NO. 11-10194

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

CITY OF IRVING, TEXAS
*Appellee*,

v.

ROBERT MOON, RACHEL TORREZ MOON, MICHAEL MOORE, GUILLERMO ORNELAZ, GILBERT ORNELAZ, AND AURORA LOPEZ
*Intervenor Defendants-Appellees.*

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On Appeal from Civil Action No. 3:10-cv-277 in the United States District Court, Northern District of Texas, Dallas Division

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# APPELLANTS' REPLY BRIEF

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

Appellants Keith A. Lepak, Marvin Randle, Dan Clements, Dana Bailey, Kensley Stewart, Crystal Main, David Tate, Vicki Tate, Morgan McComb, and Jacqualea Cooley (collectively, "Appellants") file this Reply to Appellee City of Irving, Texas' (the "City" or "Irving") and Intervenor Defendants-Appellees' ("Intervenors") (collectively "Appellees") Response Briefs, and in support thereof would respectfully show the Court as follows:

## I. INTRODUCTION

> "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."
>
> -*Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

Appellees face a substantial obstacle in this appeal. The City has, by its own admission, created electoral districts that substantially dilute the weight of its voters' votes. Yet there are literally dozens of Supreme Court opinions (like *Reynolds* above) specifically and emphatically inveighing against the evils of the very kind of vote dilution practiced by the City. This is no small problem. Words mean things. And it is hard to imagine how the Supreme Court's condemnation of vote dilution could have been more clear and unambiguous than when it "simply stated" in *Reynolds* that "an individual right to vote is ***unconstitutionally impaired when its weight is . . . diluted*** when compared with votes of [other citizens]." *Id*. (emphasis added). Moreover, *Reynolds* is hardly alone. Similarly emphatic and

clear denunciations of vote dilution can be found in many Supreme Court cases that followed (several of which are cited in Appellants Brief).

In confronting this case law, Appellees do not dispute that the Supreme Court has repeatedly condemned vote dilution as an express violation of the Equal Protection Clause. Nor do they dispute that the City's districts – by intentional design – substantially dilute the weight of certain voters' votes. Instead, Appellees contend that, because the City equalized total population among its districts, the Supreme Court's forceful language prohibiting vote dilution simply does not apply to the citizens of Irving. Appellees argue that a voter's constitutional right to an undiluted vote is conditional in nature – a right that instantly evaporates when and if a city or state "chooses" to build districts of equal population. So long as districts contain equal numbers of residents, Appellees argue, a state or city may practice whatever level of vote dilution it desires. Equalizing total population among districts thus provides states and cities with a constitutional "out" – an exemption to the otherwise strict constitutional prohibitions on vote dilution.

Appellees have no Supreme Court case law to support their contention that "[t]he right of a citizen . . . to have his vote weighted equally with those of all other citizens**"** vanishes if and when a city or state builds districts of equal population. *See Reynolds*, 377 at 576. To the contrary, the Supreme Court has underscored the primary importance of this right – characterizing it as being "more precious" than

and "preservative of" all other rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Instead, Appellees have cherry-picked a sentence here and a sentence there from previous Supreme Court decisions where (unlike here) total population was an accurate proxy for voting population. Tellingly, however, Appellees have ignored important language either directly before or after the quoted language making clear that the Supreme Court's references to equalizing districts by total population is not a means for ***avoiding*** the constitution's prohibition on vote dilution but, rather (where total population is a sufficient proxy for voter population), a means of ***achieving*** it. Appellees thus confuse the Supreme Court's discussion of a fact-specific means of achieving a constitutionally-mandated end with the end itself.

This same confusion of means with ends infects the other central argument at the heart of Appellees' briefs: that Appellants seek the recognition of a constitutional "requirement" that the City "ignore," "delete," "discriminate against," or "exclude" children and non-citizens from districting populations. This is a complete mischaracterization of Appellants' position. Appellants are not asking the City to exclude anyone from the districting population base. To the contrary, Appellants only complaint is that the City failed to ***include*** a group – voters – in its districting base. Ironically, it is the Appellees asking this Court to sanction the exclusion of this group from the apportionment base.

Appellees' "exclusion" argument is also based on a false choice between equalizing population and equalizing voters among districts. Appellees assert that these two goals are mutually exclusive – that a city or state must either equalize population or equalize voting power, but it cannot do both. This premise of mutual exclusivity forms the core of nearly all the arguments made by Appellees, including the parade of horribles they trot out as examples of what they claim surely would have followed if the City "chose" to equalize voters among districts "instead" of equalizing populations.

Yet this premise is factually and logically groundless. The premise makes no factual sense because there is no evidence in the record suggesting that equalizing both total population and voter population among the City's districts would be difficult, let alone impossible. The premise also makes no logical sense. Representational equality and electoral equality are not mutually exclusive theories. Equally apportioning voters among districts does not logically require the uneven distribution of residents. To the contrary, nothing prevents a city – like Irving – from simultaneously distributing voters and residents (or any other sub-group it desired) equally among its districts. The Court can thus disregard Appellees' extensive arguments about which "theory of representation" is more "just," "rationale," or "practical." Similarly, this Court need not decide whether (like voter equality) the Constitution requires representational equality. Instead,

the sole question before this Court is simply whether the City's current electoral Plan[1] is one where "equal numbers of voters can vote for proportionally equal numbers of officials." *See Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). Because it is not, the City has plainly violated its voters' "constitutional right to vote in elections without having [their] vote wrongfully . . . diluted." *Id.* at 52.

## II. ARGUMENT

### A. A Voter's "Constitutional Right" to an Equally-Weighted Vote Does Not Evaporate Simply Because a City's Districts Contain Equal Numbers of Residents.

#### 1. Appellees' Arguments are Premised upon a False Choice.

The central premise of Appellees' arguments is their contention that cities and states drawing voting districts must make a stark choice between two competing and mutually exclusive "theories" of representation – electoral equality and representational equality.[2] Appellees contend that a city or state can apportion

[1] The "Plan" refers to the current electoral voting system Irving uses to elect its city council. App. 001-057 (Feb. 2, 2010 Final Judgment with Plan attached as Exhibit 1).

[2] The City contends the Constitution does not mandate the "choice" of either theory, but instead leaves that "political question" to the subdivision. Intervenors contend that the Constitution requires the City to equally distribute total population among its districts. The Supreme Court, however, has clearly stated that the Constitution does not require that a city equally distribute total population among its districts. *Burns v. Richardson*, 384 U.S. 73, 91-93 (1966). Thus, the Intervenors' contention that the Constitution requires the use of total population as the apportionment base for voting plans is without merit. Alternatively, Intervenors adopt the City's position and argue that the Constitution allows Irving to "choose" to equalize total resident population among the districts instead of equalizing voters.

on the basis of total population or on the basis of voters, but cannot apportion on the basis of both. This premise of mutual exclusivity forms the backbone of Appellees' arguments in support of the vote-dilutive Plan drawn by the City. Thus, the City contends that Appellants seek the recognition of a "constitutional obligation to exclude children and non-citizens from the apportionment base." Br. of Appellee ("City's Br.") at 17. Intervenors criticize Appellants for attempting to "force" the City to "equalize citizen voting age population, not total population, within districts." Respondent-Intervenors' Br. ("Intervenors' Br.") at 7-8. Both the City and Intervenors also devote a good portion of their briefs to a hyperbolic recitation of the grievous results they claim will arise if "required" to create "grossly overcrowded districts." City's Br. at 24-25; Intervenors' Br. at 29-30. Finally, the City and Intervenors argue that creating districts containing equal numbers of voters "instead of" equal numbers of residents would be "discriminatory," "impractical," and "unjust." City's Br. at 8, 15, 17-19, 27-31; Intervenors' Br. at 6, 20-22, 32-36.

Each of these arguments has at its core the same assumption – that simultaneously equalizing total population and voter population among districts is impossible. But this assumption is fatally flawed. It is predicated on a false choice, one unsupported by either logic or any record evidence. There is nothing inherent in the process of equalizing total populations among districts that makes it

impossible (or even difficult) to simultaneously equalize voters among those same districts. To the contrary, as even the City acknowledges, ordinarily there is a "happy" correlation between population levels across those two groups. City's Br. at 10; *see also Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000). Nor is there any record evidence that it is impossible here for the City to draw districts that accomplish both goals. Rather, the City flatly admits that it divided the districts based on total population, not voter population.[3] The problem in this case is not that the City tried and failed to equalize voters among its districts; it is that the City didn't even try in the first place, believing that its decision to draw districts containing equal numbers of residents extinguished the constitutional right of its citizens to an equally-weighted vote.

Contrary to the Appellees' contentions, Appellants are not asking this Court to recognize a "constitutional obligation" to "delete" children, non-citizens, or any group from the apportionment base. Nor, as the Appellees allege, are Appellants contending that drawing districts of equal population is "unconstitutional" or "improper." Indeed, a search in Appellants' initial brief for any of these arguments

[3] *See* USCA5 31 (Defendants' Original Answer at ¶ 31).

would come up empty.[4] Instead, the City's Plan is constitutionally infirm for one reason and one reason only: it does not comply with the constitutional requirement that the "vote of any citizen is approximately equal in weight to that of any other citizen in the State." *See Reynolds,* 377 U.S. at 579. The Supreme Court has repeatedly emphasized that, however else cities and states equalize populations among districts, the resulting plan must be one in which "equal numbers of voters can vote for proportionally equal numbers of officials." *See Hadley*, 397 U.S. at 56. This principle – not the creation of a "choice" freeing cities and states to dilute the weight of its voters' votes – was the key teaching in *Burns v. Richardson*:

> ***Unless a choice is one the Constitution forbids*** … the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby. ***Thus we spoke of (t)he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens.***

384 U.S. 73, 92 (1966) (emphasis added and quotations removed).

[4] Tellingly, though repeatedly claiming Appellants make arguments about "excluding," "deleting" and "ignoring" children and non-citizens, the City and Intervenors never once cite to a single portion of Appellants' brief where these arguments are made. And for good reason: these are not positions held by Appellants in this case.

Had the City drawn districts of equal total population and ensured that each of those districts contained approximately equal numbers of voters, Appellants would not have filed this suit.[5]

**2. There is no Conflict Between Section 2 of the Fourteenth Amendment and the Constitutional Right of Voters to an Equally-Weighted Vote.**

The City defends its decision to construct district of approximately equal total population by pointing to Section 2 of the Fourteenth Amendment, which provides that total population shall be used as basis for apportioning congressional seats among the states. City's Br. at 18-22. If total population is good enough for divvying up Congressman, the City argues, surely total population is an appropriate basis for the City to use to construct its districts. Yet this argument is based on the same false choice between electoral and representational equality that infects the City's other arguments. Appellants are not asserting that equalizing total population among districts or apportioning congressional seats on the basis of

[5] The City argues at great length that Appellants are advocating the exclusion of certain groups from the representational base. Nothing could be further from the truth. Indeed, Appellants complaint is not that the City was insufficiently *exclusive* in creating this districts, but insufficiently *inclusive* because it improperly excluded voters from the districting process. Ironically, it is the City that is arguing in favor of excluding a group from consideration in the districting process – that group being the voter, one of the most protected classes of persons in all of federal jurisprudence and the very party without whom there would be no political process in the first place. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "preservative of all rights"; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("voting is of the most fundamental significance under our constitutional structure.").

total population is unconstitutional – far from it. Rather, Appellants' position is that if a city does choose to equalize total population among districts, it must also ensure that the plan results in voters having equally weighted votes.

There is, thus, no conflict between the way Section 2 of the Fourteenth Amendment apportions congressional representatives and the "one person, one vote" requirement in the Equal Protection Clause. Instead, the "one person, one vote" requirement is simply one of many constitutional and statutory requirements a city must satisfy when it determines where and how to draw its districts.[6]

### 3. No Matter the Metric Used, the Plan Unequally Weights the Votes of Irving's Voters.

Appellees also claim Appellants seek a ruling that compliance with the "one person, one vote" standard must be measured using the citizens of voting age ("CVAP") metric. This, too, is a mischaracterization of Appellants' position. Instead, as Appellants expressly noted in their initial brief, the Supreme Court has held that the appropriate metric to be used as a proxy for equalizing voters among districts could vary, depending upon the circumstances in the particular case. *See*, *e.g. Burns*, 384 U.S. at 92 (noting that, depending upon the particular facts for a

[6] As the United States admits in an amicus brief filed in support of Appellees, the mere fact that districts contain equal numbers of total residents does not automatically mean they are otherwise constitutionally permissible. Instead, where a population baseline – even total population – "results in districts that . . . otherwise violate the Constitution's guarantee of equal protection," the resulting plan is unconstitutional. Br. of United States at 15 n.4; *see also Burns*, 384 U.S. at 92 (noting that judicial deference toward apportionment bases is warranted so long as the "choice is [not] one the Constitution forbids").

given city or state, there are many potential population metrics that could be used as a proxy for equalizing voter populations among districts, including registered voters, actual voters, total population, or total population figures adjusted to exclude specific sub-groups like aliens, transients, or convicted criminals). In any case, the City's defense of its current Plan is not that it equally apportions voters among its districts measured by some metric other than CVAP. Instead, the City claims that equalizing total population is enough, even though it results in a plan where there are approximately half as many voters in District 1 as there are in Districts 3, 4, 5, and 6.

**4. Appellees' Arguments Rely upon Case Law Ripped from its Context.**

Appellees cannot cite a single Supreme Court case affirming their position that a voter's constitutional right to an equally-weighted vote vanishes once a city elects to draw districts containing equal numbers of residents. The best they can do is to cherry-pick language from Supreme Court opinions where the Court speaks approvingly of districts containing equal populations of residents. Appellees then use these out-of-context quotations to suggest that districts containing equal numbers of residents comply with the "one person, one vote" requirement, even if those districts contain substantially unequal numbers of voters. What is most telling about these selective quotations, however, is not what Appellees include in their quotations, but what they omit. When these quotations

are considered in context, it becomes clear that Appellees are confusing the Courts' approval of a means to an end with the end itself.

For example, both Appellees cite to this language in *Reynolds v. Sims*: "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats . . . must be apportioned on a population basis." City's Br. at 13; Intervenors' Br. at 10 (*citing* 377 U.S. at 568). Both Appellees, however, omit the very next line in the opinion, where the Court makes clear that apportioning districts on a total population basis is merely a means for achieving a constitutionally-mandated end – equally weighted votes for citizens:

> 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.

*Reynolds*, 377 U.S. at 568 (emphasis added). Later in *Reynolds* (in another portion omitted by the City and Intervenors), the Court further clarified this principle, holding that the "overriding objective" of creating districts of "substantially equal population" was to ensure that votes were equally weighted:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable
> . . .
> ***Whatever the means of accomplishment***, the overriding objective must be substantial equality of population among the various districts,

> ***so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State***.

*Id*. at 577-79 (emphasis added).

Likewise, Intervenors selectively cite to the following language in *Wesberry v. Sanders* : "[N]o matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives." Intervenors' Br. at 11 (*citing* 376 U.S. at 9). Yet, they neglect the language immediately proceeding that statement, in which the Supreme Court reveals the purpose behind its directive that district populations be approximately equal – specifically, to protect against vote dilution:

> We hold that, construed in its historical context, the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' ***means*** that as nearly as is practicable ***one man's vote in a congressional election is to be worth as much as another's***. . . . It would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of a State . . . ***could be weighted at two or three times the value of the votes of people living in more populous parts of the State*** . . . . We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. ***To say that a vote is worth more in one district than in another*** would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, s 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

*Wesberry*, 376 U.S. at 7-9 (internal citations omitted) (emphasis added). Thus, again, Appellees' selective quotation omits language making clear that population equality was a means to an end, not an end in itself.

In another example, Intervenors quote the Court's language in *Morris* holding that the "population-based approach of [the Supreme Court's] cases from *Reynolds* through *Abate* should not be put aside in this litigation.'" Intervenors Br. at 18 (quoting *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989)). Once again, a look at the context in which these statements are made reveals that the *Morris* Court affirmed *Reynolds'* "population-based approach" merely as a means to ensuring the constitutional "imperative" that "each citizen" had "equal power to elect representatives:"

> Tracing the imperative of ***each citizen's equal power to elect representatives*** from *Reynolds v. Sims* to *Abate v. Mundt* and beyond, the court endorsed the District Court's focus on population per representative. These cases are based on the propositions that in this country the people govern themselves through their elected representatives and that "***each and every citizen has an inalienable right to full and effective participation in the political processes***" of the legislative bodies of the Nation, State, or locality as the case may be. Since "[m]ost ***citizens*** can achieve this participation only as ***qualified voters*** through the election of legislators to represent them," full and effective participation requires "that ***each citizen have an equally effective voice in the election*** of members of his ... legislature." As Daniel Webster once said, "the right to choose a representative is every man's portion of sovereign power." Electoral systems should strive to make each ***citizen's portion equal***. If districts of widely unequal population elect an equal number of representatives, the ***voting power of each citizen in the larger constituencies is debased*** and the ***citizens*** in those districts have a

> smaller share of representation than do those in the smaller districts. ***Hence the Court has insisted that seats in legislative bodies be apportioned to districts of substantially equal populations. Achieving " 'fair and effective representation of all citizens is ... the basic aim of legislative apportionment,' and [it is] for that reason that [ Reynolds ] insisted on substantial equality of populations among districts***."

The *Morris* Court (in language also omitted by Intervenors) then summarized:

> ***The personal right to vote is a value in itself***, and ***a citizen is***, without more and without mathematically calculating his power to determine the outcome of an election, ***shortchanged*** if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way***, if he may vote for one representative and the voters in another district half the size also elect one representative.***

*Morris*, 489 U.S. at 692 (emphasis added).

Herein lies the most significant problem with the Appellees' argument: In order to prevail, they must convince this Court to pay attention to only those bits and pieces of the Supreme Court's "one person, one vote" cases where total population is referenced, but ignore the factual context of that reference and, most importantly, ignore dozens upon dozens of paragraphs in those opinions condemning the very practice of vote dilution embraced by the City in creating the Plan. Adopting the Appellees' position would require this Court to conclude that the Supreme Court did not mean what it said when it wrote the words expressly affirming the right of all citizens to an equally-weighted vote in *Reynolds*, in

*Hadley*, in *Morris*, in *Burns*, in *Wesberry*, and in every other one of its "one person, one vote" cases over the past fifty plus years. This Court should reject this untenable position.

## B. The Standing, Mootness, and Practicability Arguments Lack Merit.

### 1. Appellants Have Standing to Challenge the City's Plan.

Article III standing requires that the plaintiff suffer an injury in fact, causally connected to the conduct complained of, that is likely to be redressed by a favorable decision from the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To determine standing in a voting rights case, the court asks whether the plaintiffs "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult issues" *Baker v. Carr*, 369 U.S. 186, 204 (1962). Notably, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Id.* 205-06 (citations omitted). In *Baker*, the Court stated:

> These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated…. ***They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law.***

*Id.* at 207-08 (citations omitted).

It is undisputed that the current Plan dilutes Appellants' votes. Thus, they have been injured in fact and have a personal stake in the outcome of this controversy. Indeed, a favorable resolution of this case would give them an equal voice to all other voters in Irving. In other words, Appellants are "asserting a plain, direct and adequate interest in maintaining the effectiveness of ***their*** vote." *Baker*, 369 U.S. at 207-08. Thus, Appellants have standing to challenge the Plan.

Intervenors' reliance on *Assoc. of Cmty. Orgs. For Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999), for the proposition that Appellants lack standing because they face no prospective injury under a current Plan is inapt. In *Fowler*, the Fifth Circuit found that ACORN lacked standing to bring a National Voter Registration Act ("NVRA") claim, not because it faced no prospective injury under a current plan (as Intervenors claim), but because, although it expended organizational resources in pursuing its claim and monitoring the Louisiana's implementation of the NVRA, the organization did not suffer an injury in fact that was personal to the organization. *See id.* at 357-59. Thus, in *Fowler* an organization was seeking to vindicate the rights of voters. Here, Appellants are voters seeking to protect and vindicate ***their own rights***. Indeed, Appellants have been injured in fact by the Plan, because the votes of voters in District 1 receive significantly more weight than their votes. Accordingly, Appellants have standing to seek relief.

### 2. Appellants' Claim is Not Moot.

Appellants challenge the current Plan – not some hypothetical future scheme – and none of the Plan's district-by-district CVAP numbers referenced in this case are disputed by Irving. Indeed, these numbers are taken verbatim from Irving's responses to interrogatories.[7] Nonetheless, Intervenors argue Appellants' claim is somehow moot because a new census has been completed and, on some unspecified date in the future, a new electoral plan will be adopted on the basis of this new census data. *See* Intervenors' Br. at 37-43.

The Supreme Court has previously rejected similar mootness arguments in redistricting cases. In *Reno v. Bossier Parish School Board*, 528 U.S. 320, 327 (2000), the Board argued that the challenge to the electoral plan was moot because the new census data would change the electoral plan and thus the challenged plan would not be used again. The Court held that, although it was true that the plan would not be used again, the plan still would serve as a "baseline against which [the Board's] next voting plan will be evaluated for the purposes of preclearance." *Id.* Thus, the Court found that the case presented a live controversy.[8]

Other courts concur that results from a future census do not moot a controversy based on a plan drawn with prior census data. *See Hawkins v. Wayne*

[7] *See* USCA5 255-69 (Irving's Resp. to Interrogs. at No. 1-6).

[8] Likewise here, because Irving's current Plan will serve as a baseline against which the City's future plan will be evaluated for purposes of preclearance, this case presents a live controversy.

*Township Board of Marion County, Indiana*, 183 F.Supp.2d 1099, 1104 (finding that although the districts were due to be redrawn based on the 2000 census, the case nevertheless presented a live controversy for the court). Indeed, as the Supreme Court noted in *Moore v. Ogilvie*, the type of "one person, one vote" constitutional violation alleged by Appellants in this case is a classic example of a violation "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (holding that a "one person, one vote" claim was not mooted by an election because such claims are directed at problems "capable of repetition, yet evading review.").

In any event, it is undisputed that the current Plan is based on the 2000 Census "long form" data.[9] The Fifth Circuit has squarely held that such census figures "are presumed accurate until proven otherwise." *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853-54 (5th Cir.1999). Thus, the 2000 Census figures relied upon by the City in forming the Plan's districts are "presumed accurate." *Id.* And the standard for proving otherwise is quite high: "Proof 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 decennial census." *Id.* Intervenors have offered no

[9] *See* USCA5 255-69 (Irving's Resp. to Interrogs. at No. 1-6).

evidence – let alone "thoroughly documented," "clear," "cogent," or "convincing" evidence sufficient to "override the presumptive correctness of the prior decennial census." *Id.* Accordingly, Intervenors' mootness argument should be rejected by this Court.

**3. The City's Practicality Argument is Flawed.**

The City contends that it is not practical to use CVAP as an apportionment base because "it is simply not possible to tell if the districts are balanced" and the "available data are so imprecise that we have no good idea exactly how many citizens of voting age reside in a district." City's Br. at 28. The city's contention fails for four reasons. First, the City's singular focus on CVAP is misleading. As set forth above, the City's argument mischaracterizes Appellants' argument concerning the metric that should be used to ensure voter equality. As the Supreme Court held in *Burns*, the metric used to achieve voter equality is left to the discretion of the city or state so long as it results in voters having equally weighted votes. *See Burns*, 384 U.S. at 92. Thus, in addition to CVAP, other metrics may be used to create districts that result in undiluted votes, including registered voters, total citizen population, and even total population. *Id.* Whether that metric is constitutionally permissible depends upon how accurate a proxy it is for voter population. *See id.*

Second, the City makes its argument by attacking ACS data. As noted above, however, the CVAP numbers Appellants use to challenge the current plan are derived directly from the "Special Tabulation 56" data — not the ACS data the City is attacking.[10] Accordingly, the City's critique of ACS data — data not used to create the challenged Plan — is immaterial to the issue in this case.

Third, ACS data is accurate and reliable enough to construct districts based on CVAP. Indeed, the City's argument is contrary to the district court's finding in the matter that gave rise to this suit, *Benavidez v. City of Irving, Tex.*, where the court specifically found that the ACS data set relied upon by Benavidez to calculate district CVAP populations in Irving was "accurate and reliable." *Benavidez v. City of Irving, Tex.*, 638 F.Supp.2d 709, 720 (N.D. Tex. 2009). This is the same data that the City is now claiming is inaccurate and unreliable. In its decision, the district court noted:

> 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." 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***

[10] Moreover, the City has admitted these CVAP numbers are accurate. *See* USCA5 255-69 (Irving's Resp. to Interrogs. at No. 1-6).

> ***reliable and intends for it to be relied upon in decisions such as Voting Rights Act compliance***.

*Id.* at 721. If ACS data is accurate and reliable enough to use to determine Voting Rights Act compliance, it is surely accurate and reliable enough to determine questions of constitutional compliance.

Finally, the Fifth Circuit has unequivocally held that courts must consider CVAP under the first prong of *Thornburg v. Gingles*.[11] Any argument that CVAP data is not accurate and reliable enough to serve as a basis for questions of constitutional compliance, but is somehow suitable to be used for Section 2 vote dilution claims, is logically inconsistent and should be rejected by this Court.

## III. CONCLUSION

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

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[11] *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1021, 1023-25 (5th Cir. 2009) ("[T]he Fifth Circuit has unequivocally held … that courts must consider the *citizen* voting age population of the group challenging the electoral practice ….") (citation and quotation marks omitted). Several other Circuits have joined the Fifth Circuit in requiring voting rights plaintiffs to prove that the minority *citizen* voting age population comprises a majority. *Barnett v. City of Chicago*, 141 F3d 699, 704 (7th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served, as indicated below, on counsel of record on June 1, 2011.

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

6422 words.

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4834-1397-3001, v. 1