show that the Hispanic voters preferred the Hispanic candidate, demonstrating Hispanic voter cohesion.

b. *Application of Confidence Intervals*

Dr. Alford agreed generally with Dr. Engstrom's figures, but also imposed 95% confidence intervals on the ER results. (Defs.' Ex. 51, at 10-11.) He argued

that the confidence that can reasonably be placed in the ER estimates are low due to low levels of Hispanic concentration in the precincts, which impairs the ER analysis. (Defs.' Ex. 51, at 10.) He showed that there is a 95% chance that the actual proportion of Hispanic voters casting their votes for Rivera in 2008 was somewhere between 38.7 and 100%, and for Medina is was between 27.3 and 100%. (*Id.* at 11.) Dr. Alford concluded that "clearly the confidence interval for both estimates includes levels far too low to be considered cohesive minority voting." (*Id.*)

Dr. Engstrom also noted that the confidence intervals are wide, and stated that this result should be expected given the data. He concurred with Dr. Alford that the wide confidence intervals are due to application of ER to a set of data points that don't lend themselves to ER analysis. (Trial Tr. vol. 1, 2, Feb. 18.) Dr. Engstrom pointed to the ER scatter plots, on which the data points are all clustered in the lower left corner. (*See* PL's Ex. 27.) According to Dr. Engstrom, for a more precise ER analysis one would need data points that move further out towards a 100% Hispanic voter precinct-unlike the precincts analyzed, which all have SSRV rates of less than 35%. Dr. Engstrom also responded that the point estimate is the best single estimate, and the numbers closest to the best estimate would be more likely than the numbers at the end of the confidence interval.

Dr. Engstrom also applied confidence intervals to his EI calculations. The confidence intervals produced by the EI analysis were tight around the point estimate, indicating that the analysis was efficient and there was

not a lot of variation. (Trial Tr. vol. 1, 2-3, Feb. 18.) While Dr. Alford does not dispute the EI numbers that Dr. Engstrom arrived at, he claims that EI is particularly unsuited to estimating values outside the data cluster on the scatter plot, as is the case here. (Trial Tr. vol. 1, 132, Feb. 19; *Id.* at vol. 2, 4.)

Despite the problematic application of ER and EI where there has been a history of low levels of minority voter registration, these mechanisms are the statistical tools available to assist the Court in its analysis. Here, the figures produced by an accurate calculation of ER and EI both suggest Hispanic political cohesion, and the Court finds that it is reasonable to follow the ER and EI data-despite the shortcomings that have been addressed-to the logical conclusion that Hispanics in Irving tend to vote as a bloc.

c. *Hispanic Voter Turnout*

Dr. Alford observed that, based on SSRV data, the two precincts with the highest levels of Hispanic concentration-both located almost entirely within Plaintiff's illustrative districts-contained only 33.3 and 20.6% SSRV. (Defs.' Ex. 51, at 5.) He noted that this is "a remarkably low concentration." (Trial Tr. vol. 1, 104, Feb. 19.) Dr. Alford modeled what are essentially "reconstituted elections" as to how the 2005 and 2008 Hispanic candidates would have fared in Plaintiff's original Illustrative District and how they would have fared in the hypothetical event that Hispanic voter turnout were doubled in those elections. (*Id.* at vol. 2, 8-10; Defs.' Ex. 51 at Table 4a.) According

to Dr. Alford's hypothetical elections, in both cases the Hispanic candidates still would not have prevailed. (*Id.*) Essentially, Dr. Alford claims that low concentrations of Hispanic voters are the real cause of the failure to elect Hispanic candidates, and that these low concentrations would preclude the success of a Hispanic candidate even if the illustrative districts were actually created.

But low minority voter turnout does not militate against finding a Section 2 violation. *See Harvell v. Blytheville Sch. Dist. No. 5,* 71 F.3d 1382, 1388 (8th Cir.1995) ("low voter turnout has often been considered the result of the minority's inability to effectively participate in the political process."); *United States v. Blaine County,* 363 F.3d 897, 911 (9th Cir.2004) (describing the situation where low voter turnout could defeat a Section 2 claim as a "vicious cycle"). As Dr. Engstrom testified, different patterns of past political participation under a diluted at-large electoral system are not a good indicator of future voting behavior in a nondiluted electoral system. (Trial Tr. vol. 1, 3-4, Feb. 18.) He explained that by moving from a dilutive system to a system that is not dilutive, minority groups have improved opportunities to elect the candidates of choice, which in turn creates a stimulus to "organize and mobilize and bring more people to the polls." (*Id.*)

3. Gingles III: White Majority Bloc Voting

As discussed above, HPA analysis reports the percentage of the votes received by a candidate withing the precincts in which a particular group constitutes

over 90% of the people receiving ballots. (PL's Ex. 25, at 5.) There are numerous precincts in Irving in which more than 90% of those receiving ballots did not have a Spanish surname, so this methodology was employed to derive estimates of non-Hispanic voters' candidate preferences. (*Id.*) Dr. Engstrom additionally applied ER and EI analysis to the non-Hispanic vote, and the parties don't dispute that non-Hispanic voters tend to vote as a significant bloc. (PL's Ex. 26, at Table 1; Defs.' Ex. 51, at Table 4a; Trial Tr. vol. 1, 129, Feb. 19.)

Election	**% of Non-Hispanic Voters**
2008-Mayor	
Reza	
HPA	4.7
ER	-0.6
EI	2.0
2008-Place 3	
Rivera	
HPA	30.0
ER	19.7
EI	14.6
2005-Place 5	
Medina	
HPA	14.6
ER	10.3
EI	9.9

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D. *Totality of the Circumstances-Senate Report Factors*

The Senate Report's "list of typical factors is neither comprehensive nor exclusive" and "there is no requirement that a particular number of factors be proved, or that a majority of them point one way or the other." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752. Rather, the ultimate "question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Id.* (internal citations omitted).

1. Senate Factor 2: Racial Polarization

The second Senate factor evaluates the extent to which voting in the elections of the state or political subdivision is racially polarized. *Gingles,* 478 U.S. at 37, 106 S.Ct. 2752. In the three elections evaluated in which a Hispanic candidate was on the ballot, the Hispanic candidate always received more than 63% of the Hispanic vote and less than 31% of the non-Hispanic vote. (PL's Tr. Ex. 26, at Table 1.) In the most extreme of the three elections, City Council candidate Reza received 100% of the Hispanic vote and only 10% of the non-Hispanic vote, according to Dr. Engstrom's ER estimates. (*Id.*) The Court finds that the statistical evidence shows that racially polarized voting occurred and the degree of polarization was significant in the last three elections involving Hispanic candidates.

2. Senate Factor 3: Mechanisms that Enhance Minority Vote Dilution

The third Senate factor assesses whether there is evidence of voting procedures in place that may enhance vote dilution. *Gingles,* 478 U.S. at 37, 106 S.Ct. 2752. First, the parties do not dispute that Irving's electoral system requires that a successful candidate receive the majority vote. If one candidate does not win a majority in an Irving election, a run-off election is held between the top two candidates. (Trial Tr. vol. 1, 38-39, Feb. 20; Joint Pretrial Order 29.) The majority vote requirement is a textbook enhancing factor in at-large elections because it deprives minority voters of the opportunity to elect a candidate by "single-shot" voting-*i.e.,* of concentrating all of its votes on a single candidate. *Gingles,* 478 U.S. at 56, 106 S.Ct. 2752; *see also City of Rome v. United States,* 446 U.S. 156, 184 n. 19, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (describing the implications of a majority vote requirement and the operation of single shot voting).

Second, a numbered place system such as Irving's slotted at-large system also prevents single-shot voting. (Joint Pretrial Order 29.) *See Salas v. Southwest Texas Jr. College Dist.,* 964 F.2d 1542, 1544 n. 1 (5th Cir.1992) ("[a] numbered-post system requires a candidate to declare for a particular seat on a governmental body ... The system prevents the use of bullet, or single shot, voting.") (quoting *Campos v. City of Baytown,* 840 F.2d 1240, 1242 n. 1 (5th Cir.1988)). The place system functions by separating every seat on the City Council into an election that is a single-vote single-seat election. (Trial Tr. vol. 1, 37-38, Feb. 20.)

The Court concludes that the place requirement for Irving elections has an enhancing discriminatory effect with respect to Hispanic success in Irving elections.

Third, Irving conducts staggered term elections: only three of the eight districts and the mayoral seat are on the ballot in each election. (PL's Pretrial Order. 29.) "The use of staggered terms also may have a discriminatory effect under some circumstances, since it, too, might reduce the opportunity for single-shot voting or tend to highlight individual races." *City of Lockhart v. United States,* 460 U.S. 125, 135, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983). In a city such as Irving, where there's an at-large electoral system, a majority non-Hispanic population, and racial bloc voting predominates, staggered terms function to dilute Hispanic voting strength. *See City of Rome,* 446 U.S. at 183-85, 100 S.Ct. 1548 (affirming finding that staggered terms, together with other voting procedures, acted to dilute minority voting strength when combined with the presence of racial bloc voting, majority white population, and at-large electoral system).

3. Senate Factor 5: Socio-Economic Disparity

The fifth Senate Factor questions whether the minority group bears the effects of discrimination, in areas such as education, employment, and health, which hinders its ability to participate effectively in the political process. *Gingles,* 478 U.S. at 37, 106 S.Ct. 2752. Where disproportionate educational, employment, income level, and living conditions can be shown and where the level of minority participation in politics is depressed, "plaintiffs need not prove any further causal nexus between their

disparate socio-economic status and the depressed level of political participation." *Teague v. Attala County, Miss.,* 92 F.3d 283, 294 (5th Cir.1996) (internal citations and quotation omitted).

In Irving, there are significant disparities in the educational levels of Hispanic and white residents, as reflected in data from the 2000 Census. (Pl's Pretrial Br. 20-21.) Specifically, only 6.4% of Hispanics have Bachelor's degrees, while 23.8% of white non-Hispanics do. (Pl.'s Pretrial App. 173-174.) Similarly, 57% of Hispanics do not have high school diplomas, while the comparable figure for white non-Hispanics is only 11.1%. (*Id.*) Other socio-economic indicators also display disparities between Hispanic and non-Hispanics in Irving. According to the 2000 Census, median household income for the Hispanic population was $34,799, but $50,604 for white non-Hispanics. (*Id.*) Per capita income was $12,109 for Hispanics and $31,574 for white non-Hispanics. (*Id.*)

4. Senate Factor 7: Extent of Hispanic Electoral Success

The seventh Senate factor, the extent to which members of the minority group have been elected to public office in the jurisdiction, is the only Senate factor expressly referenced by Congress in the statutory language of Section 2. *Gingles,* 478 U.S. at 37, 106 S.Ct. 2752. In Irving, despite several attempts, only one Hispanic candidate has ever been elected to Irving's City Council. None of the current City Council members or mayor is Hispanic.

Notably, James Dickens, the only Hispanic candidate to be elected in Irving, did not have a Spanish surname and did not publicly acknowledge his Hispanic background until after the election; the non-Hispanic incumbent whom Dickens defeated had a Spanish surname. (Trial Tr. vol. 1, 18-19, Feb. 17; Joint Pretrial Order 30.) In 1999, Mr. Dickens won the City Council election for Place 1 after a run-off election against Fran Bonilla, a non-Hispanic candidate. (Trial Tr. vol. 1, 18-19, Feb. 17; PL's Ex. 35.) In 2001, Mr. Dickens ran unopposed for the City Council election for Place 1 again and won. (Trial Tr. vol. 1, 20-21, Feb. 17; PL's Ex. 36.) In 2004, Mr. Dickens again won the City Council election as the incumbent, this time against two challengers who were not serious candidates. (Trial Tr. vol. 1, 21-22, Feb. 17.) In 2007, Mr. Dickens was defeated by Thomas Spinks, a non-Hispanic candidate who took a strong anti-illegal-immigrant position during his campaign. (*Id.* at 23-24.)

Minority electoral success in a polarized electorate may be explained by special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting. *See Gingles,* 478 U.S. at 57, 106 S.Ct. 2752 (cautioning that "the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election"). The special circumstances test set forth by the *Gingles* court "was designed to prevent defendant jurisdictions from arguing that a minority candidate's occasional victory in an otherwise racially polarized electorate defeats a vote dilution." *Rodriguez v. Bexar County,* 385 F.3d 853, 864 (5th Cir.2004) (citing *Gingles,*

478 U.S. at 57, 106 S.Ct. 2752). In the case of Mr. Dickens, such special circumstances existed-the absence of an opponent, incumbency, and Mr. Dickens' Anglo name. As stated in the Senate Report, here the Court concludes that the election of one minority candidate does not "necessarily foreclose the possibility of dilution of the [minority] vote, in violation of this section ..." S.Rep. No. 97-417, at 29 n. 115 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207.

IV. CONCLUSIONS OF LAW

A. *Gingles I*

The first *Gingles* precondition requires that a plaintiff challenging an at-large election scheme demonstrate that the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district." *Gingles,* 478 U.S. at 50, 106 S.Ct. 2752. Here, Plaintiff has shown that Hispanics are sufficiently geographically compact and numerous in Irving that an illustrative district can be drawn that has a Hispanic majority of eligible voters and, therefore, Plaintiff has satisfied part one of the *Gingles* threshold test.

1. HCVAP Majority Illustrative Districts

To satisfy *Gingles I*, a plaintiff must show that it is possible to draw an election district of an appropriate size and shape where the CVAP of the minority group exceeds 50% of the relevant population in the illustrative district. *Bartlett v. Strickland,* --- U.S. ----, 129 S.Ct.

1231, 1245-46, 173 L.Ed.2d 173 (2009); *Perez v. Pasadena Indep. Sch. Dist.,* 165 F.3d 368, 372 (5th Cir.1999). This requirement ensures that the minority group will possess the potential to elect representatives of its choice in the absence of the at-large voting scheme. *Gingles,* 478 U.S. at 50 n. 17, 106 S.Ct. 2752. Unless minority voters possess such electoral potential, they cannot claim to have been injured by the at-large voting scheme. *Id.* Here, Plaintiff has demonstrated that in 2008, HCVAP will comprise 53.1 % of the total CVAP in the alternative (CVAP based) Illustrative District, 58.0% in Illustrative District A, 56.5% in Illustrative District B, and 55.6% in Illustrative District C. (*See* Pl's Ex. 5, at 3; Ex. 5, at 4; Ex. 8; Exs. 15 and 17.)

a. *Criteria for Drawing Illustrative Districts*

Plaintiff's alternative (CVAP based) Illustrative District and Illustrative Districts A, B, and C comport with traditional districting principles of population equality and respect for existing official geographic boundaries. *See Miller v. Johnson,* 515 U.S. 900, 919, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw v. Reno,* 509 U.S. 630, 651, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Mr. Ely has created illustrative districts with populations that are within 1% of 1/8 of the total population of Irving, and he has drawn district boundaries along existing Census block lines.

b. *Defendants' Objections to the Illustrative Districts*

Defendants raised objections to Plaintiff's illustrative districts based on (1) citizenship estimates based on data from census tracts, rather than census blocks; (2) low levels of Hispanic voter registration in the illustrative districts, according to SSRV data; and (3) the inability of the housing stock in the illustrative districts to accommodate the population growth implied by the HCVAP growth.

In response, Plaintiff drew districts with Hispanic majorities of eligible voters by using citizenship estimates based on data from census blocks, rather than census tracts. (*See e.g.,* Pl's Ex. 5, at 3.) Plaintiff also created an illustrative district incorporating SSRV data to show that Plaintiff could create a district with a Hispanic majority of eligible voters. (*See id.* at 2.) But contrary to Defendants' arguments regarding low levels of Hispanic voter registration in the illustrative districts, it is the overall population of eligible Hispanic voters that is relevant. *See Campos v. City of Houston,* 113 F.3d 544, 548 (5th Cir.1997) (holding that in voter dilution challenges, courts must consider the minority CVAP, not the number of minority voters that are actually registered to vote). Further, Plaintiff has demonstrated that the increase in HCVAP rates may be accounted for by the aging of Hispanic children and the decline in non-Hispanic CVAP, resulting in little or no total population growth in the illustrative districts. Finally, the 2008 CVAP majorities in illustrative districts A, B, and C are sufficiently large that they can absorb some degree of variability. (Trial Tr. Vol. 1, 46-47, Feb. 18.) Thus, Plaintiff has proposed viable illustrative districts.

2. Proof of Changed Demographic Characteristics

The Fifth Circuit has established that in Section 2 cases, Census figures are presumptively accurate until proven otherwise. *Valdespino v. Alamo Heights Indep. Sch. Dist.,* 168 F.3d 848, 853-54 (5th Cir.1999). The Fifth Circuit requires that "[p]roof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior Census." *Id.* at 854. The reliability of the 2008 estimates based on growth rates derived from ACS data constitutes the pivotal issue in this case, and the Court finds that Plaintiffs ACS based numbers for 2008 are thoroughly documented, have a high degree of accuracy, and are clear, cogent and convincing.

a. *Reliability of ACS Figures*

ACS data *is* Census data. It is produced and promulgated by the Census Bureau, and it is intended to replace the long form in the decennial Census. (Trial Tr. vol. 1, 86, Feb. 19.) Unlike data proffered to overcome Census figures in other cases, here the Census Bureau produced the data employed by Plaintiff. *See, e.g., Valdespino,* 168 F.3d at 854 (affirming decision that housing stock data could overcome Census data); *Reyes v. Farmers Branch,* No. 3:07-CV-900, 2008 WL 4791498, at *16 (N.D.Tex. Nov. 4, 2008) (declining to rely on plaintiff's "actual count" of SSRV to overcome the *Valdespino* presumption). ACS data can be-and eventually must be-relied upon; the Census Bureau will be utilizing ACS data in lieu of long form survey data beginning in 2010. (*Id.*)

To the extent that ACS data may be regarded as distinguishable from presumptively accurate Census figures, ACS data meets the standard to overcome the prior decennial Census. ACS sampling errors are transparent; they may be accounted for using the margins of error published by the ACS and the use of confidence intervals. The Court concludes that ACS data is thoroughly documented, has a high degree of accuracy, and is clear, cogent and convincing enough to overcome the *Valdespino* threshold.

b. *Estimate Derived from Census and ACS Data*

Defendants have clearly established, and Plaintiff essentially does not dispute, that according to the 2000 Census and the 2006 ACS, Plaintiff cannot meet his burden of showing a majority HCVAP illustrative district. (Trial Tr. vol. 1, 117, Feb. 17.) Therefore, Plaintiff used Census and ACS figures to extrapolate HCVAP percentages for 2008. The Court has found Mr. Ely's methodology for estimating 2008 numbers to be reliable: he thoroughly documented and explained his process, he comported with accepted statistical principles, and his estimates have been corroborated by the 2007 ACS numbers and the 2005-2007 ACS 3-year averages. The ACS figures demonstrate a clear, persistent trend in the growth of HCVAP percentages in Irving that is unlikely to change in the 2008 ACS data. The 2008 estimates have been further corroborated by the PUMS data regarding the number of Hispanic children ages 10-17 and by the SSRV analysis.

Plaintiff has not employed an *ad hoc* procedure to construct the illustrative districts. *See Kirkpatrick v. Preisler,* 394 U.S. 526, 535, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969) (post-Census population shifts may be considered if they are "thoroughly documented and applied through the state in a systematic, not an *ad hoc*, manner"). Rather, Plaintiff determined that the 2000 Census figures no longer apply, according to 2006 ACS data that showed rapid growth in Hispanic CVAP and a concurrent fall in non-Hispanic CVAP. Plaintiff then implemented a clear and direct way of estimating Hispanic CVAP and non-Hispanic CVAP in illustrative districts-applying city-wide growth rates reflected in the ACS to the districts. Thus, the Court concludes that Plaintiff's methodology was not *ad hoc*, and the estimated HCVAP numbers for 2008 are clear, cogent, and convincing to override the presumptive correctness of the prior Census.

3. Compactness

Gingles requires that the proposed district advanced by the plaintiffs be geographically compact. *See Shaw v. Hunt,* 517 U.S. 899, 916, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (finding no Section 2 violation where "no one looking at [that district] could reasonably suggest that the district contains a 'geographically compact' population of any race"). The Supreme Court has "refused to consider a noncompact district as a possible remedy for a [Section 2] violation." *LULAC,* 548 U.S. at 431, 126 S.Ct. 2594 (citing *Shaw,* 517 U.S. at 916, 116 S.Ct. 1894). The inquiry into compactness should consider "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* (internal quotes omitted).

However, "[t]he first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the [minority] population be sufficiently compact to constitute a majority in a single-member district." *Houston v. Lafayette County, Miss.,* 56 F.3d 606, 611 (5th Cir.1995) (quoting *Clark v. Calhoun County, Miss.,* 21 F.3d 92, 95 (5th Cir.1994)). "Moreover, the question is not whether the plaintiff residents' proposed district was oddly shaped, but whether the proposal demonstrated that a geographically compact district could be drawn." *Id.*; *see also Clark,* 21 F.3d at 95 ("[P]laintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-black district is feasible in [the] county. If a § 2 violation is found, the county will be given the first opportunity to develop a remedial plan." (citations omitted)). Here, the Court concludes that Plaintiff's illustrative districts satisfy the *Gingles* compactness requirement.

Thus, as to the first *Gingles* precondition, this Court concludes that Plaintiffs have demonstrated through the alternative (CVAP based) Illustrative District, Illustrative District A, Illustrative District B, and Illustrative District C that the Hispanic population in Irving is sufficiently large in number and geographically compact to constitute an effective majority in a single-member district in the southern part of the City. Accordingly, Plaintiff has satisfied the first *Gingles* factor.

B. Gingles II & III-Racial Polarization

Racially polarized voting exists "where there is a consistent relationship between [the] race of the voter and

the way in which the voter votes." *Gingles,* 478 U.S. at 53 n. 21, 106 S.Ct. 2752 (internal citations and quotations omitted). Legally significant racially polarized voting exists when the minority group is politically cohesive and the majority votes sufficiently as a bloc to enable it to usually defeat the minority-preferred choice. *Id.* at 56, 106 S.Ct. 2752. The Court concludes that racially polarized voting is clear in Irving in the three elections analyzed, based on the pattern of Hispanic voters consistently preferring the Hispanic candidate, non-Hispanic voters preferring the non-Hispanic candidate, and non-Hispanic voters vetoing Hispanic preferences.[14] (Trial Tr. vol. 1,216-17, Feb. 17.)

1. Political Cohesion of Hispanic Voters

The second *Gingles* precondition requires that Plaintiff demonstrate that Hispanics in Irving are

14. Having established the three *Gingles* factors, Plaintiff has standing to bring this action: he is a minority voter who resides within a proposed district in which the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, and voting is racially polarized. Thus, he has been affected "in a personal and individual way," he has demonstrated "a causal connection between the injury and the conduct complained of," and it is likely "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (setting forth the required elements for standing); *see also Salas v. Sw. Texas Junior Coll. Dist.,* 964 F.2d 1542, 1554 (5th Cir.1992) (stating that the *Gingles* analysis "is an inquiry into causation-whether the given electoral practice is responsible for plaintiffs' inability to elect their preferred representatives").

politically cohesive. *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. According to *Gingles,* "if the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.* The Court concludes that Hispanic voters in Irving are politically cohesive, *i.e.,* they tend to vote as a bloc.

Dr. Engstrom considered the degree to which Hispanic voters support the same candidates, and looked to the gap between the percentage of votes for the minority-preferred candidate and the non-preferred candidate. He demonstrated that Hispanic voters in Irving voted cohesively in the three elections examined, in 2005 and 2008. The methods utilized by Dr. Engstrom, ER and EI analysis, have been accepted by numerous courts in voting rights cases. *See e.g., United States v. Village of Port Chester,* No. 06 Civ. 15173(SCR), 2008 WL 190502, at *25 (S.D.N.Y. Jan. 17, 2008). Plaintiff has therefore satisfied the second *Gingles* precondition.

2. White Majority Bloc Voting

To satisfy the third *Gingles* precondition, Plaintiff must demonstrate that "the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed-usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. Proving this third point enables the minority group to show that "submergence in a white multimember district impedes its ability to elect its chosen representatives." *Id.* Further,

the requirement that the white majority be repeatedly successful "distinguishes structural dilution from the mere loss of an occasional election." *Id.*

Dr. Engstrom employed HPA, ER, and EI analysis, and the results of all three methods demonstrate that the white majority in Irving votes cohesively to defeat Hispanic preferred candidates. Therefore, Plaintiff has proven the third *Gingles* precondition.

C. Totality of the Circumstances-Senate Report Factors

As outlined above, although this Court has found that Plaintiffs have satisfied all three *Gingles* preconditions, it is also necessary to consider the totality of the circumstances before finding a Section 2 violation. *See Johnson v. DeGrandy,* 512 U.S. 997, 1011, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The most important Senate factors in a Section 2 challenge are factors 2 and 7-the extent to which elections are racially polarized and the extent to which minorities have been elected. If these two Senate factors are present, "the other factors ... are supportive of, but not essential to, a minority voter's claim." *Gingles,* 478 U.S. at 51 n. 15, 106 S.Ct. 2752.

The two Senate factors most critical to establishing a Section 2 violation, racially polarized voting (Senate factor 2) and the failure to elect minority candidates have been established (Senate factor 7). Two additional Senate factors also support Plaintiff's claims. Specifically, Irving's electoral system has in place a number of

mechanisms that enhance vote dilution, such as staggered elections, a majority vote requirement, and numbered places (Senate factor 3). Also, the Hispanic population of Irving has a lower socioeconomic status and lower political participation rate than the non-Hispanic, white majority (Senate Factor 5). The Court finds that these four Senate factors are present in Irving and weigh heavily against the ability of Hispanics to elect candidates of their own choosing; accordingly, the totality of the circumstances indicates that Defendants' method of electing the mayor and members of its City Council violates Section 2 of the Voting Rights Act.

V. CONCLUSION

For the reasons articulated above, the Court holds that Plaintiff has proven, beyond a preponderance of the evidence, that Defendants are currently in violation of Section 2 of the Voting Rights Act.

IT IS SO ORDERED.

APPENDIX E — RELEVANT CONSTITUTIONAL PROVISION

United States Code Annotated Currentness

Constitution of the United States

Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each

State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid

of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.