No. 14-940

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 CHILDREN'S DEFENSE FUND, THE FAIR ELECTIONS LEGAL NETWORK, AND THE UNION FOR REFORM JUDAISM & CENTRAL CONFERENCE OF AMERICAN RABBIS, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ROBERT BRANDON
JON SHERMAN
ARCHITA TAYLOR
FAIR ELECTIONS LEGAL NETWORK
1825 K Street NW
Suite 450
Washington DC 20006
(202) 331-1550

CORY D. SZCZEPANIK
SIDLEY AUSTIN LLP
2001 Ross Avenue
Suite 3600
Dallas, TX 75201
(214) 981-3300

DAVID R. CARPENTER*
JOSE SANCHEZ
SIDLEY AUSTIN LLP
555 West Fifth Street
#4000
Los Angeles, CA 90013
drcarpenter@sidley.com

CAMERON F. KERRY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

September 25, 2015 * Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

The Children's Defense Fund ("CDF") is a national leader for the rights of children who cannot vote, lobby, or speak for themselves. CDF's Leave No Child Behind® Mission is to ensure every child a *Healthy Start,* a *Head Start*, a *Fair Start*, a *Safe Start* and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. The organization pays particular attention to the needs of poor children, children of color, and those with disabilities. CDF educates the Nation about the needs of children and encourages preventive investments before children get sick, drop out of school, get into trouble, or suffer family breakdown.

The Children's Defense Fund-Texas is a branch of CDF committed to raising awareness specifically about the needs of Texas children, connecting children and families to resources, and working with partners statewide to coordinate broad support for legislative action on behalf of the children of Texas. CDF-California, CDF-Minnesota, CDF-New York, and CDF-Ohio also join in this brief because of this case's nationwide implications. CDF's branch offices are in states that account for 34.2 % of the country's children, 36.7 % of all poor children, 46.4 % of the total number of children of color, 48.6 % of children of color in poverty, and 36.2% of the country's uninsured

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[1] The parties have consented to the filing of this brief through their omnibus consents filed with this Court on June 9 and 10, 2015. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

children. CDF and its state branches are thus especially interested in ensuring that children have equal representation in state and local governments as policies affecting them are being developed.

The Fair Elections Legal Network (FELN) is a national, nonpartisan voting rights and legal support organization focused on removing barriers to registration and voting for traditionally under-represented constituencies. FELN works to improve election administration and access to voting through administrative, legal, and legislative reform, as well as through legal and technical assistance to voter mobilization organizations. FELN strives to make the processes of voter registration, voting, and election administration as accessible as possible for every American. FELN specifically focuses on how these processes impact students, youth, and minority voters. As it relates to young people, FELN seeks to expand the franchise and improve election processes through the implementation of policies like preregistration of 16- and 17-year olds, registration of 18-year olds through high schools, and encouraging the use of on-campus polling locations at colleges and universities.

The Union for Reform Judaism (URJ) consists of 900 member congregations across North America, including 1.5 million Reform Jews. The Central Conference of American Rabbis (CCAR) is an organization of more than 2000 rabbis serving the Reform Jewish Movement. As part of their religious commitment to social justice, the URJ and CCAR have been involved in advocacy before courts and legislatures on numerous issues, and come to this issue rooted in our firm and longstanding commitment to the principle of voting representation that is so central to the functioning of a healthy

democracy. The URJ and CCAR have appeared before this Court, for example, on issues relating to the electoral process, and will be affected by the outcome of this case insofar as they frequently advocate in state legislatures on behalf of those who are most vulnerable, who include children and families.

Proyecto Azteca, which is a member Equal Voice Network-Rio Grande Valley, and Texans Care for Children also join as signatories to this brief as Texas-based organizations dedicated to engaging in advocacy and providing support for children and low-income families.

Amici submit this brief in support of Appellees urging affirmance of the decision below upholding the constitutionality of a Texas Senate apportionment plan ("the Plan"). By creating state senate districts with approximately equal total populations, the Plan ensures equal representation in the legislature for people in areas with high concentrations of children, so that state services and resources – particularly with respect to education – are allocated fairly and appropriately to those who need them most.

As advocates on behalf of the rights of children and families and of underage citizens, *Amici* have a strong interest in confirming that representational equality of the total population, including children, is a constitutionally valid objective. *Amici* support a rule that equalizing representation based on total population should be required (recognizing that, in certain cases, other metrics may be used as reasonable proxies or supporting factors). At a minimum, however, States should have the discretion to use total population rather than citizen voting age population as the relevant and controlling metric in their apportionment plans.

SUMMARY OF ARGUMENT

Children are not able to vote, but they have a vital stake in the affairs of our Nation, just as the Nation has a vital stake in its children. In our representative democracy, "[l]egislators represent people." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Throughout our nation's history and several constitutional amendments, the voting franchise has been extended to include non-freeholders, slaves, and male citizens of all races and color (through the Thirteenth and Fifteenth Amendments), women (Nineteenth Amendment), and those eighteen years of age and older (Twenty-Sixth Amendment). Children under the age of 18 are 23% of the total U.S. population – and an even greater share of the population in Texas – and are now the largest segment of people not included in the voting population.

The problem with ignoring such a substantial share of the population in an apportionment plan is that in many states and other political sub-divisions – including Texas – the child population is concentrated in certain areas. Requiring jurisdictions to equalize citizen voting age population ("CVAP") would result in some legislators serving substantially overpopulated districts, and would undermine the representational interests of children and people in areas with higher underage populations. By diluting their political power in favor of those in less populated areas, children and families will have less access to critical resources, including quality education, health care, and services supporting children living at or below the poverty line. Relying on CVAP in such contexts also would create inequality even among *voters*, as significant numbers of citizens who are underage at the time of

apportionment will "age into" the eligible voter population while the plan is in effect.

Amici therefore agree with the arguments being made by the State of Texas and other *amici* in support of the Plan. This Court has allowed states latitude to include or exclude different categories of nonvoters "in the apportionment base," so long as their choice is not "one the Constitution forbids," *Burns v. Richardson*, 384 U.S. 73, 92 (1966). Plainly, the Constitution does not forbid apportioning legislators on the basis of total population, as this is the measure used in the Constitution itself. See U.S. Const. amend. XIV, § 2. Apportioning legislators based on total population – rather than citizens or voters – is consistent with prevailing practice, with how the Census is conducted, and most critically, with the fundamental principle of representational equality. See *Chen v. City of Houston,* 206 F.3d 502, 522-28 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1222-28 (4th Cir. 1996); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 774-75 (9th Cir. 1990).

Amici write additionally to explain the demographics of child populations in Texas and elsewhere, and to highlight the impact of eliminating such a large and significant group from the apportionment base merely because they are underage at the time of redistricting. This case is not about electoral equality in the sense of freedom from discrimination in access to the voting booth or the power to elect one's candidate of choice. This case is about the ability to have a legislature that represents all the people equally, and about the foreseeable and inevitable negative effects of declaring that children "don't count." The State of Texas, for good reason, has chosen to define the "people" entitled to equal representation to include children, among other

nonvoters. This Court, at a minimum, should uphold its power to do so.

ARGUMENT

I. TOTAL POPULATION IS A NECESSARY METRIC BECAUSE CHILD POPULATIONS ARE SUBSTANTIAL AND UNEVENLY DISTRIBUTED IN TEXAS AND ELSEWHERE IN THE UNITED STATES.

1. Across the United States, there are approximately 75 million children, making up 23% of the total population.[2] Texas has nearly 7 million residents under age 18 – 26% of its state population.[3] This is the second highest percentage in the U.S., tied with Idaho; only Utah has a higher percentage of children, at 31%.[4]

In the decade between the 2000 Census and the 2010 Census, the total U.S. child population grew by 1.8 million or 3.9%,[5] but that growth was much more

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[2] Annie E. Casey Found., *The Changing Child Population of the United States: Analysis of Data from the 2010 Census* 1 (Nov. 2011), *available at* http://www.aecf.org/m/resourcedoc/AECF-ChangingChildPopulation-2011-Full.pdf.

[3] *See* Annie E. Casey Found., Kids Count Data Ctr., *Total Population by Child and Adult Populations*, http://datacenter.kidscount.org/data/Tables/99-total-population-by-child-and-adult-populations?loc=1&loct=2#detailed/2/2-52/true/869/39,40,41/417 (last visited Sept. 23, 2015); *see generally* Annie E. Casey Found., Kids Count Data Ctr., *Texas Indicators*, http://datacenter.kidscount.org/data#TX/3/0 (last visited Sept. 23, 2015) (statistical indicators of the well-being of Texan children).

[4] *Id.*

[5] Frances Deviney & Pace Phillips, *Texas' Child Population: More Kids, More Diversity, More Responsibility* 1 (May 2011), *available at* http://library.cppp.org/files/10/TexasChildPopulation_paper.pdf.

rapid in some states than others.[6] In Texas during that period, the child population increased by 16%, growing from 5.9 million to 6.9 million and accounting for more than half of the entire U.S. child population growth. Deviney, *supra* note 5, at 1. Other states experiencing substantial child population growth since 2000 include Nevada, Utah, Arizona, Idaho, North Carolina, Georgia, Colorado, and Florida.[7]

The vast majority of children in the United States are, of course, citizens.[8] In Texas, for example, 96% of children are native born citizens,[9] and the numbers

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[6] *See id.*; Ronald Brownstein, *More Kids, More Problems*, The Atlantic, Aug. 9, 2015, *available at* http://www.theatlantic.com/education/archive/2015/08/youth-population-growth-poor-outcomes/400751/.

[7] *See The Changing Child Population*, *supra* note 2, at 1, 9-10.

[8] According to the ACS 2009-2013 5-year historical estimates, 97% of people under age 18 are citizens. U.S. Census, *American Factfinder B05003*, *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003&prodType=table (last visited Sept. 23, 2015); *see* Annie E. Casey Found., Kids Count Data Ctr., *Child Population by Nativity*, http://datacenter.kidscount.org/data/tables/116-child-population-by-nativity?loc=1&loct=2#detailed/2/2-52/true/36,868,867,133,38/76,77/447,448 (last visited Sept. 23, 2015).

[9] *Child Population by Nativity*, *supra* note 8; *see generally* Deviney, *supra* note 5, at 2 (noting that pace of international migration in Texas is declining; most population growth is from children or domestic migration). Data from Kids Count show that, in Texas' seven largest cities, 93-96% of children are citizens; even among children living in immigrant families, 88-92% are citizens. *Texas Indicators*, *supra* note 3 (index to tables for Child Population by Nativity and Children in Immigrant Families Who Are U.S. Citizens).

are similar for other states with larger populations of immigrants.[10]

These numbers put in context the attempt by Appellants and the *amici* on their behalf to frame this case solely in terms of the rights of citizen voters – often in contrast to "individuals who are not American citizens (and may even be in the country illegally)" or disenfranchised felons.[11] That framing is myopic, at best, because a very large portion of our population includes *underage citizens*, and citizen children are *by far* the largest population of people ineligible to vote – much larger than noncitizens and disenfranchised felons combined.[12] The biggest effect of using CVAP, rather than total population, for the apportionment base is not to the exclusion of noncitizens from consideration, but the exclusion of children.

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[10] *See Child Population by Nativity*, *supra* note 8. For example, in each of California, Arizona, Colorado, and Nevada, 95-97% of children are native-born.

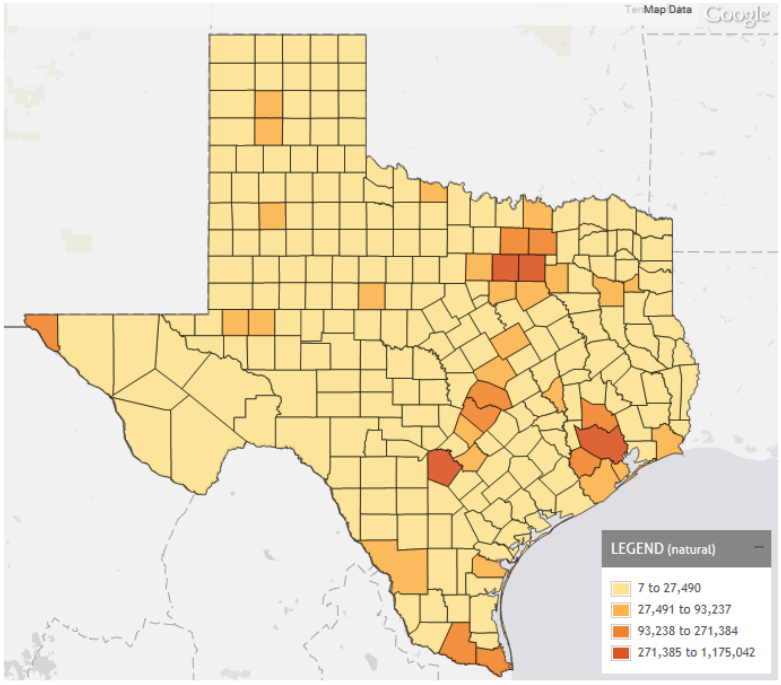
[11] Brief of the American Civil Rights Union as *Amicus Curiae* in Support of Appellants at 2; *see also, e.g.,* Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc. in Support of Appellants at 2.

[12] As reflected above, approximately 25% of the Texas population comprises underage *citizens*. Noncitizens are only approximately 11% of the total population. Kaiser Family Found., *Population Distribution by Citizenship*, http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (last visited Sept. 23, 2015). Disenfranchised felons are around 2.5% of total population (less than 3% of the voting age population). Christopher Uggen et al., Sentencing Project, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* (July 2012), *available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf.

2. As courts have observed, in many cases different metrics – total population as opposed to CVAP or voters – can be used as proxies for each other, but that is not necessarily true when there is an uneven distribution of demographic populations. See *Chen*, 206 F.3d at 525; see also *Burns*, 384 U.S. at 93-94 (upholding Hawaii's ability to use registered voters "as a reasonable approximation of both citizen and total population"). This is the case with the child population in Texas and elsewhere, and is why one cannot simply assume that using CVAP will provide, by proxy, equal representation of children in state legislatures.

In Texas, for example, the child population growth has been concentrated in just eight urban counties (Bexar, Collin, Denton, Fort Bend, Harris, Hidalgo, Tarrant, and Travis). See Deviney, *supra* note 5, at 1; Appendix 1 hereto. More than half of Texas counties – nearly all of them rural – actually have fewer children now than in 2000. *Id.*

This map illustrates the point:



TOTAL CHILD POPULATION (NUMBER) - 2013

Center for Public Policy Priorities
KIDS COUNT Data Center, datacenter.kidscount.org
A project of the Annie E. Casey Foundation

Child population as a percentage of total county population ranges from 8.5% (Loving County) to 34.9% (Gaines County). See Appendix 1. Fifteen counties have more that 30% of their total population under 18 and they contain more than half a million children (576,028). Harris County – with the largest child population (1,175,042) also has an above average percentage – 27.2%. Similar variations are seen in state senate districts, as the Child population as a percentage of total district population ranges

from 23% in District 14 to 33.1% in District 27.[13] Seven districts have more than 29% of their total population under age 18.

This phenomenon is not unique to Texas; it exists in other states where certain counties or areas have relatively high concentrations of children. For example, in California, the concentration of children by county ranges from 14.4% for San Francisco County, to 23% for Los Angeles County (roughly the state average), to 26.8% or higher for San Bernardino County and many other inland counties.[14] Wide variation in the concentration of children is also seen in, for example, Arizona (Apache County, 29.1%, vs. Yavapai County, 17.4%); Georgia (Liberty County, 29.0% vs. Clarke County, 17.6%); Illinois (Kendall County (28.6%) vs. Champaign County (19.1%), New

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[13] *See* Appendix 2 hereto, which is based on http://www.tlc.state.tx.us/redist/districts/senate.html (last visited Sept. 23, 2015).

[14] Lucille Packard Found. for Children's Health, kidsdata.org, *California Child Population*, http://www.kidsdata.org/region (last visited Sept. 23, 2015) (California Child Population tables); *see also* Lucille Packard Found. for Children's Health, *California's Declining Child Population: At the County Level, a Complex Shift* (Oct. 7, 2013), http://www.lpfch.org/cshcn/blog/2013/10/07/california%E2%80%99s-declining-child-population-county-level-complex-shift. For variation in child population by county in other states as well, *see*, *e.g.*, Annie E. Casey Found., Kids Count Data Ctr., *Florida Indicators*, http://datacenter.kidscount.org/data#FL/5/0 (last visited Sept. 23, 2015) (Population under Age 18 link); Voices for Utah Children, *Measures of Child Well-Being in Utah* 8 (2015), *available at* http://www.utahchildren.org/images/pdfs/2015/2015_Utah_KIDS_COUNT_Data_book_5-7-15.pdf; Child & Family Policy Ctr., *Early Childhood Needs Assessment* (Aug. 31, 2012), *available at* http://www.cfpciowa.org/en/data/early_childhood_needs_assessment/ (Part 1: Statewide Population Trends Narrative link) (Iowa).

York (Rockland County, 27.8% vs. New York County, 14.7%), and North Carolina (Union County, 28.6% vs. Brunswick County, 17.3%).[15] These states, too, have very good reason to use total population – rather than CVAP – to ensure that all people receive equal representation in their legislatures.

Plaintiffs have suggested that one could draw lines differently to eliminate vast discrepancies between total population and CVAP for the Texas districts. Whether or not one can draw lines to make the math work, Plaintiffs provide no allegation, much less a plausible one, that the State could equalize CVAP across districts without sacrificing other core redistricting principles. When children are as heavily concentrated in certain counties or urban centers as they are in Texas, one cannot equalize total and CVAP populations without "cracking" districts, ignoring county lines or other natural boundaries, and dividing areas of concentrated child populations into tiny slivers – thereby impairing peoples' ability to elect candidates of their choice.[16]

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[15] Data is based on the *American Community Survey One-Year Estimate: 2014*, *available at* http://factfinder.census.gov (last visited Sept. 23, 2015) (using statistics "B01003: Total Population" and "B09001: Population Under 18 Years By Age"). As additional examples, *see*, *e.g.*, *Florida Indicators*, *supra* note 14 (Population under Age 18 link); Voices for Utah Children, *supra* note 14, at 8.

[16] In this respect, it bears noting that in Texas, while almost all children are citizens, the growth of child population is occurring faster among children of racial and ethnic minority groups, while the number of white children overall and in many counties has decreased. *See* Deviney, *supra* note 5, at 2.

II. USING TOTAL POPULATION IS NECESSARY TO PROTECT CHILDREN'S INTERESTS AND RIGHTS.

A. Apportionment By Citizen Voting Age Population Would Undermine Children's Representation And Policy Interests.

In *Chen*, the Fifth Circuit observed the negative effects of using CVAP when a state has uneven concentration of demographics. 206 F.3d at 525. People in areas with "a larger population – and thus perhaps a greater need for government services than the other community" – will find their political power does not adequately represent the size of their community. *Id.* Using CVAP would thus run contrary to the principle of "representational equality – that representatives are chosen by a district's voters, but should represent all persons resident therein." *Id.* The Ninth Circuit in *Garza* made a similar observation that using a total population standard – rather than one based on voters – "is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government;" a voter-based measure would result in there being fewer representatives to serve and listen to people in high-population areas. *Garza*, 918 F.2d at 775-76 (quoting *Calderon v. City of L.A.*, 4 Cal. 3d 251, 258-59 (1971)).

This is a particular concern for children's interests, because, although children cannot vote, they are certainly affected by the political process and have a right to participate in it. See *id.* at 775-76 (citing example from *Calderon* that "a 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area"); cf. *McConnell v. Fed. Election Comm'n*, 540

U.S. 93, 231-32 (2003) (invalidating statute that prohibited minors from contributing to campaigns). Indeed, *Chen*'s observations about the negative consequences of using CVAP over total population are fully applicable here and confirmed by the data.

1. Having equal representation for children in a state legislature is critical because a principal responsibility of a state legislature is to allocate resources for its children – especially with respect to education, access to health care, and services to mitigate the effects of poverty.[17] As this Court has emphasized, education in particular "is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). It "is required in the performance of our most basic public responsibilities, even service in the armed forces," and it "is the very foundation of good citizenship." *Id.* Education is a "principal instrument" in preparing students "for later professional training," "helping [them] to adjust normally to [their] environment," and in providing a reasonable chance "to succeed in life." *Id.*

Numerous studies have demonstrated that "child well-being is related to state and local tax rates, level of [temporary assistance] benefits, per-pupil

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[17] While the federal government is substantially responsible for maintaining the welfare of senior citizens – through programs like Social Security and Medicare – much of the responsibility for sustaining the well-being of children falls on the state legislatures. As recent studies indicate, the federal government provides $23,500 in support for each elderly person, but only $3,348 for each child. William O'Hare et al., Found. for Child Dev., *Analyzing State Differences in Child Well-Being* 9 (Jan. 2012), *available at* http://fcd-us.org/sites/default/files/Analyzing%20State%20Differences%20in%20Child%20Well-Being_0.pdf.

expenditures on elementary and secondary education, and access to public medical insurance programs." O'Hare, *supra* note 17, at 3-4.[18] A recent analysis of 20 years of Texas state budget and child well-being data confirms that total per-child spending has been positively related to improvements in children's health, safety, and youth behaviors.[19] The researchers also found evidence of multiplier effects for each budget area, whereby increases in Texas spending in one area were associated with improvements in multiple dimensions of child well-being. The findings of this research provide data-

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[18] *See generally* Lynn A. Karoly et al., *Proven Benefits of Early Childhood Interventions, RAND Research Brief* (2005), http://www.rand.org/pubs/research_briefs/RB9145.html (last visited Sept. 23, 2015); Matt Broaddus, Ctr. on Budget & Policy Priorities, *Medicaid-Eligible Children Grow Up to Earn More and Pay More in Texas* (Jan. 21, 2015), http://www.cbpp.org/blog/medicaid-eligible-children-grow-up-to-earn-more-and-pay-more-in-taxes (last visited Sept. 23, 2015); Arloc Sherman et al., Ctr. on Budget & Policy Priorities, *Various Supports for Low-Income Families Reduce Poverty and Have Long-Term Positive Effects On Families and Children* (July 30, 2013), http://www.cbpp.org/research/various-supports-for-low-income-families-reduce-poverty-and-have-long-term-positive-effects (last visited Sept. 23, 2015); W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 The Future of Children 25 (1995), *available at* http://www.princeton.edu/futureofchildren/publications/docs/05_03_01.pdf; Flavio Cunha et al., *Interpreting the Evidence on Life Cycle Skill Formation, in* 1 *Handbook of the Economics of Education* 697 (Hanushek & Welch eds., 2006), *available at* http://jenni.uchicago.edu/papers/Cunha_Heckman_etal_2006_HEE_v1_ch12.pdf; Nat'l Educ. Assoc., *Early Childhood Education*, http://www.nea.org/home/18163.htm (last visited Sept. 23, 2015) (collecting studies).

[19] Ctr. for Pub. Policy Priorities, *Invest in Texas Kids. It Matters* (2013), *available at* http://www.forabettertexas.org/images/2013_RE_CW_Invest_in_Me.pdf .

based evidence to support adequate investments in children and point to the central responsibility of state elected officials to allocate state resources in ways that enable children to fulfill their potential as persons and as citizens.

For the recent 2014-2015 biennium, Texas legislators proposed spending $81 billion on children during that period – a full 40% of all state spending – with the largest categories being education (53%) and health (22%).[20] While the sufficiency of these levels is a matter for democratic debate, the data demonstrate the centrality of that debate to the business of the Texas Legislature and the magnitude of stake that Texas children have in the Legislature's decisions.

As a result, allocating adequate representation to areas with high concentrations of children is critical to ensure that children within those districts receive proportionate and essential levels of resources. The relationship between child well-being, child population, and allocation of state resources shows the need for children's interests to have more – not less – weight in state policy and budget decisions. Requiring use of CVAP as a controlling metric, however, would shift the balance of legislative power in the opposite direction, away from those who live in areas with higher concentrations of children, and toward constituencies and communities that have the least incentive to invest resources in the areas most critical to a state's children and future.

2. The need for equal representation of children is also particularly important because, as *Chen*

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[20] Eva DeLuna Castro, Ctr. for Pub. Policy Priorities, *The 2014-2015 Texas Children's Budget Doesn't Meet Our Needs*, Oct. 2013, *available at* http://www.forabettertexas.org/images/2013_10_PP_ChildrensBudget1415.pdf.

surmised, it is precisely those areas with higher child populations that have the greatest need. As a recent article in *The Atlantic* highlighted: "the states with the largest-growing youth populations[ ] tend to produce the worst outcomes for kids, judged by such measures as high-school graduation rates, access to health insurance, and exposure to poverty."[21] By way of example, in Georgia, Nevada, and Texas – three of the states where child populations have grown fastest since 2000 – the states generally were below the national average in such measures, including in:

- Per-pupil educational expenditures adjusted for regional cost differences in 2012 (nationally: $11,735, Georgia: $9,394, Nevada: $8,141, Texas: $8,113);
- The percentage of children age 18 and below without health insurance in 2011 (nationally: 10%, Georgia: 12%, Nevada: 19%, Texas: 16%); and
- The percentage of children in poverty in 2014 (nationally: 22%, Georgia: 26%, Nevada: 22%, Texas: 25%).[22]

The Annie E. Casey Foundation ranks states based on factors indicative of child well-being,[23] and as observed in *The Atlantic*,

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[21] *See* Brownstein, *supra* note 6.

[22] Annie E. Casey Found., Kids Count Data Ctr., *Kids Count National Indicators*, http://datacenter.kidscount.org/data #USA/1/0 (last visited Sept. 23, 2015) (using indicators "Per-Pupil Educational Expenditures Adjusted for Regional Differences," "Children 18 And Below Without Health Insurance," and "Children in Poverty (100 Percent Poverty)").

> Overall, nearly 37 million young people – representing 45 percent of Americans under 20 – now live in the 15 states at the bottom of the Casey Foundation list. Just 15 million youth, representing only 19 percent of that same age cohort, live in the top 15 states. Moving forward, this discrepancy may only widen: Of the 15 states that experienced the largest percentage increases in their youth populations, nine rank in the bottom 15 and just one is in its top 15.

Brownstein, *supra* note 6.

The challenges facing areas of dense child population are illustrated in greater detail by data from Texas. Texas ranks 41st in overall child well-being on the Casey Foundation list. Nearly two million children live in the seven major cities in Texas (Arlington, Austin, Dallas, El Paso, Fort Worth, Houston, San Antonio), making up fully 27% of the total child population of Texas.[24] Five of these cities have child poverty rates higher than 25% (the state average), and in Dallas, nearly 40% of children are living in poverty. These cities are also generally worse off in health indicators, including infant mortality rates and rates of low-birthweight babies.

These disparities also are reflected in Texas senate districts. Using the same Casey Foundation indicators, one can compare the two senate districts with the lowest child population percentage (Districts

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[23] Anne E. Casey Found., *2015 Data Book: State Trends in Child Well-Being* 41 app. 1 (2015), *available at* http://www.aecf.org/m/resourcedoc/aecf-2015kidscountdatabook-2015.pdf.

[24] *See Texas Indicators*, *supra* note 3.

14 and 17) and the two with the highest percentage (Districts 20 and 27).[25]

Indicators	AVG 14&17	AVG 20&27
% District children population (0-17 yrs.)	23.45%	31.75%
Infant mortality per 1000	2.59	3.94
Children living in areas of poverty*	6.15%	30.60%
Percent children with food insecurity	19.39%	23.91%
Percent attrition in public high schools	19.88%	25.13%
High school dropouts	4.13%	8.84%
Confirmed victims of child abuse per 100,000 children (0-17)	8.06	9.86

This comparison shows that the two districts with higher child concentrations have worse conditions across multiple indicators of child well-being, reflecting greater need for resources – and influence in the legislature – to promote children's education, health care, and relief from the conditions of poverty. Using total population for the apportionment base at least provides people in Districts 20 and 27 with equal representation in the legislature to address these needs through the democratic process.

Using CVAP, however, would push representation away from people in such areas, and toward people in less populated areas with fewer children and less immediate contact with the challenges facing areas of dense child population. On the whole, the legislature will have less incentive to invest in programs and services that are most critical to child well-being. Because access to education and basic levels of health

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[25] *See id.*

and economic well-being are critical for a child's future participation in society and civic life, using CVAP risks perpetuating long-term inequality. The need to provide equal representation for our children now, so that they, and the Nation, can benefit from such participation in the future, confirms why using total population is not only a constitutionally permissible metric, but also the correct and controlling one.

B. Using CVAP Ignores The Substantial Number Of Underage Citizens Who Will "Age Into" The Voting Population.

Using CVAP as a required or controlling metric also ignores that underage citizens will "age into" the voting population over the course of the decade-long life span of an the apportionment plan. Thus, where there are higher concentrations of youth, over time the percentage of voters will increase. Plaintiffs and their *amici* argue that it is unfair for eligible voters to have their votes "diluted," simply based on where they live. By the same logic, it is similarly unfair to ignore the electoral equality interests of underage citizens who will become voters, simply because of when the data was collected.

To illustrate this point, one can look to the American Community Survey ("ACS") data, which is what Plaintiffs use for their arguments about CVAP deviations. As many have and presumably will point out to the Court, in contrast to the Census the ACS data is based on sampling. Thus, while this data is sufficiently reliable to make broad-brush observations, it lacks the granularity necessary to make apportionment determinations at the census-block level. Nevertheless, ACS data provides indicators of the high portion – and uneven distribution – of persons who would not be counted in CVAP

apportionment but who will age into the voting population.

According to the 2009-2013 historical ACS estimate, there are over 3.4 million children in Texas aged 9-17. See Appendix 2, attached hereto. That equates, on average, to nearly 110,000 people per senate district, almost all of whom are citizens and will be eligible to vote in the upcoming elections while the current apportionment plan is in effect. This is a large number compared to the districts' average ("ideal") citizen voting age population, which Plaintiffs allege is only 502,000.

Moreover, as reflected above and in the Appendix, these populations are not evenly distributed. For example, Senate District 27 has nearly 130,000 people who are underage now but will reach the age of 18 before the next Census, as compared to only 91,000 in Senate District 14. Even if lines were re-drawn, one cannot eliminate the fact that children are more densely concentrated in certain areas compared to others. Apportioning seats by CVAP would inevitably leave certain senate districts with larger concentration of underage people who will age in over the course of a decade.

Thus, using CVAP will not only undermine the principles of representational equality for children and people in areas with high child populations; it will also do a poor job of providing *electoral equality*. People in areas with high child populations will see their districts steadily packed with more voting-eligible 18-years-olds, and their votes inevitably will become "diluted" during the life of a plan. A plan that dilutes the votes of those with the greatest stake in children's well-being will necessarily – and likely negatively – impact the most consequential policy

decisions and resource choices for children's well-being.

For these additional reasons, there is no basis to require that States exclude children when defining the apportionment base, although that is the effect of what Plaintiffs argue. To avoid such inequitable and absurd results, the Court should confirm that total population is the presumptively proper apportionment base, or at least that States have discretion in what metric they use, based on their particular demographic characteristics and the pursuit of the constitutionally permissible objective of representational equality.

CONCLUSION

For these reasons, and those stated by Appellees, the decision of the District Court should be affirmed.

Respectfully submitted,

ROBERT BRANDON
JON SHERMAN
ARCHITA TAYLOR
FAIR ELECTIONS LEGAL NETWORK
1825 K Street NW
Suite 450
Washington DC 20006
(202) 331-1550

CORY D. SZCZEPANIK
SIDLEY AUSTIN LLP
2001 Ross Avenue
Suite 3600
Dallas, TX 75201
(214) 981-3300

DAVID R. CARPENTER*
JOSE SANCHEZ
SIDLEY AUSTIN LLP
555 West Fifth Street
#4000
Los Angeles, CA 90013
drcarpenter@sidley.com

CAMERON F. KERRY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

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APPENDIX 1

Child Population Data By County (Texas)

Source: Center for Public Policy Priorities analysis of 2000 Decennial Census Data from Summary File 3 and 2010 Decennial Census Redistricting Data, U.S. Census Bureau:

County	Child Pop (2013)	Child Pop. as % of Total Pop. (2013)	% Change in Child Pop. 2000-2010
Anderson	11,361	19.3%	0.38%
Andrews	4,756	28.8%	5.15%
Angelina	23,727	26.4%	4.74%
Aransas	4,538	18.6%	-15.39%
Archer	2,089	22.6%	-12.46%
Armstrong	376	19.3%	-24.33%
Atascosa	12,965	27.5%	4.95%
Austin	7,014	24.0%	11.83%
Bailey	2,182	30.6%	10.97%
Bandera	3,759	17.9%	-7.58%
Bastrop	20,037	25.5%	20.49%
Baylor	733	20.2%	-19.83%
Bee	6,885	21.2%	-7.61%
Bell	93,237	28.5%	28.19%
Bexar	482,300	26.6%	17.36%
Blanco	2,129	20.1%	11.90%
Borden	125	19.0%	-22.91%
Bosque	3,973	21.5%	-0.71%
Bowie	22,183	23.5%	1.27%

Brazoria	90,353	27.3%	25.88%
Brazos	44,666	22.0%	21.68%
Brewster	1,964	21.2%	-4.43%
Briscoe	327	21.2%	-25.36%
Brooks	1,985	27.2%	-20.30%
Brown	9,066	23.3%	-6.27%
Burleson	3,970	22.7%	-8.55%
Burnet	9,850	22.2%	18.56%
Caldwell	9,616	24.5%	10.21%
Calhoun	5,559	25.6%	-3.55%
Callahan	3,215	23.0%	-4.53%
Cameron	135,886	32.3%	18.45%
Camp	3,282	26.0%	8.16%
Carson	1,482	24.2%	-12.61%
Cass	6,921	22.5%	-6.66%
Castro	2,386	29.7%	-8.05%
Chambers	9,951	27.1%	33.05%
Cherokee	13,463	25.6%	7.31%
Childress	1,470	20.9%	-11.24%
Clay	2,346	21.6%	-10.71%
Cochran	820	27.2%	-21.94%
Coke	644	19.7%	-25.80%
Coleman	1,908	21.6%	-9.30%
Collin	235,062	27.5%	59.00%
Collingsworth	798	27.0%	-0.12%
Colorado	4,935	22.9%	-4.81%
Comal	26,562	22.4%	29.04%
Comanche	3,267	23.3%	-4.82%
Concho	562	13.9%	-9.56%
Cooke	9,678	24.6%	-1.12%
Coryell	21,997	28.6%	6.77%
Cottle	341	22.9%	-23.25%
Crane	1,312	27.7%	1.18%

Crockett	963	25.7%	-16.12%
Crosby	1,626	27.2%	-19.64%
Culberson	634	26.5%	-30.30%
Dallam	2,068	29.7%	1.26%
Dallas	671,039	27.3%	5.69%
Dawson	3,329	24.0%	-10.82%
Deaf Smith	6,103	31.6%	0.97%
Delta	1,109	21.0%	-13.06%
Denton	193,223	26.8%	51.74%
DeWitt	4,550	22.0%	-5.61%
Dickens	451	19.2%	-3.91%
Dimmit	3,118	28.3%	-11.76%
Donley	689	19.0%	-11.45%
Duval	2,911	25.0%	-20.50%
Eastland	4,133	22.1%	-2.00%
Ector	43,274	29.0%	8.12%
Edwards	387	20.8%	-32.31%
El Paso	239,807	28.9%	28.75%
Ellis	42,770	27.4%	10.76%
Erath	9,007	22.6%	4.14%
Falls	3,666	21.0%	-24.51%
Fannin	7,389	21.4%	3.49%
Fayette	5,198	20.9%	6.57%
Fisher	777	20.1%	-13.65%
Floyd	1,692	27.1%	-23.66%
Foard	240	18.7%	-33.65%
Fort Bend	184,974	28.4%	53.20%
Franklin	2,555	24.0%	13.18%
Freestone	4,567	22.7%	9.66%
Frio	4,254	23.4%	-8.61%
Gaines	6,561	34.9%	20.55%
Galveston	75,926	24.8%	10.91%
Garza	1,253	19.2%	-6.59%

Gillespie	5,020	19.5%	12.35%
Glasscock	314	25.1%	-25.27%
Goliad	1,548	20.8%	-8.09%
Gonzales	5,412	26.6%	3.09%
Gray	5,825	25.2%	2.00%
Grayson	28,860	23.4%	4.14%
Gregg	31,509	25.2%	4.13%
Grimes	6,007	21.8%	3.80%
Guadalupe	37,940	26.5%	43.72%
Hale	10,215	28.7%	-5.75%
Hall	816	24.5%	-15.74%
Hamilton	1,744	20.6%	-7.30%
Hansford	1,599	29.0%	8.20%
Hardeman	967	24.0%	-14.94%
Hardin	14,301	25.1%	5.63%
Harris	1,175,042	27.2%	16.58%
Harrison	17,118	25.6%	1.87%
Hartley	1,303	21.2%	18.84%
Haskell	1,171	20.0%	-15.13%
Hays	43,280	24.7%	62.14%
Hemphill	1,125	28.2%	18.85%
Henderson	17,919	22.4%	-0.05%
Hidalgo	271,384	33.2%	33.57%
Hill	8,357	23.7%	1.91%
Hockley	6,189	26.3%	-5.91%
Hood	10,780	20.3%	12.47%
Hopkins	8,910	25.0%	7.65%
Houston	4,621	19.8%	-8.40%
Howard	7,942	22.0%	-3.46%
Hudspeth	919	26.7%	-8.24%
Hunt	21,684	24.5%	5.37%
Hutchinson	5,609	25.8%	-10.98%
Irion	354	20.5%	-22.20%

Jack	1,905	20.9%	-2.88%
Jackson	3,657	25.1%	-9.23%
Jasper	8,566	24.2%	-5.76%
Jeff Davis	366	16.4%	-13.91%
Jefferson	60,098	23.7%	-7.54%
Jim Hogg	1,474	28.2%	-7.79%
Jim Wells	11,976	28.6%	-4.80%
Johnson	41,539	26.4%	12.68%
Jones	3,543	18.0%	-20.11%
Karnes	2,891	19.2%	-11.98%
Kaufman	29,857	27.6%	42.86%
Kendall	8,524	22.6%	25.26%
Kenedy	92	21.9%	-15.70%
Kent	175	21.8%	4.52%
Kerr	9,957	19.6%	1.22%
Kimble	897	19.1%	-11.08%
King	58	20.1%	-43.33%
Kinney	689	18.8%	-16.59%
Kleberg	8,171	25.5%	-6.40%
Knox	955	25.0%	-20.17%
La Salle	1,538	20.9%	-4.52%
Lamar	11,978	23.8%	-6.06%
Lamb	3,870	28.1%	-0.45%
Lampasas	4,846	23.7%	-13.29%
Lavaca	4,331	22.2%	-4.30%
Lee	4,007	23.6%	-3.64%
Leon	3,688	21.6%	0.64%
Liberty	19,540	24.7%	-0.05%
Limestone	5,368	23.0%	-1.48%
Lipscomb	890	25.7%	8.07%
Live Oak	2,290	19.4%	-14.06%
Llano	3,089	15.7%	13.50%
Loving	7	8.5%	-30.77%

Lubbock	72,241	24.7%	9.00%
Lynn	1,533	26.6%	-19.52%
Madison	2,987	21.2%	-6.72%
Marion	1,900	18.1%	5.13%
Martin	1,530	28.7%	-40.20%
Mason	828	19.9%	9.77%
Matagorda	9,285	25.4%	-17.83%
Maverick	18,193	32.5%	-9.57%
McCulloch	1,948	23.4%	1.79%
McLennan	60,749	25.1%	-15.03%
McMullen	146	18.1%	4.95%
Medina	11,825	24.6%	4.27%
Menard	438	19.2%	-23.25%
Midland	41,181	27.0%	7.12%
Milam	6,116	25.1%	-1.56%
Mills	1,165	23.4%	-9.04%
Mitchell	1,749	18.8%	-5.26%
Montague	4,495	22.5%	-1.35%
Montgomery	131,311	26.4%	45.25%
Moore	6,946	31.4%	3.64%
Morris	3,021	22.9%	-8.39%
Motley	245	20.5%	-22.81%
Nacogdoches	16,059	24.7%	6.00%
Navarro	13,046	26.5%	5.12%
Newton	3,172	21.8%	-15.01%
Nolan	3,777	25.1%	-8.08%
Nueces	88,229	25.1%	-0.97%
Ochiltree	3,387	31.4%	17.41%
Oldham	567	27.2%	-8.76%
Orange	20,331	24.6%	-11.54%
Palo Pinto	6,942	24.3%	0.13%
Panola	5,817	24.0%	2.25%
Parker	29,620	24.4%	22.64%

Parmer	2,985	30.0%	-2.46%
Pecos	3,849	24.3%	-17.79%
Polk	9,607	20.4%	1.51%
Potter	34,422	27.7%	5.83%
Presidio	2,176	27.3%	-5.23%
Rains	2,239	20.3%	8.84%
Randall	31,651	24.9%	10.62%
Reagan	1,042	28.7%	-11.17%
Real	591	17.7%	-7.56%
Red River	2,577	20.8%	-19.54%
Reeves	3,054	22.0%	-19.91%
Refugio	1,673	23.0%	-12.87%
Roberts	239	25.8%	6.31%
Robertson	4,058	23.9%	-6.69%
Rockwall	24,126	28.4%	81.48%
Runnels	2,522	24.5%	-15.01%
Rusk	12,105	22.6%	4.99%
Sabine	1,989	18.0%	-4.12%
San Augustine	1,784	20.0%	-12.15%
San Jacinto	6,248	22.7%	12.98%
San Patricio	18,011	27.4%	-12.47%
San Saba	1,186	19.6%	-25.55%
Schleicher	1,042	30.3%	34.51%
Scurry	4,355	24.9%	2.87%
Shackelford	776	22.8%	-5.33%
Shelby	6,682	25.7%	0.31%
Sherman	847	27.6%	-8.40%
Smith	53,950	25.1%	15.70%
Somervell	2,097	24.2%	16.07%
Starr	20,238	32.6%	3.17%
Stephens	2,173	23.0%	-2.37%
Sterling	294	23.8%	-30.25%

Stonewall	301	21.2%	-12.18%
Sutton	1,063	25.9%	-3.32%
Swisher	1,948	25.4%	-12.23%
Tarrant	522,356	27.3%	24.75%
Taylor	33,144	24.6%	-4.46%
Terrell	185	20.7%	-24.04%
Terry	3,277	25.9%	-9.37%
Throckmorton	325	20.1%	-21.46%
Titus	9,691	29.5%	16.02%
Tom Green	27,490	24.0%	-4.41%
Travis	267,301	24.1%	27.00%
Trinity	2,784	19.6%	-3.58%
Tyler	4,204	18.9%	-10.03%
Upshur	9,554	23.8%	2.12%
Upton	895	27.0%	-8.32%
Uvalde	7,585	28.3%	-6.12%
Val Verde	14,355	29.6%	1.27%
Van Zandt	12,307	23.0%	2.85%
Victoria	23,454	26.2%	-5.41%
Walker	11,632	16.8%	1.82%
Waller	11,052	24.4%	27.07%
Ward	3,007	26.6%	-12.47%
Washington	7,430	21.6%	-0.73%
Webb	90,052	33.8%	26.19%
Wharton	10,751	26.0%	-6.46%
Wheeler	1,453	24.9%	4.26%
Wichita	31,288	23.5%	-8.19%
Wilbarger	3,269	24.8%	-15.32%
Willacy	5,691	25.8%	-6.63%
Williamson	128,180	27.7%	62.15%
Wilson	11,270	24.7%	19.91%
Winkler	2,110	28.1%	-1.45%
Wise	15,493	25.2%	11.59%

Wood	8,458	19.6%	6.24%
Yoakum	2,513	30.7%	6.43%
Young	4,536	23.8%	-0.58%
Zapata	4,890	34.1%	19.38%
Zavala	3,666	30.3%	-7.48%

APPENDIX 2

Child Population by State Senate District, based on 2009-2013 Historical American Community Survey Estimate (ordered from lowest to highest according to percentage of children).

SD	Pop. under 18 (%)	Total Pop Under 18	Pop. Ages 9-17
SD 14	23.0%	198,989	102,928
SD 3	23.7%	200,080	113,599
SD 17	23.9%	196,100	101,979
SD 28	24.4%	190,398	114,810
SD 16	24.5%	204,660	101,358
SD 30	24.6%	206,982	123,720
SD 1	24.7%	203,039	124,334
SD 5	24.7%	209,643	114,590
SD 24	25.1%	202,219	119,062
SD 25	25.1%	213,895	116,619
SD 26	25.8%	208,425	107,459
SD 11	26.2%	214,119	115,012
SD 13	26.4%	209,586	98,161
SD 22	26.6%	218,370	91,305
SD 4	26.7%	222,881	104,058
SD 18	27.1%	229,664	95,868
SD 10	27.4%	233,088	96,799
SD 12	27.5%	230,864	112,644
SD 15	27.5%	226,978	117,756
SD 8	27.6%	227,448	129,590
SD 2	27.6%	228,131	119,112
SD 31	27.7%	224,002	109,625
SD 23	28.7%	235,491	111,611
SD 9	28.8%	240,967	96,868

SD 19	29.1%	239,001	109,398
SD 21	29.2%	239,019	101,718
SD 7	29.3%	240,849	129,837
SD 29	29.5%	244,536	92,525
SD 20	30.4%	258,540	122,974
SD 6	31.8%	263,501	104,820
SD 27	33.1%	262,753	107,392
		Total 9-17	3,407,531
		Avg. 9-17	109,920