BEFORE THE TEXAS SENATE COMMITTEE ON REDISTRICTING

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Testimony of:

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Issues Affecting the Apportionment Base

A first question in any redistricting is "Who counts?" Or, to put it another way, if the districts are to be drawn to be equal in size, by what means do we measure equality? In the past, that has not been a question. Districts were drawn to have roughly equal numbers of persons with total population being the apportionment base. In recent years, however, there has been an effort by some to switch the apportionment base from total population to a metric that is based on the number of potentially eligible voters with citizen-voting-age population (CVAP) being the measure that is generally suggested.

There are legitimate policy arguments for the use of either metric as each embodies a different theory of representation. The two theories were described by Ninth Circuit Judge Alex Kozinski as representational equality and electoral equality.[1] A representational equality theory is based on the premise that a legislator represents all the residents of the district, young and old, citizen and non-citizen. All are affected by the actions of the legislative body, and under a representational model should treated equally when districts are drawn. An electoral equality model, on the other hand, values equality of voting strength. Essentially, districts should have equal numbers of voters—or, more precisely, equal numbers of persons potentially eligible to vote. Persons backing an electoral equality model legitimately ask whether it is fair to have a district that, even though it is equal to other districts in total population, has a significantly greater number of voters. Representational equality proponents counter whether it's fair to have a retirement

community such as Sun City where all the residents are at least 55 years of age count twice as much in the redistricting calculus as an adjacent community where the average household consists of two adults and two children.

Although each of the two systems has reasonable theoretical and philosophical underpinnings, legislators and courts are likely to focus more on the practical effect of the chosen system. If a legislative body were to switch from a total-population metric to a CVAP standard, districts that currently have a disproportionately high number of non-citizens and a disproportionately high number of children would need to become larger by adding more citizens and adults. In Texas, the group with the largest number of non-citizens is Hispanic. In fact, 27.8 percent of the adult Hispanic population is composed of non-citizens compared to only 5.1 percent of the adult non-Hispanic population.[2] Additionally, the group with the highest number of children is Hispanic.[3] Thus, switching to a CVAP standard would make Hispanic districts larger as adult citizens from adjacent areas are moved into the predominantly Hispanic district to increase the district's CVAP. Thus, it would be more difficult to draw new predominantly Hispanic districts and, perhaps, more difficult to retain the existing number of predominantly Hispanic districts. The partisan result of switching to a CVAP-based system would be, according to Hans von Spakovsky, to create "a noticeable shift toward Republicans and away from urban districts."[4]

The litigation effort to require a CVAP apportionment base

Three cases originating in Texas attempted to obtain a judicial declaration that CVAP, rather than total population, is the required apportionment base.[5] In the first, *Chen v. City of Houston,[6]* the nature of the apportionment base was a peripheral issue; however, it became clear in oral argument in the Fifth Circuit and in the Fifth Circuit opinion that it was one that caught the attention of the court. The Fifth Circuit declined to find that CVAP was the required

apportionment metric and concluded that the issue was a political question left to the political process.[7] The plaintiff appealed to the Supreme Court. It declined to hear the case, although one Justice dissented from the denial of certiorari because he felt it was an issue the Court should address.[8] A second effort was in made *Lepak v. City of Irving*[9] to bring the issue to the Supreme Court in order to attain a ruling that CVAP or a similar eligible-elector metric was the required apportionment base, but it, too, failed.[10]

The third effort, *Evenwel v. Abbott*,[11] which related to the districting of the Texas Senate, did produce a Supreme Court opinion. The Court, however, ruled that the constitution did not require Texas to use CVAP or a similar metric when drawing districts. Total population, which is the metric that has been used almost universally throughout the United States, complied with constitutional requirements. The Court noted that the case did not require it to determine if states could choose to use CVAP as the apportionment base, and it made clear that it was not addressing that issue.[12] Thus, as a matter of federal constitutional law, it is clear that total population is a permissible apportionment base. There is Fifth Circuit dictum suggesting that CVAP is a permissible, but not a required choice, but the Supreme Court has not directly addressed whether CVAP may be used as the metric by which districts are balanced.[13]

Potential Issues Regarding the Use of CVAP

If the legislature wishes to abandon the existing and traditional total-population apportionment base in favor of a CVAP or similar voter-eligible metric, there are considerations other than whether the use might be permissible under the U.S. Constitution.

The Texas Constitution, for example, addresses the apportionment base for the two houses of the legislature. Under article III, section 26, of the Texas Constitution the House of Representatives is to be apportioned among the counties according to "population." The Senate,

though, is governed by article III, section 25, which provides that the body is to be divided into districts "according to the number of qualified electors." Presumably, this would require drawing districts to include equal numbers of registered voters. There are, however, federal district court decisions and an attorney general opinion that find the article III, section 25, provision for apportioning senate districts by qualified electors to be unconstitutional under the Fourteenth Amendment to the United States Constitution.[14] Notwithstanding these earlier decisions, it may be likely that if the issue were presented to the federal courts today, they would not find the Texas Constitutional provision to be invalid on its face, at least insofar as it was relied on to support a potentially eligible-voter metric such as CVAP. However, that does not necessarily resolve the issue. If a districting plan based on CVAP rather than total population, in fact, operates to discriminate against racial or ethnic minorities, it still could be found to be invalid. Switching from a total population to a CVAP system does not necessarily mean that the resulting districting plan will discriminate against Hispanics or another protected minority group, but it may very likely increase the risk that it will.

The Texas Constitution does not directly address the standard for congressional districting. While the United States Constitution is clear on how congressional seats are to be apportioned among the states—*i.e.,* on a population-based rather than a voter-based model—it does not specifically address how the district lines are to be drawn within the states. The issue of how congressional seats are apportioned among the states, though, suggests that the framers of the constitutional provision chose a representational equality measure so that congressional districts were designed to contain equal number of persons. Indeed, in the issue of whether seats should be apportioned among the states on the basis of population rather than voters was extensively debated in both the House and Senate when the Fourteenth Amendment was being drafted, and the

members were well aware of the impact of each model. There were direct votes to substitute a voter-based model for a population-based model, and the population-based model prevailed by a vote of 131-29 in the House[15] and by a vote of 31-7 in the Senate.[16] Thus, while the Constitution is silent on how the districts are to be drawn within the states, the language and history relating to apportionment of seats among the states reflect a population-based model rather than a voter-based or voter-eligible-based mode is contemplated.

The Voting Rights Act

For the first time since 1981 the Legislature will adopt a post-census redistricting that is not subject to preclearance under section 5 of the Voting Rights Act. Thus, it is not necessary to determine whether a potential switch from a population apportionment base to a CVAP base is retrogressive, which was the section 5 standard.[17] Any districting plan, though, must not have either the purpose or effect of discriminating against groups protected by the Voting Rights Act if it is to escape section 2 scrutiny. That is a judgment that can be made only in the context of an actual districting plan. It is important to be aware that a CVAP-based system will likely have the effect of making it more difficult to draw districts where Hispanics are likely to enjoy electoral success, and, thus, may make it more difficult for the final plan to conform to section 2 requirements.

Will data be available to support a CVAP apportionment base?

CVAP data is currently available at the census-block-group level from the five-year American Community Service file. That data, which is derived from a statistical sample and is reported at the 90-percent confidence level is not sufficiently specific to draw districts. In order to develop a more accurate and useable CVAP file, the Department of Commerce recently sought to add a citizenship question to the 2020 census. This was highly controversial, in part because

demographers and census professionals believed that adding the question without prior testing of its effect would compromise the accuracy of the census and, in part because the addition of the question was thought by some to have a partisan motivation. The issue of adding a citizenship question made its way to the Supreme Court, which ruled in June that the Department's decision to add the question was required to be set aside. The Secretary of Commerce was required to provide a reasoned justification for his action, but the Court determined that the justification advanced—*i.e.,* to assist the Department of Justice in its enforcement of the Voting Rights Act— was pretextual and contrived.[18]

Although the ostensible reason of assisting the Department of Justice in enforcing the Voting Rights Act was contrived, the apparent actual reason was to provide a database that could be used to draw districts on the basis of CVAP. Due to fast approaching requirements for printing the census forms for the 2020 census, there was no time following the Court's ruling for the Department of Commerce to correct its error in time to meet the printing deadline. In an effort to have block-level CVAP numbers in time for the post-2020 redistricting, President Trump issued an executive order designed to facilitate the Census Bureau's ability to use administrative records in combination with the census to produce the necessary database.[19]

While CVAP data derived by merging administrative records with census data may well be more accurate than data derived from the census questionnaire, it may not be clear how accurate and usable the data is until it is actually developed and published. It is anticipated that the CVAP data contemplated in the executive order will be released at the same time as the basic redistricting data—the P.L. 94-171 file—which is required to be released by April 1, 2021 but will likely be released a month or more before that date. If there is a government shutdown, which is a possibility if the House, the Senate, and the President cannot agree on a budget prior to November 21, the

Census Bureau may be delayed in its preparations for the 2020 census. This could affect the timing of the census release. Finally, since the CVAP numbers are being prepared pursuant to an executive order, that decision could be reversed if there is a change in administrations, which, depending on the result of the November 2020 election, could occur prior to the scheduled release of the CVAP data.

Conclusion

During the modern era, Texas has historically used total population when drawing districts. Efforts to require states to use CVAP as the apportionment base have been rejected by the courts, but the Supreme Court left open the issue of whether states and local jurisdictions could choose to redistrict on that basis. While the courts would likely find that, as a general matter, using CVAP is a permissible choice, any particular plan would have to be carefully designed to ensure it conformed to the requirements of section 2 of the Voting Rights Act. Meeting section 2 requirements is likely to be harder when using a CVAP base, since it will likely make it more difficult to draw districts where Hispanics have an equal opportunity to elect. In any event, any decision to switch to something other than total population as the apportionment metric will need to wait publication of the census numbers to learn whether useable CVAP data will be available.

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[1] *Garza v. County of Los Angeles,* 918 F.2d 763, 781 (Kozinski, J., concurring in part and dissenting in part).

[2] American Community Survey, 2017 one-year estimates, tables B05003 and B05003I. The percentage of non-citizens among adult Asians is somewhat higher than among adult Hispanics, but the number of Hispanics is many times larger.

[3] The median age for Hispanics in Texas is 28.9 years, compared to 42.2 for non-Hispanic Whites, 35.7 for non-Hispanic Asians, and 33.2 for non-Hispanic Blacks. American Community Survey, 2018 one-year estimates, tables B1002I, B1002H, B1002D, and B1002B.

[4] Hans A. von Spakovsky, *Evenwel v. Abbott: Destroying Electoral Equality and Eroding "One Person, One Vote,"* 2016 CATO SUP. CT. REV. 101, 118 (2016).

[5] The witness was the lead counsel for the City of Houston and for the City of Irving in the first two of those cases. In the third, *Evenwel v. Abbott,* he represented Harris County as an amicus in the Supreme Court.

[6] 206 F.3d 502 (5th Cir. 2000).

[7] *Chen,* 206 F.3d at 528.

[8] *Chen v. City of Houston,* 532 U.S. 1046 (Thomas, J., dissenting from denial of certiorari).

[9] 453 Fed. Appx. 522 (5th Cir. 2011) (per curiam).

[10] *Lepak v. City of Irving,* 569 U.S. 904 (2013) (mem.) (denying certiorari).

[11] ___U.S.___, 136 S.Ct. 1120 (2016).

[12] *Id.,* at 1133.

[13] Addressing a somewhat unusual situation in Hawaii, which had a large transient military population, the Supreme Court noted that it had been shown no constitutionally founded reason to interfere with a state's decision either to include or exclude aliens, transients, short-term or temporary residents, or persons convicted of crime in the apportionment base. It did note in that case, though, that it had accepted a voter-based apportionment "only because . . . it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Burns v. Richardson,* 384 U.S. 73, 92-93 (1966).

[14] *Kilgarlin v. Martin,* C.A. No. 63-H-390 (W.D. Tex. January 11, 1965) (summary judgment) (three-judge court); *see also, Kilgarlin v. Martin,* 252 Fed. Supp. 404, 411 (S.D. Tex.1966) (three-judge court) (referring to the earlier summary judgment), *rev'd on other grounds,* 386 U.S. 120 (1967); *Terrazas v. Clements,* 581 F. Supp. 1319, 1328 (N.D. Tex. 1983) (three-judge court) (finding the requirement to draw districts according to the number of qualified electors diluted the voting strength of racial and ethnic minorities and discriminates against them in violation of the Fourteenth and Fifteenth Amendments); OPIN. TEX. ATTY GEN'L No.MW-350 (1981).

[15] *Congressional Globe,* 39th Cong., at 538 (Jan. 31, 1866).

[16] *Id.,* at 2986, 2991 (June 6, 1866). A more detailed description of the history of the congressional apportionment language in section 2 of the Fourteenth Amendment can be found in Harris County's U. S. Supreme Court amicus brief in *Evenwel v. Abbott*, located at 2015 WL 5731668.

[17] Under the section 5 retrogression standard there would have been a strong probability that a switch from a total-population metric to a CVAP metric would have produced an objection.

[18] *Dept. of Commerce v. New York,* __U.S.__, 139 S. Ct. 2551, 2575-76 (2019).

[19] Exec. Order No. 13,880 (as of July 11, 2019), 84 Fed. Reg. 33,821 (July 16, 2019).