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

KEITH A. LEPAK, MARVIN RANDLE, DAN CLEMENTS, DANA BAILEY, KENSLEY STEWART, CRYSTAL MAIN, DAVID TATE, VICKI TATE, MORGAN MCCOMB, and JACQUALEA COOLEY, Plaintiffs,	)	
v.	)	C.A. No. 3:10-cv-00277-P
CITY OF IRVING, TEXAS, Defendant.	)	

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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I. INTRODUCTION

This Court should deny Plaintiffs' motion for summary judgment, through which Plaintiffs seek to block the City of Irving from using its current districting plan for the election of city council members. Plaintiffs argue that the City of Irving's districting plan, adopted with this Court's approval to remedy the City's previous violation of the Voting Rights Act, is inconsistent with the one-person, one-vote principle flowing from the Equal Protection Clause of the Fourteenth Amendment. Although each district is approximately equal in total population, Plaintiffs contend that because one district has a smaller number of citizens of voting age than the other districts, this renders the plan unconstitutional.

Plaintiffs' legal theory is wholly unavailing. As this Court has previously recognized, total population has uniformly been accepted as a proper measure for equalizing district size in compliance with the one-person, one-vote principle. Total population is the baseline for congressional, state, county and municipal apportionments in Texas and throughout the nation. This Court should follow the approach of every Court of Appeals to have addressed this question, including the Fifth Circuit, and hold that the City of Irving's use of total population figures is constitutionally unobjectionable.

II. STATEMENT

In the Benavidez v. City of Irving litigation, this Court held on July 15, 2009 that Irving's use of an at-large election system for city council denied Hispanic voters an equal opportunity to elect representatives of their choice in violation of Section 2 of the Voting Rights Act. See Benavidez v. City of Irving, 638 F. Supp. 2d 709, 732 (N.D. Tex. 2009). On February 3, 2010, this Court entered a Final Judgment enjoining the City of Irving from conducting any future city

council elections in which all members are elected at-large. The Court also ordered that the City of Irving adopt the districting plan that the parties had jointly agreed to, and which had been precleared by the Department of Justice pursuant to Section 5 of the Voting Rights Act. This settlement plan divided the eight-member at-large city council into six single-member districts with two other members elected at-large. Each district is substantially equal in total population.

On February 11, 2010, the Plaintiffs in this case filed suit to enjoin the City of Irving from conducting elections using the districts in the Court-approved settlement plan. In essence, Plaintiffs object to the fact that the settlement plan was drawn using total population as the districting baseline, rather than using citizen voting age population ("CVAP"). When this vote dilution argument was previously raised in the Benavidez litigation, the Court followed applicable Fifth Circuit precedent and held that apportionment based on a "total population standard **. . .** is entirely appropriate." Benavidez, 638 F. Supp. 2d at 714 (discussing Chen v. City of Houston, 206 F.3d 502, 522-28 (5th Cir. 2000)). The Court should reach the same conclusion in this case.

III. ARGUMENT

A. Total Population is the Standard Used for Congressional, State, and Municipal Apportionments

The Supreme Court has recognized that total population is an appropriate baseline to use in order to comply with the one-person, one-vote principle. Following the Supreme Court's guidance, the standard practice of states, counties, and municipalities is to use total population for all apportionments. Plaintiffs' argument that the City of Irving was constitutionally required to draw its city council districts based on the number of citizens of voting age in each district is thus at odds with long-standing districting practices throughout Texas and the entire country.

1. The Supreme Court Has Consistently Used Total Population to Measure Compliance with the One-Person, One-Vote Principle

In Wesberry v. Sanders, 376 U.S. 1 (1964), the Supreme Court held that Article I, Section 2 of the Constitution requires that congressional districts be drawn so that each contains an equal number of persons. See Wesberry, 376 U.S. at 18 (stating that the "Constitution's plain objective" makes "equal representation for equal numbers of people the fundamental goal for the House of Representatives"). Ever since the announcement of the one-person, one-vote principle, "in cases where the Supreme Court has evaluated population disparities between congressional districts, it has always done so by looking at total population." Kalson v. Paterson, 542 F.3d 281, 289 n.16 (2d Cir. 2008); see, e.g., Karcher v. Daggett, 462 U.S. 725 (1983); Kirkpatrick v. Preisler, 394 U.S. 526 (1969). While the Supreme Court has not ruled directly on the question, it has given strong indications that it is impermissible to use any measure other than total population for congressional districting.[1]

The Supreme Court's reliance on total population figures is not limited to the congressional context. Shortly after Wesberry, in Reynolds v. Sims, 377 U.S. 533 (1964), and Avery v. Midland County, 390 U.S. 474 (1968), the Supreme Court held that under the Equal

[1] For example, in Kirkpatrick v. Preisler, Missouri argued that population variances between its congressional districts could be justified by reasons including that "the percentage of eligible voters among the total population differed significantly from district to district." 394 U.S. at 534. In rejecting Missouri's arguments, the Court stated that "[t]here may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2." Id. at 534-35 (emphasis added).

More recently in Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999), the Court held that the Census Act, at 13 U.S.C. § 195, "directly prohibits the use of sampling in the determination of population for purposes of apportionment." See Dep't of Commerce, 525 U.S. at 338. Notably, U.S. Census Bureau data on CVAP comes not from the decennial census, but from an annual sampling called the American Community Survey. See U.S. Census Bureau, American Community Survey, http://www.census.gov/acs/www/about_the_survey/why_were_you_selected/ (explaining sampling methodology). As such, the Supreme Court's ruling in Department of Commerce should be read to prohibit the use of CVAP as a population baseline for congressional apportionments.

Protection Clause of the Fourteenth Amendment, the one-person, one-vote requirement is fully applicable to state and local districting. In Reynolds, the Supreme Court relied on total population figures in discussing population disparities between counties. 377 U.S. at 542 n.7 & 545-46. Likewise, the discussion of malapportionment in Avery is also based on total population numbers. 390 U.S. at 475.

Plaintiffs' attempt to require the City of Irving to use citizen voting age population instead of total population is particularly at odds with the Supreme Court's decision in Gaffney v. Cummings, 412 U.S. 735 (1973). In Gaffney, the Court approved a state legislative redistricting plan based on total population that contained some numerical deviations based on political factors. In approving that plan, the Court expressly recognized that "total population – even if stable and accurately taken – 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." Id. at 746. Gaffney explained that total population figures drawn from census data would by necessity include numerous persons who were not eligible to vote, including "aliens, nonresident military personnel, [and] nonresident students," and observed that some states have considerable disparities between total population and "age-eligible voters." Id. at 747. Even as it noted these issues, the Court in Gaffney gave no indication that these disparities could render the use of total population data unconstitutional. Indeed, the Court in Gaffney rejected the one-person, one-vote challenge and upheld the map that had been drawn to equalize total population and not CVAP.

2. Jurisdictions In Texas Use Total Population for Apportionment

Plaintiffs' arguments are further undermined by an examination of actual districting practices in Texas. The notion that the City of Irving was required to district based on CVAP is

belied by how anomalous such a practice would be. As explained in the Declaration of Department of Justice Voting Section Deputy Chief Robert Berman, the Department of Justice ("DOJ") has a uniquely comprehensive vantage on how states, counties, and municipalities, including those in Texas, actually draw their districts. See Decl. of Robert Berman, attached at United States' App. 1-2. This understanding is the result of the Attorney General's review and enforcement responsibilities under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The City of Irving, like all counties and cities in Texas, as well as the State itself, is subject to the preclearance requirements set out in Section 5.[2] Under this preclearance requirement, Texas and all of its subjurisdictions are required to obtain federal approval before implementing any changes relating to voting, including redistricting plans.

Notwithstanding the fact that many counties and cities in Texas have disparities between their total population and their citizen voting age population, see, e.g., Campos v. City of Houston, 113 F.3d 544, 547 (5th Cir. 1997) (citing data indicating that 45.8% of adult Hispanics in Houston are noncitizens), jurisdictions in Texas have uniformly adopted and submitted for review under Section 5 districting plans that use total population to equalize population figures between districts. Indeed, as explained by the DOJ official who supervises the review process under Section 5, a review of the redistricting submissions from the state, counties and municipalities in Texas after the 2000 Census showed that "all these jurisdictions used total population in the districting process as the basis for determining whether population was equal

[2] Section 4 of the VRA establishes a formula to determine those jurisdictions subject to the Act's special provisions, including the requirements of Section 5. 42 U.S.C. § 1973b(b). The list of Section 5 covered jurisdictions is set forth in the Appendix to the Procedures for the Administration of Section 5. See 28 C.F.R. pt. 51 app.

among districts." Berman Decl. ¶ 3, at United States' App. 2.[3] Plaintiffs' argument for requiring use of CVAP is thus literally without known precedent or parallel in the most recent districting plans submitted by Texas jurisdictions to DOJ for Section 5 review.[4]

The Texas Legislative Council has advised that total population will be the appropriate population benchmark in the upcoming 2010 redistricting cycle. Specifically, the redistricting guide published by the Texas Legislative Council states that total population is the requisite benchmark for apportionment. See TEXAS LEGISLATIVE COUNCIL, GUIDE TO 2011 REDISTRICTING 15 (2010) ("Because the federal constitutional requirement that districts of a given type have equal or nearly equal population (one person, one vote), redistricting plans must include information about the total population of each district.").[5] The guide further states that "districts of a given type (senate, house, congressional, SBOE) must have equal or nearly equal populations," and that "[i]deal district population is the population a district would have if all districts in a plan have equal populations, and it is determined by dividing the total state population by the number of districts in the plan." Id.

3. Total Population Is the Apportionment Standard Relied On By States and Localities Throughout the Country

Redistricting manuals relied on by states and local jurisdictions have long made clear that, in practice, total population is the standard baseline used to draw districts that comply with

[3] All 340 jurisdictions used total population for apportionment. Some jurisdictions excluded prison population when calculating total population. See United States' App. 2.

[4] In advance of the 2000 redistricting cycle, the Texas Legislative Council also advised that total population is the baseline to be used for all apportionments. See TEXAS LEGISLATIVE COUNCIL, GUIDE TO 2001 REDISTRICTING 26 (2000) (defining "ideal district population" as a "measure calculated by dividing the total population of the state or other jurisdiction being redistricted by the number of districts in the type of redistricting plan being considered"), available at http://www.tlc.state.tx.us/pubspol/redguide01.htm.

[5] Available at www.tlc.state.tx.us/redist/pdf/Guide_to_2011_Redistricting.pdf.

the one-person, one-vote requirement. For example, the manual on reapportionment published by the National Conference of State Legislatures in advance of the 1990 redistricting cycle states that to measure population equality among districts, "a logical starting point is the 'ideal' district population," explaining that in "a single-member district plan, the 'ideal' district population is equal to the total state population divided by the total number of districts." NATIONAL CONFERENCE OF STATE LEGISLATURES REAPPORTIONMENT TASK FORCE, REAPPORTIONMENT LAW: THE 1990S 18 (1989). This guidance was repeated during the 2000 redistricting cycle and manuals produced in anticipation of the upcoming round of redistricting continue to provide the same instruction. See, e.g., J. GERALD HEBERT ET AL., THE REALISTS' GUIDE TO REDISTRICTING 1 (2000) ("Perhaps the most fundamental requirement the law imposes on redistricters is 'population equality' . . . . In practical terms, population equality means that each district in an apportionment plan should have roughly, if not precisely, the same number of people as every other district."); TEXAS LEGISLATIVE COUNCIL, GUIDE TO 2001 REDISTRICTING 26 (2000) (same); NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2000 21 (1999) (same); .J. GERALD HEBERT ET AL., THE REALIST'S GUIDE TO REDISTRICTING 1 (2d ed. 2010) (same); TEXAS LEGISLATIVE COUNCIL, GUIDE TO 2011 REDISTRICTING 15 (2010) (same); NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 23 (2009) (same).

The invalidity of Plaintiffs' arguments here is further underscored by prior testimony from Professor Ronald Keith Gaddie, an affiant for Plaintiffs in this case. See Dkt. 26, Appendix to Pls.' Brief in Support Summary Judgment at Pls.' App. 70-74 (discussing population deviations under the City of Irving districting plan and using citizens of voting age as the relevant baseline). In 2007, Professor Gaddie was designated as a defense expert in a vote dilution case brought by the United States against the Village of Port Chester, New York.

Similar to the underlying litigation here, in the Port Chester case the district court held that Port Chester's at-large election of its Board of Trustees denied the Hispanic population of the Village an equal opportunity to participate in the political process in violation of Section 2 of the Voting Rights Act. See United States v. Vill. of Port Chester, 704 F. Supp 2d. 411, 416 (S.D.N.Y. 2010). During his Port Chester deposition, Professor Gaddie testified that "[t]otal population is what we draw the districts around in terms of attempting to meet one person one vote." See United States v. Vill. of Port Chester, Jan. 26, 2007 Dep. of Ronald Keith Gaddie at 180, attached at United States' App. 12 . He also stated that he could not "recall ever seeing a district in a scheme that wasn't based on total population." Id. at 179, United States' App. 11.

B. No Court Has Ever Required A Jurisdiction to Use Citizen Voting Age Population in Apportionment Instead of Total Population

No federal court has ever held that a jurisdiction was prohibited from using total population and was instead required to use another population measure in its place. See Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000); Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996); Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990). Plaintiffs fail to cite two of these three cases and relegate the third, the controlling decision of the Fifth Circuit, to a single footnote. See Dkt. 25, Pls.' Brief in Support of Summary Judgment at 15 n.18 ("Pls.' Br.").

First and most importantly, the Fifth Circuit has already rejected the argument that Plaintiffs make here in Chen v. City of Houston, 206 F.3d at 528. Chen noted that the drafters of the Fourteenth Amendment contemplated that there would be differences between total population and the population of eligible voters but still made total population the standard for purposes of allocating congressional representatives among the States. Id. at 527. Drawing on

this history, the Fifth Circuit held that the courts cannot require a jurisdiction to jettison districting based on total population in favor of another standard, such as CVAP. Id. at 528.

As this Court recognized in the underlying Section 2 litigation, Chen is controlling here. See Benavidez, 638 F. Supp. 2d at 714. In their footnote addressing Chen, Plaintiffs make no effort to distinguish the legal arguments that they are making from the ones that the Fifth Circuit has already rejected. Instead, Plaintiffs assert that this Court should view Chen as applying "only . . . to the specific circumstances of that case" such that its holding does not apply to what Plaintiffs characterize as the "extreme vote dilution" that exists under the Court-approved Irving plan. See Pls.' Br. at 15 n.18. Plaintiffs cannot distinguish this case from Chen. Nothing in Chen suggests that there is a point at which the divergence between CVAP and total population renders a jurisdiction's use of total population unconstitutional.[6] Moreover, the deviation between total population and CVAP that Plaintiffs challenge here is not meaningfully larger than the deviation at issue in Chen.[7] Plaintiffs thus fail, both factually and legally, to differentiate this case from Chen.

[6] Plaintiffs' brief states that the Fifth Circuit in Chen called the CVAP vote dilution claim "extremely close and difficult." See Pls.' Br. at 15 n.18. But the Fifth Circuit never characterized the CVAP claim in this manner – the language that Plaintiffs rely on was in reference to a separate racial gerrymandering claim, referred to as a Shaw claim. See Chen, 206 F.3d at 505 ("Though the issue is extremely close and difficult, after careful review, we have concluded that the plaintiffs failed to meet their evidentiary burden on the Shaw claim and summary judgment was appropriate."). Elsewhere in the opinion, the Fifth Circuit did state in reference to the CVAP issue that, "while this is a close question, we find that the choice of population figures is a choice left to the political process." Chen, 206 F.3d at 523. Thus, the "close question" was not, as Plaintiffs would have it, about whether the vote dilution complained of was sufficiently "extreme" to warrant judicial intrusion, but was the question of whether the courts ought to intervene in the selection of a population baseline. The Fifth Circuit holds that they should not. See Chen, 206 F.3d at 528.

[7] The petition for a writ of certiorari in Chen, denied at 532 U.S. 1046 (2001), states that, when measured by CVAP, the maximum deviation between districts in the challenged plan was 32.5%. The district with the largest number of citizens of voting age contained 134,744 persons while the district with the fewest contained 96,242, a variance of 38,502 persons. See Cert. Pet., Chen v. City of Houston, No. 99-1946, 2000 U.S. S. Ct. Briefs LEXIS 1136.

Prior to the Fifth Circuit's decision in Chen, the Ninth and Fourth Circuits also rejected Plaintiffs' arguments. In the Garza litigation, the district court found that Los Angeles County, in its system for electing the Board of Supervisors, was unlawfully diluting the votes of Hispanics in violation of both the Constitution and Section 2 of the Voting Rights Act. See Garza v. County of Los Angeles, 756 F. Supp. 1298, 1304 (C.D. Cal. 1990). The court-ordered remedial plan in Garza, like the plan at issue here, drew districts substantially equal in total population. See Garza, 918 F.2d at 773 n.4. However, because there was a large disparity between the districts when looking to citizen voting age population, the County argued to the Ninth Circuit that the district court's plan "unconstitutionally weights the votes of citizens" in the majority Hispanic district, where a significant number of non-citizens resided, as compared to "citizens in other districts." Id. at 773. The Ninth Circuit in Garza explained that nothing in the Supreme Court's one-person, one-vote decisions requires jurisdictions to use an apportionment measure other than total population, and instead indicated that on the facts presented, the County was constitutionally-required to use total population as the apportionment baseline. See Garza, 918 F.2d at 775-76 (explaining that use of CVAP would burden the right to equal representation for those living in the majority Hispanic district and would therefore "constitute a denial of equal protection to these Hispanic plaintiffs").[8] Garza further explained that because children and non-

[8] In Burns v. Richardson, 384 U.S. 73, 94 (1966), the Supreme Court held that Hawaii was not required to draw its state legislative districts using total population because a large portion of the population consisted of military personnel and tourists. After the 2000 Census, however, Hawaii relied on total population for congressional apportionment and total permanent resident population for state apportionment. See www.hawaii.gov/elections/maps/redistricting/Red_crit.pdf. Garza explained that while Burns "seems to permit states to consider the distribution of the voting population . . . in constructing electoral districts," that decision "does not, however, require states to do so." Garza, 918 F.2d at 774 (emphasis in original). Moreover, nothing in Burns changes the fact that a jurisdiction may not, consistent with Section 2 of the Voting Rights Act and the Equal Protection Clause, draw districts in order to equalize CVAP rather than total population when doing so has the purpose or has the effect of unlawfully diluting minority voting strength.

citizens are persons within the scope of the Equal Protection Clause, to exclude them from the apportionment basis would unconstitutionally abridge their rights to petition their elected representatives and to participate in the political process through actions other than voting and running for office. Id. at 775.

Plaintiffs' argument was also rejected by the Fourth Circuit in Daly v. Hunt, 93 F.3d at 1228. As in Garza, the Daly court held that nothing flowing from the Supreme Court's one-person, one-vote precedents can be read as authorizing courts to require use of an apportionment baseline based on electoral population instead of total population. Id. at 1227. In so holding, the Daly court reiterated the Fourth Circuit's long-standing dictum that use of "total population is 'constitutionally unassailable beyond question.'" Id. (quoting Ellis v. Mayor & City Council of Baltimore, 352 F.2d 123, 140 (4th Cir. 1965)). Plaintiffs' arguments are thus contrary to an unbroken line of thoroughly-reasoned decisions from all three of the Courts of Appeals to address their claims.

IV. CONCLUSION

For the foregoing reasons, this Court should reject Plaintiffs' unfounded attempt to bar the City of Irving from implementing its entirely constitutional districting plan and thus deny Plaintiffs' motion for summary judgment.

Respectfully submitted,

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