

**In The  
Supreme Court of the United States**

—◆—  
SUE EVENWEL, ET AL.,

*Appellants,*

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY  
AS GOVERNOR OF TEXAS, ET AL.,

*Appellees.*

—◆—  
**On Appeal From The United States District Court  
For The Western District Of Texas**

—◆—  
**BRIEF OF THE TEXAS SENATE HISPANIC  
CAUCUS AND THE TEXAS HOUSE OF  
REPRESENTATIVES MEXICAN AMERICAN  
LEGISLATIVE CAUCUS AS *AMICI CURIAE*  
IN SUPPORT OF APPELLEES**

—◆—  
NINA PERALES  
*Counsel of Record*  
THOMAS A. SAENZ  
JOHN PAUL SALMON  
MEXICAN AMERICAN LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC.  
110 Broadway, Suite 300  
San Antonio, TX 78205  
(210) 224-5476  
nperales@maldef.org

*Counsel for Amici Curiae*

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Established in 1987, the Senate Hispanic Caucus is comprised of all Hispanic Texas State Senators and those Senators who represent districts with large minority populations. The goals of the Senate Hispanic Caucus include promoting legislative initiatives that better the Texas Hispanic community, particularly in the areas of economic development, health, education, civic engagement and civil rights. The members of the Senate Hispanic Caucus advance its mission through introducing, educating Senators about, and voting in support of legislation that benefits the Latino community in Texas, as well as voting against legislation that harms the Latino community. Members of the Senate Hispanic Caucus live in demographically diverse districts that will suffer severe negative effects from adoption of the apportionment metrics urged by Plaintiffs, including loss of constituent representation and diminished regional presence in the Legislature.

The Mexican American Caucus (MALC) was founded in 1973 in the Texas House of Representatives for

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<sup>1</sup> Pursuant to Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

the purpose of strengthening the numbers of Latino House members and better representing a united Latino constituency across the state. MALC is the oldest and largest Latino legislative caucus in the United States. MALC has a membership of 39 House members from all parts of the state, and MALC members vote as a bloc on consequential matters for Latino constituents, including voting rights. Members of MALC live in demographically diverse districts that will suffer severe negative effects from the adoption of the apportionment metrics urged by Plaintiffs, including loss of constituent representation and diminished regional presence in the Legislature.



## **SUMMARY OF ARGUMENT**

The apportionment metrics advanced by Plaintiffs would strip state legislative seats out of Houston, Dallas and South and West Texas and create grossly oversized districts of up to one million people. In addition, Plaintiffs' apportionment metrics would have disastrous effects on the Latino community because the metrics are tied to demographic characteristics, such as youth and lower rates of voter registration, that are most closely associated with Latinos.

Subtracting predominantly Latino population from apportionment in Texas will shift seats towards more heavily Anglo and older population in Central and East Texas. This radical change in apportionment

and representation will harm the voters who live in communities with significant Latino populations, whether or not those voters are themselves Latino. Packed into super-sized legislative districts, voters and their non-voting children and neighbors will be forced to compete with a vast number of other constituents for state resources and responsive legislation. Elected representatives without the resources or capacity to tend to the needs of hundreds of thousands more constituents will strain to the breaking point. For the Latino community in particular, which has struggled to gain the opportunity to elect their candidates of choice, apportionment based on citizen-voting-age population (CVAP) or registered-voter population would eliminate opportunity districts and subtract decades of progress from the Texas redistricting maps.



## **ARGUMENT**

### **I. The Apportionment Metrics Sought by Plaintiffs Shift Legislative Seats Away From Texas's two Largest Cities and South and West Texas**

The great diversity of Texas is mirrored in its largest cities. People of all races and backgrounds mix together in the state's economic and cultural hubs. Houston, the largest city in Texas, is home to 25 Fortune 500 corporations, including some of the



nation's largest energy companies.<sup>2</sup> The Dallas metropolitan area is the fourth-largest employment center in the nation with more than three million jobs.<sup>3</sup> Texas is also diverse in its South and West Texas regions, which include agricultural areas as well as cities. South and West Texas are home to the largest inland ports along the U.S.-Mexico border – crossing billions of dollars in goods annually.<sup>4</sup> Subtracting millions of children and others not yet eligible or registered to vote from the apportionment base skews legislative districts away from the source of much of the state's economic success.

### **A. Texas Is One of the Most Demographically Diverse States in the Nation**

From 2010 to 2014, Texas's population grew 7%, compared to 3% overall for the United States.<sup>5</sup> Texas's population is younger than the national average;

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<sup>2</sup> Office of the Governor Greg Abbott, *Fortune 500 Companies in Texas* (2015), [http://gov.texas.gov/files/ecodev/Fortune\\_500.pdf](http://gov.texas.gov/files/ecodev/Fortune_500.pdf).

<sup>3</sup> U.S. Bureau of Labor Statistics, *Dallas-Fort Worth Area Employment – July 2015* (2015), [http://www.bls.gov/regions/southwest/news-release/AreaEmployment\\_DallasFortWorth.htm](http://www.bls.gov/regions/southwest/news-release/AreaEmployment_DallasFortWorth.htm).

<sup>4</sup> Adie Tomer and Joseph Kane, *The Top 10 Metropolitan Port Complexes in the U.S.*, Brookings (July 1, 2015), <http://www.brookings.edu/blogs/the-avenue/posts/2015/07/01-top-10-metro-ports-tomer-kane>.

<sup>5</sup> U.S. Census Bureau, *Texas: People QuickFacts* (Aug. 31, 2015), <http://quickfacts.census.gov/qfd/states/48000.html>.

more than one-quarter of Texans are under age 18.<sup>6</sup> Texas is 44% Anglo, 39% Latino, 12.50% African American, and 4.50% Asian American.<sup>7</sup>

The composition of the Texas electorate is also changing. Latinos have slowly increased their registration rates over time and in November 2014 constituted 23% of Texas registered voters.<sup>8</sup> Today, 47% of native-born Texas children are Latino; these young people will become eligible to vote as they turn 18.<sup>9</sup>

Texas's population, however, is unevenly distributed. In Plaintiffs' Senate Districts 1 and 4, the residents are, on average, slightly older and less

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The term "Anglo" refers to persons who identify to the U.S. Census Bureau as White and not Hispanic.

<sup>8</sup> See U.S. Census Bureau, Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014 (2014), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html>; U.S. Census Bureau, Table 4a: Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2002 (2002), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2002/tab04a.pdf>.

<sup>9</sup> See U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_B05003&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003&prodType=table) (limit geography to Texas); U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status (Hispanic or Latino), 2014 American Community Survey 1-Year Estimates (2014), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_B05003I&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003I&prodType=table) (limit geography to Texas).

racially diverse than state averages.<sup>10</sup> Senate Districts 1 and 4 are 67% and 63% Anglo, respectively, although Texas on the whole is 44% Anglo.<sup>11</sup> Less than one in ten registered voters in Senate Districts 1 and 4 is Latino.<sup>12</sup> The voter turnouts in Senate Districts 1 and 4 are also slightly higher at 37% than the statewide average of 34%.<sup>13</sup>

## 1. Children in Texas

Texas children constitute the largest number of persons ineligible to vote in the state – 7,040,918.<sup>14</sup> Compared to older age brackets, Texas children are also disproportionately Latino.<sup>15</sup>

Race and ethnicity play a strong role in the distribution of children across Texas. In Texas, the average Anglo family contains 0.8 children and 2.14

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<sup>10</sup> See Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

<sup>11</sup> *Id.*; U.S. Census Bureau, Texas: People QuickFacts (Aug. 31, 2015), <http://quickfacts.census.gov/qfd/states/48000.html>.

<sup>12</sup> Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), [ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172\\_RED206\\_2014G\\_Statewides.pdf](ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf).

<sup>13</sup> Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

<sup>14</sup> U.S. Census Bureau, Texas: People QuickFacts (Aug. 31, 2015), <http://quickfacts.census.gov/qfd/states/48000.html>.

<sup>15</sup> See *id.*

adults.<sup>16</sup> The average Latino family contains 1.49 children and 2.38 adults.<sup>17</sup> Texas House and Senate districts containing the greatest percentages of families living with children tend to be in areas with high Latino populations. For example, according to the 2010 Census, the state Senate districts with the highest percentages of families living with children were in Houston and along the Texas-Mexico border.<sup>18</sup> Eight of the ten state House districts with the highest percentage of families living with children were also in Houston and along the Texas-Mexico border.<sup>19</sup>

The child population varies so widely across Texas Senate and House districts that simply using voting-age population as an apportionment metric renders the current plans malapportioned on that metric.<sup>20</sup> In fact, the main source of Plaintiffs' claimed

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<sup>16</sup> U.S. Census Bureau, Table Viewer: Average Family Size by Age (White Alone, Not Hispanic or Latino Householder), 2010 Census (2010), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_10\\_SF1\\_P37I&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_P37I&prodType=table) (limit geography to Texas).

<sup>17</sup> U.S. Census Bureau, Table Viewer: Average Family Size by Age (Hispanic or Latino Householder), 2010 Census (2010), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_10\\_SF1\\_P37H&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_P37H&prodType=table) (limit geography to Texas).

<sup>18</sup> See U.S. Census Bureau, 2010 Census Summary File 1 (2011) (calculated from Tables P17, P18, P34, P37, and P38).

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (ideal voting-age population: 589,669; District 27 voting-age  
(Continued on following page)

“imbalance” in voter eligibility across the state is due to the presence of children, and specifically the relatively large number of children who are Latino.

## **2. Adult Non-citizens in Texas**

Adult non-citizens in Texas constitute a much smaller population than children. According to the U.S. Census Bureau, 2,685,393 adult non-citizens live in Texas.<sup>21</sup> Although adult non-citizens constitute less than 8% of the Texas population, the majority of adult non-citizens in Texas are Latino and tend to live in Latino communities.<sup>22</sup> Thus, excluding adult non-citizens from apportionment exacerbates the effect on Latino communities of excluding children.

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population deviation from ideal: -11.12%; District 3 voting-age population deviation from ideal: 8.77%).

<sup>21</sup> U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_B05003I&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003I&prodType=table) (limit geography to Texas).

<sup>22</sup> Pew Research Ctr., Statistical Portrait of the Foreign-Born Population in the United States, 2012, Table 13 (2014), <http://www.pewhispanic.org/2014/04/29/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2012/>; U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_B05003I&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003I&prodType=table) (limit geography to Texas).

Adult non-citizens include individuals with a mix of immigration statuses, including legal permanent residents, visa-holders, and the undocumented. Many adult non-citizens, although not currently able to vote, are eligible to naturalize; each year, more than 50,000 Texans become naturalized U.S. citizens.<sup>23</sup>

### **3. Eligible Individuals Who Are Not Yet Registered to Vote**

In Texas, approximately 2.1 million U.S. citizens of voting age are not registered to vote.<sup>24</sup> Although eligible, these individuals have either never registered or fallen off the rolls after changing address and not updating their voter-registration information.

Here too, race and ethnicity drive regional differences. Latino voter registration lags Anglo voter registration by 17 percentage points.<sup>25</sup> Factors contributing to lower rates of voter registration among

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<sup>23</sup> U.S. Dep't of Homeland Sec., U.S. Naturalizations: 2013 (2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_natz\\_fr\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_natz_fr_2013.pdf).

<sup>24</sup> See Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), [ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172\\_RED206\\_2014G\\_Statewides.pdf](ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf) (total voter registration: 14,047,871); Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14 (total CVAP: 16,197,740).

<sup>25</sup> U.S. Census Bureau, Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014 (2014), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html>.

Latino citizens include younger average age and lower educational attainment than Anglos.<sup>26</sup>

#### 4. Registered Voters Who Do Not Vote

In 2014, over 9 million registered voters in Texas did not vote.<sup>27</sup> In 2012, a presidential election year, over 5 million registered voters did not go to the polls.<sup>28</sup>

Low voter turnout is a problem throughout Texas. In Ms. Evenwel's Senate District 1, voter turnout in the 2014 General Election was only 37% of the district's registered voters and only 31% of the district's citizen-voting-age population.<sup>29</sup> Similarly, in Mr. Pfenninger's Senate District 4, voter turnout in the 2014 General Election was only 37% of the

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<sup>26</sup> U.S. Census Bureau, Table 5: Reported Voting and Registration, by Age, Sex, and Educational Attainment: November 2014 (2014), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html>.

<sup>27</sup> Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), [ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172\\_RED206\\_2014G\\_Statewides.pdf](ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf).

<sup>28</sup> Tex. Legislative Council, Plan S172: 2012 General Election Analysis (2013), [ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172\\_RED206\\_2012G\\_Statewides.pdf](ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2012G_Statewides.pdf).

<sup>29</sup> Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (total voter registration); *see id.*; Tex. Legislative Council, Plan S172: Hispanic Population Profile, App. 14.

district's registered voters and only 34% of the district's citizen-voting-age population.<sup>30</sup>

## **B. The Metrics Advanced by Plaintiffs Shift Districts Across the State and Create Grossly Overpopulated Districts**

As explained in Section II below, apportionment based on either CVAP or registered-voter population does not equalize the weight of votes. However, apportionment on those metrics does result in excessive total population deviations and fewer seats in Houston, Dallas and South and West Texas.

### **1. The Texas Senate Map and Plaintiffs' Metrics**

The Texas Senate contains 31 single-member districts. *See* Tex. Const. art. III, §§ 2, 25. In the current Senate redistricting plan, the ideal total population used for apportioning districts is 811,147.<sup>31</sup> The overall plan deviation from the total population ideal is 8.04%.<sup>32</sup>

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<sup>30</sup> Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (total voter registration); *see id.*; Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

<sup>31</sup> Tex. Legislative Council, Plan S172: District Population Analysis (2015), App. 13.

<sup>32</sup> *Id.*



In a Senate redistricting plan apportioned on the basis of CVAP, districts in Houston, Dallas and South and West Texas would have to take on substantial new territory and population in order to reach the ideal.<sup>33</sup>

South and West Texas would lose a Senate district, reducing the number of seats in that region from five to four.<sup>34</sup> The remaining districts would be forced to increase their total populations by an average of over 100,000.<sup>35</sup>

In Houston, Senate District 6, currently represented by Senator Sylvia Garcia, would swell to over one million constituents in order to reach the CVAP ideal.<sup>36</sup> Senate District 6 would also no longer be a Latino opportunity district. The Latino CVAP would drop below 50% and the Latino registered voters

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<sup>33</sup> See Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6 (plan proposed for reference by amici curiae); Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

<sup>34</sup> See Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6.

<sup>35</sup> See Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

<sup>36</sup> *Id.*

would drop from 55% to 45% as the district expanded to take in new areas that are not majority Latino.<sup>37</sup>

Also in Houston, Senate District 13, currently represented by Senator Rodney Ellis, would have to grow to over 900,000 in total population in order to meet the CVAP ideal.<sup>38</sup> As a result, the district's African American voting-age population would drop to 39%.<sup>39</sup>

In Dallas, Senate District 23, represented by Senator Royce West, would have to grow to over 900,000 in total population.<sup>40</sup>

By contrast, Senate District 24 in Central Texas drops more than 100,000 below the ideal total population to 707,313.<sup>41</sup> Senate District 25, also in Central Texas, and Senate District 3, in East Texas, contract to less than 730,000.<sup>42</sup>

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<sup>37</sup> Compare Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14 *with* Tex. Legislative Council, Proposed Plan S173: Hispanic Population Profile (2015), App. 18.

<sup>38</sup> See Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

Overall, the total population deviation of the plan would be 36.36%.<sup>43</sup> The number of Latino majority districts in the Senate plan would drop from seven to five.<sup>44</sup> Most of the remaining Latino and African American districts would dramatically increase in total population.<sup>45</sup>

Similar to the CVAP apportionment map, a map apportioned based on registered voters would reduce the number of Latino majority districts in the Senate plan from seven to five<sup>46</sup> and most of the remaining Latino and African American districts would dramatically increase in total population.<sup>47</sup> Overall, the total population deviation of the plan would be 58.04%.<sup>48</sup>

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<sup>43</sup> See Tex. Legislative Council, Proposed Plan S173: District Population Analysis (2015), App. 17.

<sup>44</sup> See Tex. Legislative Council, Proposed Plan S173: Hispanic Population Profile (2015), App. 18.

<sup>45</sup> See Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

<sup>46</sup> Tex. Legislative Council, Proposed Plan S174: Hispanic Population Profile (2015), App. 22.

<sup>47</sup> Tex. Legislative Council, Proposed Plan S174: Population and Voter Data with Voter Registration Comparison (2015), App. 23.

<sup>48</sup> Tex. Legislative Council, Proposed Plan S174: District Population Analysis (2015), App. 21.

## 2. The Texas House Map And Plaintiffs' Metrics

The Texas Constitution's "County Line Rule" requires the Legislature to apportion state House districts to whole counties "according to the number of population in each, as nearly as may be." Tex. Const. art. III, § 26. The County Line Rule "generally limits the redistricting body to the creation of districts that consist of whole counties or groups of whole counties."<sup>49</sup> Following this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), Texas adopted the single member district system of electing state representatives.

In the current Texas House of Representatives districting plan, the district ideal total population is 167,637.<sup>50</sup> This ideal is used by the Legislature to apportion districts to counties and to draw districts.

In a House plan apportioned on the basis of CVAP or registered voters, Cameron and Hidalgo Counties in the Lower Rio Grande Valley would lose a combined two seats because of their low CVAPs and registered-voter populations.<sup>51</sup> El Paso County would

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<sup>49</sup> Tex. Legislative Council, State and Federal Law Governing Redistricting in Texas at 141 (2011), [http://www.tlc.state.tx.us/redist/pdf/2011\\_0819\\_State&Federal\\_Law\\_TxRedist.pdf](http://www.tlc.state.tx.us/redist/pdf/2011_0819_State&Federal_Law_TxRedist.pdf).

<sup>50</sup> Tex. Legislative Council, Plan H358: District Population Analysis (2015), App. 25.

<sup>51</sup> See Tex. Legislative Council, Plan H358: Hispanic Population Profile (2015), App. 25; Tex. Legislative Council, Plan H358: Population and Voter Data with Voter Registration

(Continued on following page)

lose one seat.<sup>52</sup> This loss of seats reduces those counties to the political representation held in 1980.<sup>53</sup>

Harris County (Houston) would lose two state representative seats and Dallas County would lose one state representative seat.<sup>54</sup>

The negative effects of changing apportionment in the Texas House are not limited to apportionment of seats to counties. Within counties, a House plan apportioned on the basis of CVAP or registered voters would force some districts to expand, and others to contract, in order to meet the new apportionment metric. For example, in Harris County, the House district with the lowest CVAP (HD 137-Gene Wu) is 40% below the CVAP ideal.<sup>55</sup> The House District with

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Comparison (2015), App. 31; U.S. Census Bureau, Voting Age Population by Citizenship and Race (CVAP), 2009-2013 American Community Survey (2013), [https://www.census.gov/rdo/data/voting\\_age\\_population\\_by\\_citizenship\\_and\\_race\\_cvap.html](https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html); Tex. Sec'y of State, Voter Registration and Unofficial Early Voting Figures (2014), <http://www.sos.state.tx.us/elections/historical/counties.shtml>.

<sup>52</sup> See *supra* note 51.

<sup>53</sup> See Tex. Legislative Council, State House Districts 1982-1984 Elections (2010), [http://www.tlc.state.tx.us/redist/pdf/historical\\_house/h\\_1982\\_1984.pdf](http://www.tlc.state.tx.us/redist/pdf/historical_house/h_1982_1984.pdf).

<sup>54</sup> See *supra* note 51; Mex. Am. Legal Def. and Educ. Fund, Map of County Apportionment of House Seats by CVAP – Dallas Region (2015), App. 9; Mex. Am. Legal Def. and Educ. Fund, Map of County Apportionment of House Seats by CVAP – Houston Region (2015), App. 10.

<sup>55</sup> See Tex. Legislative Council, Plan H358: Hispanic Population Profile (2015), App. 26.

the highest CVAP (HD 134-Sarah Davis) is 20% above the CVAP ideal.<sup>56</sup> House District 137 would be forced to take on thousands of new residents, while House District 134 would shed residents to meet a CVAP ideal.

Similarly, in Dallas County, the district with the lowest CVAP (HD 103-Rafael Anchia) is 33% below the ideal and the district with the highest CVAP (HD 108-Morgan Meyer) is 13% above the ideal.<sup>57</sup> As in Houston, districts below the CVAP ideal in Dallas would become grossly malapportioned as thousands of individuals are packed into their boundaries, while other districts contract and become much smaller in total population.

**C. The Loss of Legislative Seats, and the Creation of Super-sized Districts, will Injure Constituents and Elected Representatives**

The apportionment metrics advanced by Plaintiffs reduce the number of representatives from Houston, Dallas and South and West Texas and make it harder for the remaining representatives in those delegations to pass legislation serving regional interests. In addition, the accompanying growth of “underpopulated” districts to take in dramatically higher total population puts impossible burdens on the

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<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

legislators representing these districts and forces constituents to compete with each other for scarce legislator time and resources.

In super-sized districts, Senators and Representatives will be hard-pressed to represent all of their voters as well as disproportionately high numbers of non-voters. For example, in order to meet a CVAP ideal, Senate District 29 (El Paso) would have to expand to take in Del Rio, a city of over 35,000 residents, located 423 miles from El Paso.<sup>58</sup> The Senator who represents SD 29, Jose Rodriguez, would have to reallocate his already small office budget to cover the new geography and would face having to close an existing district office to open a new office in or near Del Rio. Senator Rodriguez would have to stretch his small staff to respond to requests for assistance from over 90,000 new constituents.

In addition to the drain on member and staff resources, legislative districts that grow to take in disproportionately high populations also take in more geographic areas with competing interests. Although all legislative districts contain a variety of interests, adding more people and more geography to some

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<sup>58</sup> *Compare* Tex. Legislative Council, Plan S172: Map of Current Texas Senate Districts (2014), App. 5 *with* Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6; *see also* U.S. Census Bureau, American FactFinder, 2014 Population Estimate (2014), [http://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml) (search “Del Rio City, Texas”).

districts will overburden them compared to other districts that will stay the same size or even become smaller. The competing needs for economic development, improvements in roads and highways, public safety, healthcare, and education will become even greater in districts that take in new counties and cities in order to meet a CVAP or registered-voter population ideal.

## **II. Plaintiffs' Claim to an "Equally Weighted Vote" Is Illusory and Cannot Form the Basis of an Equal Protection Claim**

The practical goal of Plaintiffs' standard is to shift legislative seats, and public policy, from one part of the state to another based on votes cast in elections.<sup>59</sup>

Plaintiffs claim that their equally-populated districts are unconstitutional because the districts do not guarantee equality in the weight of their votes. Plaintiffs invoke a "right to an equally weighted vote" and "the right of *voters* to an equally weighted *vote*."<sup>60</sup>

As the Court has explained, its requirement of equal population in districts does not and is not intended to equalize the weight of a vote:

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<sup>59</sup> See Mex. Am. Legal Def. and Educ. Fund, Plan S172: Map of District Variation in Voting-Age Population (2015), App. 1.

<sup>60</sup> Pls.' Opp'n to Mot. to Dismiss, ECF. No. 20 at 7, 9 (emphasis original).



[I]t must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. . . . [I]f it is the weight of a person's vote that matters, 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.

*Gaffney v. Cummings*, 412 U.S. 735, 746-48 (1973)  
(internal citations omitted)

That same year, the Court ruled that a 9.90% variation in equal population in Texas legislative redistricting did not give rise to a one-person-one-vote violation:

For the reasons set out in *Gaffney v. Cummings*, *supra*, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut.

*White*, 412 U.S. at 764. Of note, this Court found no malapportionment in the Texas House plan despite the Court's recognition that Mexican Americans lived in heavily concentrated communities in some areas of the state and that "Mexican-American voting

registration remain[s] very poor in the county.” *Id.* at 768. If the Equal Protection Clause required equalization of the weight of a vote, the fact that few Mexican Americans were voting in 1973 would have rendered the state’s redistricting plan malapportioned. This Court made no such finding.

### **A. As a Practical Matter, the “Weight” of Votes Cannot Be Equalized**

Even if a state tried to equalize the weight of votes by apportioning population based on votes cast, the endeavor would be fruitless. Voter turnout is a moving target; it varies with every election.<sup>61</sup> As voter turnout rises and falls, a state would have to redraw its political boundaries after every election – creating confusion for voters and elected officials. Also, because past elections cannot predict turnout in future elections, the goal of an equally-weighted vote would remain forever out of reach as the state looked backward to past elections to draw its political lines.<sup>62</sup>

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<sup>61</sup> For example, in the 2012 November General Election, 8,049,220 Texans voted. *See* Tex. Legislative Council, Plan S172: 2012 General Election Analysis (2013), [ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172\\_RED206\\_2012G\\_Statewides.pdf](ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2012G_Statewides.pdf). Two years later, in the November 2014 General Election, Texas voter turnout dropped 41% to 4,727,805. *See* Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), [ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172\\_RED206\\_2014G\\_Statewides.pdf](ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf).

<sup>62</sup> *See Burns v. Richardson*, 384 U.S. 73, 92 (1966) (noting that registered or actual voter numbers vary depending on who  
(Continued on following page)

There is even fluctuation in voter turnout for districts in the same redistricting plan, as officials elected in staggered terms (like the Texas Senate) face very different electorates. For example, during the last decade, Ms. Evenwel voted for her Senator in non-presidential years. In 2010, her Senate District 1 elected its Senator with only 140,273 votes.<sup>63</sup> Because so few voters in Ms. Evenwel's Senate district cast a ballot in that race, Ms. Evenwel's vote was weighted among the most powerful across Senate districts in that election.<sup>64</sup> Comparing the vote of Ms. Evenwel to the electorate for Senate seats in the 2008 election demonstrates that, for those elections, any injury flowing from an unequally weighted vote belonged to most 2008 Senate voters, and not Ms. Evenwel.<sup>65</sup>

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chooses to participate, competitiveness of the campaign, and even the weather).

<sup>63</sup> See Tex. Sec'y of State, 2010 General Election Race Summary Report (2010), [http://elections.sos.state.tx.us/elchist154\\_state.htm](http://elections.sos.state.tx.us/elchist154_state.htm).

<sup>64</sup> See *id.*

<sup>65</sup> Compare *id.* with Tex. Sec'y of State, 2008 General Election Race Summary Report (2008), [http://elections.sos.state.tx.us/elchist141\\_state.htm](http://elections.sos.state.tx.us/elchist141_state.htm).

## **B. Apportionment Based on Voter Eligibility Metrics Such as CVAP or Registered Voters Creates Bizarre Results and Does Not Equalize the Weight of Votes**

Comparing votes cast in an election (i.e., the substance giving “weight” to the vote) to either CVAP or registered voters is an apples-to-oranges comparison. The chasm between the approximations (CVAP and registered voters) and the standard (votes cast) is too wide to bridge. Moreover, apportionment based on CVAP or registered voters creates arbitrary results.

### **1. The Texas Senate Plan and CVAP**

CVAP would not cure Plaintiffs’ claimed injury of unequally weighed votes and, in some cases, would exacerbate the injury.

If Senate districts were apportioned based on CVAP, Ms. Evenwel and Mr. Pfenninger would remain disadvantaged based on the weight of their votes cast as compared to voters in other districts with lower voter turnout and higher CVAP. For example, Senate Districts 3, 5, 22, 24, 28, and 30 all contain greater CVAP than Mr. Pfenninger’s District 4, but District 4 casts more ballots than Districts 3, 5, 22, 24, 28, and 30.<sup>66</sup> Under the current plan, Mr.

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<sup>66</sup> *Compare* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 *with* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

Pfenninger's vote cast carries less weight in determining Senate elections than votes cast in Districts 3, 5, 22, 24, 28, and 30 because District 4 voters cast more votes than these other districts. However, if Senate districts were reapportioned to equalize CVAP, Districts 3, 5, 22, 24, 28, and 30 would drop more CVAP than would District 4 because each of these districts has a higher CVAP than District 4.<sup>67</sup> Assuming voters are equally distributed across CVAP, following reapportionment, District 4 would cast *even more* votes when compared to Districts 3, 5, 22, 24, 28, and 30 than before reapportionment. Therefore, CVAP-based apportionment would exacerbate Mr. Pfenninger's claimed injury of an unequally-weighted vote with respect to these districts.<sup>68</sup>

Just as problematic, under Plaintiffs' proposed standard, CVAP-equalized apportionment would diminish the weights of votes cast in Dallas and Houston. Voters in current Senate Districts 23 (Dallas) and 15 (Houston) cast more ballots but have lower CVAPs as compared to Districts 19, 20, 21, and 26.<sup>69</sup> Voters in Senate District 7 (Houston) present the

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<sup>67</sup> All of these districts are above the CVAP ideal of 522,508. *See* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

<sup>68</sup> Similarly, the weight of Ms. Evenwel's vote would be diminished as compared to votes cast in Districts 3, 5, and 30.

<sup>69</sup> *Compare* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 *with* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

most extreme example. Their votes would be diminished as compared to votes cast in Districts 2, 11, 14, 19, 22, 24, 26, 28, 30, and 31.<sup>70</sup>

On the other hand, the highest CVAP Senate district in the state, Senate District 3, is considered “over populated” for CVAP-equalized apportionment, despite casting fewer votes in the 2012 General Elections than Districts 1, 4, 5, 10, 14, 17, 18, and 25.<sup>71</sup>

The metric of voter registration for apportionment also creates winners and losers that do not track the weight of the vote. For example, in the 2014 General Election, Senate District 15 (Houston) cast more votes than Senate Districts 19, 20, 21, 26, and 29 but has fewer registered voters.<sup>72</sup> The unexpected winner in apportionment based on voter registration is Senate District 30 (Wichita Falls). Because of its higher voter registration, Senate District 30 is “more populated” when compared to the following Districts, all of which cast more votes than Senate District 30

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<sup>70</sup> See Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15; Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

<sup>71</sup> Compare Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 with Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

<sup>72</sup> See Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

in the 2014 General Election: 1, 4, 5, 7, 8, 10, 11, 12, 16, 17, 18, 22, and 24.<sup>73</sup>

The disparity in the weight of votes across districts created by using CVAP or registered voters for apportionment gives rise to the exact type of imbalance that Plaintiffs claim violates the Equal Protection Clause. The arbitrary results that flow from using CVAP or voter registration render these metrics inappropriate for apportionment.

### **C. Equalization of Both Total Population and Voters Cannot Be Achieved**

Plaintiffs' standard requires the impossible – districts that simultaneously equalize total population and voters. Such a redistricting plan is a chimeric; it cannot be formed.

#### **1. Plaintiffs' Complaint Asserts Dual Constitutional Mandates**

According to Plaintiffs' complaint, "[t]he one-person, one-vote principle requires Texas to safeguard the right of electors like [Plaintiffs] to an equally weighted vote *in addition to* equal representation based on total population."<sup>74</sup> Under the asserted dual mandates, "Texas should not be permitted to base

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<sup>73</sup> See *id.*

<sup>74</sup> Compl., J.S. App. 31a (emphasis added).

apportionment on voter population alone.”<sup>75</sup> Plaintiffs distinguished their dual-mandate standard from the single-mandate standard asserted in *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2002), that CVAP alone must be equalized.<sup>76</sup> The district court accordingly, considered and rejected only Plaintiffs’ asserted dual-mandate standard.<sup>77</sup>

## **2. Plaintiffs Tiptoe Away from Dual Mandates But Continue to Assert that Both Total Population and Voters Can Be Equalized**

Plaintiffs now subtly shift from a dual-mandate standard toward a single-mandate standard in this Court. They assert: “[T]he ‘population’ States must equalize for one-person, one-vote purposes is the population of eligible voters.”<sup>78</sup> Plaintiffs now deem

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<sup>75</sup> Pls.’ Mot. for Sum. J., ECF No. 12, at 9.

<sup>76</sup> *See id.* (“*Chen* decided a legal issue different from the one presented here. In *Chen* . . . the Fifth Circuit was confronted with an argument that the Fourteenth Amendment required Houston ‘to use CVAP rather than total population’ in designing city council districts.”) (quoting *Chen*, 206 F.3d at 523); *see also* Compl., J.S. App. 32a (“*Chen* did not consider whether electoral power could be ignored when it is possible to safeguard both interests.”).

<sup>77</sup> *See* Mem. Op., J.S. 5a (“[Plaintiffs] conclude that PLANS 172 [*sic*] violates the one-person, one-vote principle of the Equal Protection Clause by not apportioning districts to equalize *both* total population and voter population.”) (emphasis original).

<sup>78</sup> Pls.’ Br. 15.



districts of equalized total population to be merely a state “interest,” not a mandate.<sup>79</sup>

This Court should consider only Plaintiffs’ dual-mandate standard because Plaintiffs did not assert a single-mandate standard in their complaint, and the district court did not consider a single-mandate standard. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (“Ordinarily, we do not decide in the first instance issues not decided below.”) (internal quotations omitted).

Plaintiffs, nevertheless, continue to assert that both total population and voters can be equalized in a Texas Senate districting plan.<sup>80</sup> Plaintiffs have never supported their assertion with anything other than implausible, conclusory statements.<sup>81</sup>

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<sup>79</sup> *See id.* at 48.

<sup>80</sup> *See id.* at 46 (“[H]ad the Texas Legislature used the population of eligible voters as its starting point . . . , it still could have largely reconciled total and voter population.”).

<sup>81</sup> *See, e.g.,* Pls.’ Mot. for Summ. J., ECF No. 12-1 (Declaration of Peter A. Morrison, Ph.D.: “I was not asked to, and did not attempt to, devise a plan that would optimally balance [CVAP and total population] deviations. . . . I was able to create a 31-district plan . . . that eliminated the gross deviations in CVAP without significantly exceeding the 8.04% total population deviation from ideal in Plan S172.”).

### 3. Both Total Population and Voters Cannot Be Equalized Across Texas Senate Districts

Texas's concentrations of children, non-citizens, non-registered voters, and non-voting-but-registered voters prevent the drawing of Texas Senate districts equalizing both total population and voters within overall plan deviations of 10%.<sup>82</sup>

The current Texas Senate plan has a deviation of 8.04% based on total population. Therefore, the plan is balanced for total population within an acceptable range. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983).<sup>83</sup> To achieve Plaintiffs' dual-mandate standard, current Senate districts would have to gain or lose significant numbers of children, citizens, registered voters, and actual voters, without significantly

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<sup>82</sup> If the standard of "equalized" total population and voters is not equalization within 10% deviations, but is rather a "best-fit" or "lowest-possible-combined deviation," then the standard is not a dual-mandate standard, as asserted. The Court has never required a State to minimize the combined deviations of two population measures; instead, it has allowed deviations greater than 10% for "nonpopulation criteria." *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("Any number of consistently applied legislative policies might justify some variance [in population equality], including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.").

<sup>83</sup> *See* Tex. Legislative Council, Plan S172: District Population Analysis (2015), App. 13.

altering total population numbers. Regional variations in the populations of children, citizens, registered voters, and actual voters make this task impossible.<sup>84</sup>

Current Districts 27 (Brownsville) and 29 (El Paso) illustrate why a dual-mandate plan cannot be devised. Each district is underpopulated by voting-age population,<sup>85</sup> CVAP,<sup>86</sup> registered voters,<sup>87</sup> and actual voters.<sup>88</sup> Districts 27 and 29, however, cannot add significant numbers of voting-age residents, citizen-voting-age residents, registered voters or actual voters

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<sup>84</sup> The task is impossible to the extent that districts must be contiguous. *Cf.* Compl., J.S. App. 24a (“It would have been possible for the Texas Legislature to adjust district boundaries so as to create 31 contiguous districts containing both relatively equal numbers of electors and relatively equal total population.”).

<sup>85</sup> The voting-age population of District 27 is 524,120, a deviation of -11.12% from ideal; the voting-age population of District 29 is 571,426, a deviation of -3.09% from ideal. *See* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

<sup>86</sup> The CVAP of District 27 is 399,530, a deviation of -23.54% from ideal; the CVAP of District 29 is 469,130, a deviation of -10.26% from ideal. *See* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

<sup>87</sup> The registered-voter population of District 27 is 354,303, a deviation of -21.81% from ideal; the registered-voter population of District 29 is 415,152, a deviation of -8.39% from ideal. *See id.*

<sup>88</sup> The actual-voter population of District 27 is 84,566, a deviation of -44.55% from ideal; the actual-voter population of District 29 is 83,529, a deviation of -45.23% from ideal. *See* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

because (1) they are at or near ideal total population,<sup>89</sup> and (2) they are surrounded by other districts lacking the same population groups.<sup>90</sup> Thus, if Districts 27 and 29 added significant numbers of voting-age residents, citizen-voting-age residents, registered voters, or actual voters by taking those individuals from surrounding districts, Districts 27 and 29 would greatly exceed acceptable total population deviations,<sup>91</sup> and the new Districts 27 and 29 would drain surrounding districts of population, which would further exacerbate those districts' negative deviations from ideal voting-age population, citizen-voting-age population, registered-voter population, and actual-voter population.

To achieve the dual mandates, Districts 27 and 29 would have to swap populations with districts on the opposite end of the deviation spectrum. Those districts, however, are not contiguous to Districts 27 and 29.<sup>92</sup>

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<sup>89</sup> The total population of District 27 is 786,946, a deviation of -2.98% from ideal; the total population of District 29 is 816,681, a deviation of 0.68% from ideal. *See id.*

<sup>90</sup> *See* Mex. Am. Legal Def. and Educ. Fund, Plan S172: Maps of District Variation in Voting-Age Population, CVAP, Voter Registration, and Votes Cast (2015), Apps. 1-4.

<sup>91</sup> Districts 27 and 29 would add geography that included not just the desired populations, but also all other population groups, including children, non-citizens, non-registered voters, and non-voters.

<sup>92</sup> *See* Mex. Am. Legal Def. and Educ. Fund, Plan S172: Maps of District Variation in Voting-Age Population, CVAP, Voter Registration, and Votes Cast (2015), Apps. 1-4.

Amici curiae have drafted alternative maps equalizing CVAP population and registered voters across Texas Senate districts, within 4% total deviation.<sup>93</sup> In each alternative map, South Texas loses a seat (District 19) because all current South Texas districts (Districts 19, 20, 21, 27, and 29) must add populations of citizen-voting-age residents and registered voters to bring those deviations within acceptable limits. Achieving equalization under these measures, however, massively increases the plans' total population deviations from ideal. Total population deviation goes from a baseline of 8.04% in the current Texas Senate plan, to 36.36% in the CVAP-equalized plan and to 58.04% in the registered-voter-equalized plan.<sup>94</sup> Under the CVAP-equalized plan, Districts 27 and 29 jump in population and acquire total population deviations of 18.80% and 12.04%, respectively.<sup>95</sup> Likewise, District 6 in Houston and

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<sup>93</sup> See Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6; Tex. Legislative Council, Proposed Plan S174: Map of Texas Senate Districts Equalized by Voter Registration (2015); App. 7.

<sup>94</sup> Compare Tex. Legislative Council, Plan S172: District Population Analysis (2015), App. 13 with Tex. Legislative Council, Proposed Plan S173: District Population Analysis (2015), App. 17 and Tex. Legislative Council, Proposed Plan S174: District Population Analysis (2015), App. 21.

<sup>95</sup> See Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19. Under the registered-voter-equalized plan, Districts 27 and 29 realize total population deviations of 18.80% and 9.83% respectively. See Tex. Legislative Council, Proposed Plan S174: Population and Voter Data with Voter Registration Comparison (2015), App. 23.

District 23 in Dallas add CVAP and registered voters to correct large negative deviations in these measures under the current plan.<sup>96</sup> Consequently, the total population deviations for District 6 and District 23 jump to 23.56% and 12.29%, respectively, under the CVAP-equalized plan.<sup>97</sup>

#### **4. Both Total Population and Voters Cannot Be Equalized Across Texas House Districts**

Plaintiffs do not assert that the Texas House can be districted to achieve their asserted dual-mandate standard. However, the principle of equal protection does not stop with one legislative chamber. *See Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) (“It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also

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<sup>96</sup> See Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14 (District 6 CVAP deviation: -26.51%; District 23 CVAP deviation: -10.69%); Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (District 6 registered-voter deviation: -34.76%; District 23 registered-voter deviation: -8.29%).

<sup>97</sup> See Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19. District 6’s total population deviation increases to 35.49% under the registered-voter-equalized plan, and District 23’s total population deviation increases to 12.29% under this plan. See Tex. Legislative Council, Proposed Plans 174: Population and Voter Data with Voter Registration Comparison (2015), App. 23.

evaluating the actual scheme of representation employed with respect to the other house.”); *see also Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 735 n.27 (1964) (“[In *Tawes*] we discussed the need for considering the apportionment of seats in both houses of a bicameral state legislature in evaluating the constitutionality of a state legislative apportionment scheme, regardless of what matters were raised by the parties and decided by the court below.”). Accordingly, the Court must consider Plaintiffs’ dual-mandate standard as applied to the Texas House.

The Texas House cannot be districted in a plan that equalizes both total population and voters for the same reasons that prevent the drawing of an equalized-total-population-and-voter-eligible plan in the Texas Senate. In fact, the reasons are more pronounced with the Texas House.

The Texas House is comprised of 150 districts, each wholly contained within a single county where possible. This County Line Rule prevents statewide equalization of both total population and voters because it limits how districts may be altered. For example, El Paso County contains districts 75, 76, 77, 78, and 79.<sup>98</sup> Each of these five districts is equalized for total population, but all have negative CVAP

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<sup>98</sup> *See* Tex. Legislative Council, Plans S172: Map of Current Texas Senate Districts (2014), App. 5.

deviations under the current plan.<sup>99</sup> If the County Line Rule is followed, in El Paso County there is no way to reallocate the population to equalize CVAP across all districts because the county's population contains too few citizen-voting-age residents to bring all five districts near the statewide ideal.<sup>100</sup>

If the County Line Rule is abandoned, regional differences in populations of children, citizens, registered voters, and actual voters would prevent the drawing of districts equalizing total population and eligible voters for the same reasons that apply to the Texas Senate. Current House districts in South Texas, Dallas, and Houston, which are equalized for total population, are completely, or nearly completely, surrounded by districts similarly lacking in CVAP.<sup>101</sup> One or more of these South Texas, Dallas, and Houston districts could achieve ideal CVAP, but, consequently, swell in total population and further deprive neighboring districts of CVAP.

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<sup>99</sup> See Mex. Am. Legal Def. and Educ. Fund, Plan H358: Map of District Variation in CVAP (2015), App. 11. The CVAP deviations are: District 75, -28.27%; District 76, -12.30%; District 77, -15.88%; District 78, -8.39%; and District 79, -8.84%. See Tex. Legislative Council, Plan H358, Hispanic Population Profile (2015), App. 26.

<sup>100</sup> It may be possible to equalize CVAP if El Paso County loses a seat; however the remaining four districts would greatly exceed the ideal total population.

<sup>101</sup> See Tex. Legislative Council, Plan H358: Map of Current Texas House Districts (2014), App. 8.



## **5. Plaintiffs’ Dual-Mandate Standard Should Be Rejected Because the Court Does Not Impose Impossible Standards**

The law does not create traps. *See Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) (“The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under [Voting Rights Act] § 5 should the legislature place a few too few.”). Plaintiffs’ dual-mandate standard creates an impossible goal in Texas by establishing competing constitutional limits.<sup>102</sup> The Court should reject Plaintiffs’ standard because, as implemented in Texas, the standard is impossible to satisfy.

## **III. The Current Effort to Reduce Latino Representation Through Apportionment Follows a Long History of Voting Discrimination in Texas**

The radical changes in apportionment sought by Plaintiffs, if adopted by Texas, would raise an inference of unconstitutional racial discrimination against Latino voters.

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<sup>102</sup> *Cf.* Pls.’ Mot. for Summ. J., ECF No. 12 at 9-10 (“Texas should not be permitted to base apportionment on voter population alone; it must fairly balance all relevant factors within constitutional limits.”).

In *LULAC v. Perry*, 548 U.S. 399, 439 (2006), this Court noted “the long history of discrimination against Latinos and Blacks in Texas” (internal quotations omitted). The Court explained:

‘Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and the restrictive voter registration time periods are an unfortunate part of this State’s minority voting rights history. The history of official discrimination in the Texas election process – stretching back to Reconstruction – led to the inclusion of the state as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions.’

*Id.* at 439-40 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994)).

Two years before the Court struck down state poll taxes in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), Texans voted to retain the poll tax despite public recognition that it operated to

exclude Latinos and African Americans from voting.<sup>103</sup> The same year as *Harper*, the Texas Legislature met in a special session and enacted Senate Bill 1, which required voters to re-register annually.<sup>104</sup> The annual re-registration requirement was not rescinded by the Texas Legislature until 1971.<sup>105</sup>

In 1973, this Court declared that Texas's use of multi-member election districts in San Antonio and Dallas diluted minority voting strength in violation of the Fourteenth Amendment. *White*, 412 U.S. 755. The Court took particular note of the historical factors leading to very low political participation rates by Mexican Americans in Bexar County in South Texas:

The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult, particularly, the [district] court thought, with respect to the political life of Bexar County. '(A) cultural incompatibility . . . conjoined with the poll tax and the most restrictive

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<sup>103</sup> Dallas Public Library, Voting Rights: The Poll Tax, Marion Butts Collection, <http://dallaslibrary2.org/mbutts/assets/lessons/L9-voting+rights/Marion%20Butts%20-%20Voting%20Rights%28PPT%29.pdf>.

<sup>104</sup> O. Douglas Weeks, Tex. State Historical Ass'n, Election Laws, Handbook of Texas Online (2010), <https://tshaonline.org/handbook/online/articles/wde01>.

<sup>105</sup> *Id.*

voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.’ [*Graves v. Barnes*, 343 F. Supp. 704, 731 (W.D. Tex. 1972).] The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county.

*White*, 412 U.S. at 768-69.

Texas legislators continued to draw district boundaries that diluted the Latino vote after *White*. In every decade since the 1970’s, one or more Texas statewide redistricting plans was blocked by the U.S. Department of Justice or the federal courts for illegally diluting Latino votes.<sup>106</sup>

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<sup>106</sup> See Letter from U.S. Dep’t of Justice to Tex. Sec’y of State (Jan. 1976), <http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1020.pdf> (Texas House); Letter from U.S. Dep’t of Justice to Tex. Sec’y of State (Jan. 25, 1982), <http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1900.pdf> (Texas Senate); Letter U.S. Dep’t of Justice to Tex. Sec’y of State (Jan. 25, 1982), <http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1910.pdf> (Texas House); Letter from U.S. Dep’t of Justice to Tex. Sec’y of State (Nov. 12, 1991), <http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2380.pdf> (Texas House); Letter from U.S. Dep’t of Justice to Tex. Sec’y of State (Nov. 16, 2001), <http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2930.pdf> (Texas House); *Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, slip op. (W.D. Tex. Mar. 19, 2012) (Texas House).

Most recently, in 2006, the Court struck down the Texas congressional redistricting plan because it diluted Latino voting strength in violation of section 2 of the Voting Rights Act. *See LULAC*, 548 U.S. at 440.

The battles for political opportunity fought by Latinos in Texas have resulted in seven Senate districts in which Latinos have the opportunity to elect their candidate of choice. Changing the apportionment metric for the Texas Senate would reduce the number of opportunity districts by at least two, sending the map back to the 1980's.<sup>107</sup> The Texas House map would suffer a similar fate. Worse, many Latino voters would find themselves not only with fewer opportunity districts overall, but also living in districts that contain far more constituents than districts that elect Anglo representatives.

Because the apportionment metrics advanced by Plaintiffs are tailored to characteristics of the Latino community (such as youth and low voter-registration rates), and the metrics themselves do not equalize the weight of votes, their use gives rise to an inference of intentional vote dilution in violation of the Fourteenth Amendment.

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<sup>107</sup> *See* Tex. Legislative Council, State Senate Districts 1982 Election (2010), [http://www.tlc.state.tx.us/redist/pdf/historical\\_senate/s\\_1982.pdf](http://www.tlc.state.tx.us/redist/pdf/historical_senate/s_1982.pdf).

#### **IV. The Effect of Shifting Political Representation to More Homogenous Communities Will Be Fewer Policy Proposals and Less Enacted Legislation Addressing the Needs of Diverse Communities in Urban Areas and in South and West Texas**

Plaintiffs' proposed apportionment standard would shift representation from urban areas to rural areas and from South and West Texas to Central and East Texas.

##### **A. Past Legislative Accomplishments May Never Have Been Achieved**

Against these headwinds, communities in urban areas and in South and West Texas may never have achieved the legislative accomplishments of recent sessions.

Before 2013, the Lower Rio Grande Valley did not have a medical school to serve the region's 1.2 million inhabitants.<sup>108</sup> The region suffers from the highest incidence of diabetes in the state, and a third of its residents live below the poverty line.<sup>109</sup> In the 2013

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<sup>108</sup> See U.S. Census Bureau, Metropolitan Statistical Areas; and for Puerto Rico, 2014 Population Estimates (2014), <https://www.census.gov/popest/data/metro/totals/2014/> (adding McAllen-Edinburg-Mission, TX Metro Area and Brownsville-Harlingen, TX Metro Area).

<sup>109</sup> See Tex. Dep't of State Health Serv., The Health Status of Texas at 39, Map 20 (2014), <https://www.dshs.state.tx.us/chs/HealthStatusTexas2014.pdf>; U.S. Census Bureau, 2013 Small Area Income

(Continued on following page)

Texas Legislative Session, Senators from South and West Texas worked together to co-author and pass a bill establishing a medical school in the Rio Grande Valley.<sup>110</sup> They lobbied their colleagues in the Senate, secured funding and gathered the necessary votes to win passage of the bill. If representation had been stripped from South and West Texas, the delegation would have been smaller and less influential, and this generational accomplishment might never have been achieved.

### **B. Harmful Legislation May Be Imposed if Large, Diverse Communities are Underrepresented**

Diverse communities strengthen a representative democracy by providing balance to majority factions. *See* The Federalist No. 10 (James Madison) (“Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”). Plaintiffs’ proposed standard would shift political power away from growing and diverse communities in urban areas and South and West Texas towards more established and more homogenous communities in Central and East

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and Poverty Estimates (2013), <http://www.census.gov/did/www/saife/data/statecounty/data/2013.html> (data for Cameron and Hidalgo Counties).

<sup>110</sup> *See* Act of May 22, 2013, 83d Leg., R.S., ch. 726, 2013 Tex. Gen. Laws 1846.

Texas. Weakening the presence of large, diverse communities at the state Capitol can lead to passage of laws detrimental to those communities.

Of immediate concern, legislation narrowly defeated by coalitions of Senators representing districts in urban areas and West and South Texas may pass in future sessions if Senate seats shift to Central and East Texas. Among such narrowly defeated measures in 2015 was Senate Bill 185, which would have banned cities from taking local needs into account when designing policies on police questioning of immigrants.<sup>111</sup> Passage of the measure would have severely constrained local control and chilled police-community relations – particularly in high-minority-population communities. Senators from Dallas, Houston and South and West Texas joined with a small number of additional colleagues in a bipartisan effort to defeat the bill.<sup>112</sup> The group of 13 Senators denied the bill’s supporters a three-fifths majority needed to bring the bill for debate on the Senate floor, a necessary precursor to passage.<sup>113</sup> A switch of just

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<sup>111</sup> See Tex. S.B. 185, 84th Leg., R.S. (2015).

<sup>112</sup> See Julian Aguilar, *With Clock Running, Immigration Bills Cling to Senate Calendar*, Tex. Tribune, May 19, 2015, available at <http://www.texastribune.org/2015/05/19/-state-repeal-sanctuary-cities-back-calendar-there/>.

<sup>113</sup> See *id.*; see also Tex. S. Rules 5.13, 16.07, S. Res. 39, 84th Leg., R.S., 2015 S.J. of Tex. 50, 50-53.



one Senator from opposition to support would have enabled the bill to move forward.



### CONCLUSION

For the foregoing reasons and those stated in the brief by Texas, the judgment below should be affirmed.

Respectfully submitted,

NINA PERALES

*Counsel of Record*

THOMAS A. SAENZ

JOHN PAUL SALMON

MEXICAN AMERICAN LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC.

110 Broadway, Suite 300

San Antonio, TX 78205

(210) 224-5476

nperales@maldef.org

*Counsel for Amici Curiae*

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