No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL and EDWARD PFENNINGER,

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 *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Immigration Reform Law Institute (IRLI), is a non-profit legal education and advocacy law firm working to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful, to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or comply with our national immigration and citizenship laws, and to provide expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

While *Amicus* agrees with all points raised by the Appellants, this *amicus curiae* brief is focused on the district court's rigid application of total population as an apportionment metric in general and specifically its failure to appreciate the debasement of citizen-voting power due to total population apportionment in high immigration states such as Texas.

[1] Both parties have filed blanket consents to *amicus curiae* briefs as noted on the docket in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from IRLI has made a monetary contribution to the preparation or submission of this brief. IRLI does not have a parent corporation, and no publicly held company owns ten percent or more of IRLI's stock.

SUMMARY OF ARGUMENT

The State of Texas's current policy of counting aliens, legal and illegal, for apportionment is abridging the democratic rights of its citizens. Due to Plan 172's failure to consider the citizen-voter population of the state, the senate districts Appellants reside in and elsewhere have become substantially malapportioned. Two related and perverse effects have resulted from such a policy: (1) Citizen-voters in districts with many aliens are given outsized voting power, and (2) more representation is being allocated to areas where alien populations are large. By using total population as a metric, Plan 172 dilutes the representation of citizens in districts with fewer numbers of aliens. The resulting variation in the number of citizens in Texas's senate districts therefore violates the principles of equality of representation embodied in the Constitution and decisions from this Court.

Because these variations are increasing, the situation demands this Court's urgent attention. Texas has one of the highest immigrant populations and one of the fastest immigration growth rates in the country. Massive immigration inflows into the State and elsewhere over the past four decades make the first generation of apportionment cases, decided when total and voter populations "tracked" each other, increasingly outmoded and anachronistic.

Although the framers of both the Constitution and the Fourteenth Amendment understood that

alienage should not prevent a person from being counted in a census, decades of mass immigration and the resulting distortive effect on citizen representation is beginning to diminish the very democratic rights our founders sought to create. Any equal-protection based "right" of apportionment for *legal* aliens cannot be justified when it comes at the expense of actual citizens. Indeed, no persuasive policy justification has been offered for violating electoral equality and debasing the citizens' right to vote. As for *illegal* aliens, historical evidence shows granting them representation and apportionment "rights" was never contemplated by drafters of the Census Clause and the Apportionment Amendment.

By basing apportionment simply on aggregate bodies, Texas legislators are able to manipulate the "weighting" of voting populations by increasing their numbers in districts with fewer aliens. This Court has already found this general practice to be unconstitutional. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964). ("Weighting the votes of citizens differently, by any methods or means, merely because of where they happen to reside, hardly seems justifiable."). This abuse of the apportionment system is witnessed in other parts of the country where state and local governments use so-called "sanctuary" policies to encourage illegal aliens to migrate to their communities, thereby ramping up their respective state's representative base. On top of legislative votes at the state level, apportionment by total population disrupts legislative votes at the national level, including

Electoral College votes for President. One way for Texas to end the abuse under its current system is to harmonize its voting population with its total population by excluding legal and illegal aliens from its apportionment base.

This Court must act in order to return to the citizens of Texas their rightful share of political power and close the gross disparities between electors in the state's senate districts.

ARGUMENT

A. Equality Among Electors Requires the Invalidation of the Current Texas Districting Plan.

In *Burns v. Richardson*, this Court acknowledged that, barring a metric where a discriminatory choice to include or exclude persons could arise, equality among electors is paramount. 384 U.S. 73, 92 (1966). Equality and vote dilution cannot coexist. In *Reynolds*, this Court defined "vote dilution" as occurring when "[a]n individual's right to vote for state legislators is unconstitutionally impaired [because] its weight is in a substantial fashion diluted [ ] compared with votes of citizens living in other parts of the State." 377 U.S. at 567; *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A citizen] has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."), and *Reynolds*, 377 U.S. at 567 ("To the extent

that a citizen's right to vote is debased, he is that much less a citizen."). This principle arises from the "one person, one vote" principle embodied in our founding documents, Constitution, and documents of national historical significance as identified by the Court in *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.").

In *Burns*, the state of Hawaii redrew its districts by including only registered voters in its apportionment base so as to exclude both "military personnel" and "transients," groups whose numbers had grown considerably in the years previous. This Court upheld that plan against an equal protection challenge. In so doing, the Court noted that the increased concentration of the excluded groups in a particular county would have made apportionment by population "grossly absurd and disastrous." *Id.* at 94. According to the court, "[t]otal population figures may [ ] constitute a substantially distorted reflection of the distribution of state citizenry." *Id*. The court held that "with a view to its interim use, Hawaii's registered voter base does not on this record fall short of constitutional standards." *Id.* at 97.

In Texas with its outsized legal and illegal alien populations, blind adherence to apportionment by general population is creating a "distorted reflection" of the state's elector distribution and "grossly absurd"

senate districts. As the record reveals, under the current districting plan in Texas "the vote of an elector residing in a district where the number of electors is relatively high, like the districts in which Appellants reside, is given significantly less weight than the votes of those in districts where the number of electors is relatively low." Complaint at 2, *Evenwel v. Perry*, No. 1:14-CV-335 (W.D. Tex. Apr. 21, 2014); Appellants' Jurisdictional Statement at 9, 10 (Tables 2 and 3). In other words, the current plan dilutes Appellants' vote in a substantial fashion. As a result, the plan cannot stand.

Furthermore, electoral equality supersedes any real or imagined privileges of political representation possessed by legal and illegal aliens. As Judge Kozinski rightly stated in his concurring and dissenting opinion in *Garza v. County of Los Angeles*, "at the core of one person one vote is the principle of electoral equality, not that of equality of representation." 918 F.2d 763, 782 (9th Cir. 1990). An alien's "right" to political representation must give way to the *paramount* concern of equality among electors as "[t]he right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly *or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens*." *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) (emphasis added). When apportionment "rights" dilute the vote of the citizenry, the former must give way to the latter.

During the debates of the Reconstruction Congress over the Fourteenth Amendment's Apportionment Clause, Senators expressed concerns about the distortive effects of an apportionment system based on total population. Senator John Sherman of Ohio, for instance, could not understand why a state that has "a very large element of unnaturalized foreigners" should be given political power at the expense of other states. Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. PUB. L. 35, 59 (2010). For Sherman, the correct proposition was the one that "puts a citizen in one State on a footing of precise equality with a citizen in every other State." *Id.*[2] And this Court has so held that to be the standard.

The undeniable perversion of democracy at issue here has been compounded by Texas as the challenged apportionment has diluted the vote of the citizenry in favor of those not authorized to reside in the United States in the first instance. Whether the illegal alien has just been "transported into the United States by a smuggler, has received a deportation notice, or is simply an illegal resident who has not been apprehended because of ineffective federal

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[2] In contrast, Representative Roscoe Conkling from the big-immigration state of New York, lobbied to include unnaturalized foreigners because, as he said, the estimated "unnaturalized foreigners" in his state contributed "three Representatives and a fraction of a fourth." *Id.* at 52, 53, n.105.

law enforcement," Texas apportions them along with citizens and legal aliens. Charles Wood, *Losing Control of America's Future*, 22 HARV. J.L. & PUB. POL'Y 465, 470 (Spring 1999). The Constitution cannot be interpreted to sustain such a practice. Indeed, the granting of such rights does not comport with the general approach of this Court as outlined in *Mathews v. Diaz*, distinguishing between citizens and guests or interlopers:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, *nor the illegal entrant*, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its citizens and some of its guests.

426 U.S. 67, 80 (1976) (emphasis added).

B. Illegal Aliens Have No Right to Apportionment or Representation under the Constitution or the Fourteenth Amendment.

The doctrine of allegiance embodied in Congress's plenary power over naturalization rests on the condition that an alien must submit to the nation's laws and declare his or her intention to lawfully settle in order to be subject to those laws. Without such submission he or she is still subject to the laws of their foreign jurisdiction: "[W]hen [illegal] aliens only partially submit to the laws of their host nation they violate the first rule of the law of nations concerning emigration – the doctrine of allegiance and submission

of the government." Charles, *supra* at 63. The drafters understood that political privileges, such as apportionment and representation, were "subject to allegiance and subjecting one's self fully to the laws." *Id.*

During the Reconstruction debates, then-Senator Andrew Johnson of Tennessee stated that "when a person is an alien enemy, either being the *subject of a foreign jurisdiction* or by virtue of his own treason, he remains an alien enemy to this Government until Congress relieves him from that disability." *Id.* at 65 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2400 (1866)) (emphasis added). This disability included "forfeiting all the [political] rights that he ever enjoyed under the Constitution," including "*the right to be represented in Congress* . . . the right to hold office . . . [and] every right except such as he may exercise under the law of nations." *Id.* (emphasis added).

Illegal aliens, by their very existence in the United States, are not subjecting themselves "fully to the laws." Their very presence flouts the law. Just one example is the failure to register their presence with immigration authorities once they have been in the country for 30 days or longer. 8 U.S.C. § 1302.[3] Illegal aliens, therefore, do not possess rights to apportionment

[3] *See also* Jon Feere, *The Myth of the "Otherwise Law-Abiding" Illegal Alien*, CENTER FOR IMM. STUDIES (Oct. 2013), *available at* http://cis.org/myth-law-abiding-illegal-alien.

or representation under the Constitution or the Fourteenth Amendment.

C. The Ninth Circuit's "Access Theory" upon which the District Court Relied is Misplaced and Anachronistic.

In *Garza*, one of the last major decisions dealing with the one-person, one-vote principle, the United States Court of Appeals for the Ninth Circuit held that Los Angeles County was constitutionally required to use total population in redistricting because the people, including those who are ineligible to vote, form the basis for representative government. 918 F.2d 763. The court de-emphasized the effects such an approach could have on the eligible voters in a particular district, claiming that basing districts on voter population would "abridge the right of aliens and minors to petition that representative." *Id.* at 775. This "access theory" used to justify the denial of electoral equality, however, conflicts with this Court's previous pronouncement in *Burns* that equality among electors is paramount, and that the term "persons" in Section 2 of the Fourteenth Amendment's "whole number of persons in each State"-clause is amenable to an interpretation that effectuates the one-person, one-vote principle and eschews vote dilution. 384 U.S. at 90.

Considering that equality among electors is constitutionally paramount, the viability of the rigid "access theory" created by the *Garza* majority, and

followed by the district court here, depends on whether an electoral district's general population figures can "track" that district's voter population. "[U]nder ordinary demographic conditions where noncitizen populations are relatively small and spread more or less proportionately throughout the electoral area, total population is a reliable proxy for voter population. But, when there are large numbers of nonvoters and when those nonvoters are disproportionately concentrated in certain areas, this correlation begins to break down." Krabill & Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. L. & POL. 275, 282 (Spring 2012. "This correlative harmony between total population and voter population began to break down in the late 1980s and early 1990s when, driven by a large influx of concentrated illegal immigration, certain cities and counties faced the same disconnect between total population and voter population that Hawaii had faced in *Burns*." *Id.* Due to this radical change to our immigration policy and trends, "tracking" has become a constitutionally dysfunctional practice, especially in large immigrant receiving states such as Texas where non-citizens make up over 16 percent of the population.[4]

Given the difference in weight afforded to Texas's senate districts, the *Reynolds* Court today would

[4] *State and County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48000.html (last visited Aug. 04, 2015).

surely have found apportionment based on total population to be dilutive and inadequate. 377 U.S. at 579 ("Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."). Further, this Court stated two years later in *Burns* that they "carefully left open the question what population was being referred to" thereby signaling that gross voter disparities in the future could and should be corrected. 384 U.S. at 91; *see also Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from denial of certiorari) ("Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement . . . we have left a critical variable in the requirement undefined. We have never determined the relevant 'population' that States and localities must equally distribute among their districts.").

When *Reynolds* was decided in 1964 the distinction between total and voter population had a similar relative position among electoral districts around the country. Disparities were slight and thus could have little impact on electoral equality. But since the passage of the Immigration and Nationality Act in 1965, the immigrant population has dramatically expanded, making the practice of "tracking" increasingly problematic in many parts of the country. According to the 1960 census, four years before the *Reynolds* decision, the national count of immigrants was 9.7 million, or 5 percent of the population. The

1980 census, the first full census following the Act's implementation in 1968, showed a jump in national immigrant figures to 14.1 million, or 6 percent of the population.[5] The last census in 2010 showed an immigrant-count of *40 million*, or *13 percent* of the population, a "historic high" according to the Census Bureau. This change in immigration policy since *Reynolds* has turned the United States into the largest importer of people in the world by a very large margin.[6]

If such an increase in the immigrant population was distributed evenly among the electoral districts of the 50 states, electoral inequality would perhaps not be a problem. But currently, according to census experts, 40 percent of all immigrants coming into the country settle in just five cities: New York, Los Angeles, Chicago, Miami and Houston.[7] The same study found that Houston and Dallas-Fort Worth were

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[5] Elizabeth M. Grieco, *et al., The Size, Place of Birth, and Geographic Distribution: 1960 to 2010*, U.S. CENSUS BUREAU (Oct. 2012), page 19, Figure 1, *available at* https://www.census.gov/population/foreign/files/WorkingPaper96.pdf.

[6] *International Migration 2013*, UNITED NATIONS (2013), page 1, Bar Chart: "Countries with the largest numbers of international migrants, 2000 and 2013 (millions)," *available at* http://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/wallchart2013.pdf.

[7] Audrey Singer & Jill H. Wilson, *Immigrants in 2010 Metropolitan America: A Decade of Change*, BROOKINGS INST. (Oct. 13, 2011), *available at* http://www.brookings.edu/research/papers/2011/10/13-immigration-wilson-singer.

among six cities with the fastest immigration growth rates during the last census period.[8]

The velocity and concentration of the nation's immigration intake has created a "rotten borough" effect in many parts of the country, including Texas.[9] "Rotten borough" is a term from 18th and 19th century British politics used to describe a feature of industrialization where depopulated and usually pastoral districts could be carried by only a nominal amount of voters while other, newly industrialized districts had little to no representation at all. Until this apportionment system was reformed in the late 19th Century, these disparities were often purposely maintained by corrupt interests in order to control seats in the House of Commons.

University of Maryland Professor of Government James Gimpel prefers the term "hollow districts." In testimony before a congressional panel about the problems of total population-based apportionment, Prof. Gimpel spoke of the possibility under our current system of electoral districts actually having almost *no citizens* at all, and stated that "[n]early hollow districts do exist . . . and the proliferation of

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[8] Audrey Singer, *Immigrants in 2010 Metropolitan America: A Decade of Change*, BROOKINGS INST. (Oct. 24, 2011), *available at* http://www.brookings.edu/research/speeches/2011/10/24-immigration-singer.

[9] *Rotten Borough Definition*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/topic/rotten-borough (last visited Aug. 04, 2015).

such districts does tax the citizen status of all Americans."[10]

Texas's system of disregarding electoral equality, relying on questionable court decisions, also has national implications. A relative increase in the population of one state can result in an increase in that state's share of representation in the House and its share of Electoral College votes, along with a decrease in the share of one or more other states. This makes apportionment a "zero-sum game." Wood, *supra* at 489. In Texas's case, it received four congressional seats (the most of any state) following the 2010 census;[11] seats which would have been distributed elsewhere but for the state's rapidly growing legal and illegal alien populations. In short, states with more citizens are being penalized.

Noting that the redistribution of seats moves from districts with high-citizen, but static, populations to districts with expanding non-citizen populations, Prof. Gimpel in his testimony described the prevailing perversity thusly:

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[10] *Counting the Vote: Should only U.S. Citizens be included in Apportioning our Elected Representatives?: Hearing before House Subcommittee on Federalism and the Census*, 109th CONGRESS 88 (2005) (statement of James G. Gimpel, Professor of Government, University of Maryland, College Park), http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26074/html/CHRG-109hhrg26074.htm (last visited Aug. 04, 2015).

[11] Kristin D. Burnett, *Congressional Apportionment*, U.S. CENSUS BUREAU (Nov. 2011), page 2, Table 1, *available at* https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.

> A Member of Congress who receives 200,000 votes will be thrown out, and the one who has received [ ] 50,000 will be retained only because of noncitizens in the apportionment phase. . . . [T]he perverse moral of the current system is clear: *The greater the proportion of citizens in a State, the fewer congressional seats that State receives.*[12]

University of California sociologist Roger Waldinger has observed these effects in his state of California noting that "[h]eavy immigrant densities make the Mexican-American districts into rotten boroughs, where only a small proportion of the adult population votes, a situation that does little to encourage electoral competition or mobilization." Roger Waldinger, *From Ellis Island to LAX: Immigrant Prospects in the American City*, 30 INT. MIGR. REV. 1078, 1085 (Winter 1996).

In the case at bar, Appellants' senate districts appear to have become "rotten boroughs" to a large degree. Their districts, numbers 1 and 4, have a respective Citizen Voting-Age Population (CVAP) of 568,780 and 533,010.[13] By contrast, senate districts 6 and 27, some of the largest immigrant-districts in the state, have respective CVAP of only 372,420 and 376,495. A "substantial variation" such as this cannot

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[12] Gimpel testimony, *supra* note 10.

[13] *See* Senate Districts, *Texas Political Almanac,* http://www.txpoliticalalmanac.com/index.php?title=Main_Page (last visited Aug. 04, 2015).

be constitutionally sustainable. *Avery v. Midland County*, 390 U.S. 474, 485 (1968) (holding that the Constitution forbids substantial variation in drawing districts for units of local government). As a result of these disparities, the latter districts need far fewer voters to win, which is a direct affront to the one-person, one-vote principle. Indeed, voter turnout in the last general election for districts 1 and 4 was 294,353 and 250,521, respectively,[14] compared to district 6 and district 29 where only 131,490 and 169,398 voters showed up. District 27 had an even lower voter turnout of 113,542, but that seat was unopposed.

Much like the rotten boroughs of 18th and 19th century Britain, certain senate districts in Texas, those with greater amounts of legal and illegal aliens, are able to gain greater representation per voter. Change and adaptation is the cure for any anachronistic policy. This Court in *Burns* chose to respond to new, changing conditions. The lower court here erred by not doing likewise. As a result, the Court should rule in Appellants' favor.

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[14] *Race Summary Report – 2012 General Election*, OFFICE OF THE SECRETARY OF STATE (Nov. 2012), http://elections.sos.state.tx.us/elchist164_state.htm (last visited Aug. 04, 2015).

D. Apportionment by Total Population Induces Abuse.

Total population apportionment incentivizes elected officials to push for so-called "sanctuary" policies or laws that encourage illegal aliens to migrate to their districts.[15] The result is an increase to their respective representative base and political advantage:

> The action of some local governments encouraging the settlement of unlawfully present aliens through sanctuary policies ultimately increases their respective State's representative base. Just as the Founding Fathers experienced problems with the varying rules of naturalization affecting the granting of the rights of citizenship without the consent of the Confederation, a similar dilemma presents itself when states allow and encourage unlawful aliens to settle within their respective borders. Without the consent of the Union, some localities and municipalities are openly permitting and encouraging unlawful aliens to settle, thus granting them the conditional political privilege of being apportioned and represented; all the while increasing their respective State's apportionment base.

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[15] No precise definition of the term "sanctuary policy" or "sanctuary law" exists. Generally, it refers to an act, ordinance, or policy that limits or prohibits public officials from assisting or cooperating with federal immigration authorities seeking to apprehend and remove illegal aliens.

Charles, *supra* at 76. What is more, these areas also receive more funding from the federal government due to their outsized political representation.

Although the decision of where to settle is no doubt multifactorial for an illegal alien, the magnet effect of a sanctuary policy or law is clear. The recent tragic murder of an innocent young women by an illegal alien in the city of San Francisco proves this point. When the five-time deported admitted killer was asked by a reporter granted an interview if he returned to San Francisco because of its sanctuary law, he stated "yes."[16]

The data confirms that counties and cities that maintain sanctuary policies and laws also have a larger share of the national illegal alien population. Specifically, 3.2 million of the nation's 11 million illegal aliens reside in just 19 counties spread over metropolitan areas of New York-New Jersey, Los Angeles, Chicago, Miami and San Francisco-Oakland.[17] Each of these localities has a sanctuary policy or law. Similar to the overrepresentation enjoyed by certain senate districts in Texas, these five

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[16] *San Francisco Shooter States He Chose City for Sanctuary Policies*, ABC 7 KGO (Jul. 06, 2015), *available at* https://www.youtube.com/watch?v=K2WoQ8Pcttk#t=117.

[17] *See* Unauthorized Immigrant Profiles – State and County Estimates, MIG. POL'Y INST., http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles (last visited Aug. 04, 2015).

areas receive a full 8 seats in the House of Representatives which they should not have.

E. Continued Debasement of Citizens' Voting Power Due to Abuse of the Apportionment Process Demands a Swift Response from this Court.

The velocity and concentration of legal and illegal immigration makes resolution of the issue at bar more urgent than ever. Texas has failed to accommodate and adapt to its current immigration rates resulting in the diminishment of its citizens' political power – an unsustainable situation under *Reynolds* and the Fourteenth Amendment. *See Connor v. Finch*, 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives.").

Curiously, the district court asserts that complaints about the inherent unfairness of the political system must be remedied by that very same system. *See* Memorandum Opinion and Order of the United States District Court for the Western District of Texas, *Evenwel v. Perry*, No. 1:14-CV-335 (W.D. Tex. Nov. 05, 2014) ("We conclude that Plaintiffs are asking us to "interfere" with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals. We decline

the invitation to do so.") (citing *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) and *Chen*, 206 F.3d 502). Since apportionment has already substantially affected the mechanism of political change, that is, the electoral process, Appellants cannot be limited to that process for recourse and remedy. Only this Court can remedy this situation. Indeed, this Court has weighed into the "political thicket" to address voting district-disparities numerous times since *Baker v. Carr*. 369 U.S. 186, 258, 259 (1962) (Clark, J., concurring) (stating "the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.' "); *see also Burns*, 384 U.S. at 93 (leaving open what a "permissible population basis" could be in the future.). How should citizens react if a legislative vote at the state or national level to correct the current system was defeated by votes from malapportioned districts? Further, legislators who benefit from decreasing the "weighting" of voting populations by increasing their numbers in districts with fewer legal and illegal aliens are arguably incentivized to block reforms. This Court, therefore, must act in order to bring the Fourteenth Amendment's one-person, one-vote principle back to its *Reynolds*-era moorings and end the inversion of electoral equality in Texas.

Resolution of the issue at bar is made even more urgent as the illegal immigration rate is likely to actually increase. This is predicted by numerous sources due to several factors, including lax border

security, collapsing detainment rates, and the "magnet" effect of mass legalization programs, such as the Deferred Action for Childhood Arrivals (DACA) program of 2012 and the Deferred Action for Parental Accountability (DAPA) program of 2014.[18]

In its ongoing litigation with the federal government over DACA and DAPA, Texas stated in its complaint that interviews with apprehended Unaccompanied Alien Children (UAC), "showed overwhelmingly" they were "motivated by the belief that they would be allowed to stay in the United States." Amended Complaint for Declaratory and Injunctive Relief at 14 (Docket No. 14), *Texas v. United States*, No. 1:14-CV-254 (S.D. Tex.). Texas also submitted written testimony supporting this conclusion from Dr. Karl Eschbach, a former demographer for the state and an expert in demographic trends and illegal immigration. Declaration of Karl Eschbach, Ph.D. supporting Plaintiffs (Docket No. 64-33), *Texas v. United States*, No. 1:14-CV-254 (S.D. Tex.). Eschbach told the court that legalization policies "encourage those eligible to stay in the United States and incentivizes other ineligible unauthorized immigrants to

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[18] William A. Kandel, *et al.*, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, CONG. RES. SERV. (Jul. 03, 2014), *available at* http://fas.org/sgp/crs/homesec/R43628.pdf; *see also* Jennifer Scholtes, *CBP Chief: Policies may be Fuelling Spike in Minors Crossing Border Illegally*, CQ ROLL CALL (Apr. 2, 2014) and David Nakamura, *Influx of Minors across Texas Border Driven by Belief They will be Allowed to Stay in U.S.*, WASH. POST (Jun. 13, 2014).

remain in the United States with the hope that they will be the beneficiaries of a future adjustment of status." *Id.* at 3. Further, he stated, "the effect of DACA and DAPA is to incentivize residents of other countries to come to the United States." *Id.* at 11.

Besides Texas, the federal government has also admitted to the magnet effect policies can have on illegal immigration. In a recent case regarding the constitutionality of denying UACs a Sixth Amendment right to counsel, attorneys for the Justice Department argued that if such a grant was made, this could lead to increased immigration in the future. Order at 35 (Docket No. 114), *JEFM v. Holder*, No. C14-1026 (W.D. Wash. Apr. 13, 2015). ("Defendants assert that the effect of a ruling favorable to plaintiffs would be to encourage even more youngsters to journey illegally to the United States."). Further, the federal government has been predicting a bigger surge of UACs going forward. Officials have stated apprehensions for 2015 will rise to 127,000;[19] a giant increase from 2014's figure of 90,000 and a manifold increase from 2003-2011 annual levels which averaged around 7,000.[20]

[19] David Rogers, *Flood of child migrants a neglected challenge*, POLITICO (May 28, 2014), *available at* http://www.politico.com/story/2014/05/flood-of-child-migrants-a-neglected-challenge-107198.html.

[20] *Id.*

CONCLUSION

For the foregoing reasons, *amicus curiae* IRLI respectfully requests this Court to reverse the judgment of the district court in Appellants' favor.

Respectfully submitted,

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