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Testimony of

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Chairwoman Huffman, Vice Chairman Hinojosa, and members of the Select Committee:

Thank you for the invitation to testify at the inaugural meeting of the Senate Select Committee on Redistricting.

The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and legal institute that works to reform, revitalize, and defend our country's system of democracy and justice. For more than two decades, the Brennan Center has built up a large body of nationally respected research and work on these issues, including in the fields of redistricting and election law. I am Senior Counsel in the Center's Democracy Program, where my work focuses on redistricting and the census.

My remarks today will focus on three particular areas where Texas has the potential to stumble in redistricting in 2021, but I am happy to address additional topics. I am also happy to follow up with the Committee with additional information, either on the subject of my testimony or on other topics, and to offer other help and assistance.

Race and Partisan Gerrymandering

Texas is among the most demographically diverse states in the country and also is more polarized politically along racial and ethnic lines than most states. This has meant that Texas lawmakers of both parties have often faced pressures to use race for political purposes when drawing maps.

But there are important legal limits to the ability to do so, even if lawmakers can show that their motive was purely political. These limitations remain despite the U.S. Supreme Court's ruling this summer in *Rucho v. Common Cause* that partisan gerrymandering claims are non-justiciable in federal court.[1]

From the standpoint of Texas, the most significant constraint on the aggressive seeking of partisan advantage is that the use of race or ethnicity as a proxy for partisanship remains constitutionally suspect under the Supreme Court's racial gerrymandering line of cases and could subject the state to liability for racial, rather than partisan, gerrymandering.

Unlike claims rooted in racial animus, the Supreme Court's racial gerrymandering jurisprudence does not require proof of discriminatory intent. Rather, the legal inquiry is whether race predominated in the drawing of district boundaries. The Supreme Court has made clear that a state's motive is irrelevant to this inquiry. Rather, strict scrutiny review is triggered whenever:

> [L]egislators have 'place[d] a significant number of voters within or without' a district predominately because of their race, regardless of their ultimate objective in taking that step . . . In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.[2]

This limitation is notable. Historically, in Texas, the engineering of partisan advantage for either Democrats or Republicans has relied heavily on underrepresenting communities of color in order to shore up electoral opportunities for white candidates of whatever party is in charge at the time. Indeed, given the high level of racially polarized voting in the state, it is difficult to successfully gerrymander in Texas without at least some targeting of racial and ethnic minorities.

The 2011 congressional map passed by the Texas Legislature, for example, had some of the highest rates of partisan bias of any congressional map this decade. However,

[1] Rucho v. Common Cause, 139 S.Ct 2484 (2019).

[2] Cooper v. Harris, 137 S.Ct. 1455, 1473-4 fn.7 (2017) (emphasis added).

the partisan bias was a product largely of the failure to preserve a Latino ability to elect district in West Texas and the failure to create additional electoral opportunities for Latinos in North Texas.[3] When a court subsequently modified the map to address the treatment of minority communities, the map's bias fell significantly.[4] Maps proposed by Latino groups, but not adopted, would have reduced the bias even further.[5]

The Apportionment Base

This Committee also could face calls for it to change the apportionment base used in redistricting.

Currently, every state, including Texas, draws both legislative and congressional districts on the basis on total population, ensuring that all districts have roughly equal numbers of people.[6]

However, President Trump raised the possibility in a July 11, 2019 executive order that some states might wish to draw legislative districts instead based on eligible voters instead of total population in the upcoming cycle of redistricting.[7] Chairman Phil King has publicly stated that the House Redistricting Committee intends to continue the current practice of using total population in redistricting. We urge that this Committee also continue to use total population.

The Texas Constitution requires that districts for the Texas House of Representatives be drawn on the basis of population.[8] However, parallel provisions relating to redistricting of the Texas Senate are silent as to the apportionment base.[9] Nonetheless, there are strong legal, historical, and pragmatic reasons for maintaining Texas' current practice of using total population.

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[3] Laura Royden, Michael Li, and Yurij Rudensky, "Extreme Gerrymandering and the 2018 Midterm." New York City: Brennan Center for Justice, March 23, 2018, last accessed October 28, 2019, https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf

[4] Ibid.

[5] Ibid.

[6] Brief for the States of New York, et al., as Amici Curiae in Support of Appellees, Appendix 1, Evenwel v. Abbott, 578 U.S. __ (2016) (No. 14-940) (collecting state apportionment laws).

[7] Collecting Information About Citizenship Status in Connection with the Decennial Census, Exec. Order No. 13,880, 84 FR 33821 (July 11, 2019).

[8] Texas Const. Art. III, sec. 26.

[9] Texas Const. Art. III, sec. 25.

First, the use of total population is rooted in the longstanding American belief that there should be "no taxation without representation." As the Supreme Court recognized in 2016 in *Evenwel v. Abbott*, "the Framers of the Constitution and the Fourteenth Amendment comprehended [that] representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy debates . . . [as well as] in receiving constituent services." [10]

Just as importantly, drawing Senate districts on the basis of eligible voters would penalize areas with large numbers of children. Children in Texas account for roughly 80 percent of persons not eligible to vote, according to an initial Brennan Center estimate. Both urban areas and state's fast-growing suburbs and exurbs (among the most dynamically growing regions in the nation) would be impacted. Worse, it would impose a penalty on these regions despite the fact that during the course of the decade many of those who are currently children will turn 18 and become eligible to vote.

Finally, and perhaps most importantly, any switch in the apportionment base for the Texas Senate also would be subject to provisions of federal law that bar discrimination against racial or language minorities. These include section 2 of the Voting Rights Act, which prohibits states from using a "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[11] In addition, any intentional discrimination on the basis of race would violate the Fourteenth and Fifteenth Amendments of the Constitution.

A switch in the apportionment base for Senate districts would adversely impact the ability of minority communities, and, in particular, Latinos, to participate in the electoral process. Thus, any reduction in minority electoral power will likely violate section 2 of the Voting Rights Act and, if the Legislature adopts a map knowing about that effect, it also faces a significant risk of being found to have engaged in intentional discrimination.

Dummymandering

Last, but not least, it will be important for this Committee to understand that redistricting is about tradeoffs and to weigh those tradeoffs carefully.

In the past, the Texas Legislature has often chosen to aggressive maximize the number of seats held by the party in charge (as noted, frequently by targeting communities of color). But doing so has required the party in charge to make a tradeoff between having safer seats and having more seats.

[10] Evenwel v. Abbott, 136 S.Ct 1120, 1132 (2016) (internal citations omitted).

[11] 52 U.S.C. § 10301.

While we do not offer political advice, we do note that a "more seats" strategy has proven fraught the past two cycles given Texas' fast rate of population growth and its rapid demographic change. In places like the Dallas-Fort Worth Metroplex and greater Austin, for example, both legislative and congressional seats that were safe at the start of the decade have become competitive or even flipped by the end of the decade. In Dallas County, this has now happened two decades in a row.