

**No. 21-0538**

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**In the Supreme Court of Texas**

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IN RE CHRIS TURNER, IN HIS CAPACITY AS A MEMBER OF THE TEXAS HOUSE  
OF REPRESENTATIVES AND HIS CAPACITY AS CHAIR OF THE HOUSE  
DEMOCRATIC CAUCUS, *ET AL.*,

*Relators.*

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On Petition for Writ of Mandamus

TO GREGORY S. DAVIDSON, IN HIS OFFICIAL CAPACITY AS EXECUTIVE CLERK  
TO THE GOVERNOR, *ET AL.*

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**BRIEF OF *AMICUS CURIAE***  
**LEAGUE OF WOMEN VOTERS OF TEXAS**

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## TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....	i
INDEX OF AUTHORITIES .....	vii
I. INTEREST OF THE AMICUS CURIAE.....	1
II. INTRODUCTION .....	2
III. WITHOUT FUNDING, THE LEGISLATURE WILL NOT BE ABLE TO REDISTRICT.....	4
IV. GOVERNOR ABBOTT’S VETO VIOLATES THE SEPARATION OF POWERS CLAUSE BECAUSE IT INTERFERES WITH THE LEGISLATURE’S CONSTITUTIONAL OBLIGATION TO REDISTRICT. ....	8
V. GOVERNOR ABBOTT’S VETO VIOLATES THE SEPARATION OF POWERS CLAUSE BECAUSE IT EFFECTIVELY DELEGATES REDISTRICTING TO THE COURTS. ....	11
VI. CONCLUSION .....	14
CERTIFICATE OF COMPLIANCE.....	16
CERTIFICATE OF SERVICE .....	17



## INDEX OF AUTHORITIES

### Cases

<i>Arizona State Legislature v. Arizona Independent Redistricting Comm’n</i> , 576 U.S. 787, 807 (2015) .....	2
<i>Armadillo Bail Bonds v. State</i> , 802 S.W.2d 237, 239 (Tex. Crim. App. 1991) .....	8,11
<i>Ely v. Klahr</i> , 403 U.S. 108, 115 (1971) .....	4
<i>Evenwel v. Abbott</i> , 136 S. Ct. 1120, 1123-1125 (2016) .....	11,12
<i>LULAC v. Perry</i> , 548 U.S. 399, 415 (2006) .....	2
<i>Maryland Comm. For Fair Repr. v. Tawe</i> , 377 U.S. 656, 676 (1964) .....	13
<i>Perez v. Abbott</i> , 2017 WL 1406379 (W.D. Tex. April 20, 2017) (3-judge court) .....	7
<i>Perez v. Texas</i> , 970 F.Supp.2d 593, 607 (W.D. Tex. 2013) (3-judge court) .....	7
<i>Perry v. Del Rio</i> , 67 S.W.3d 85, 91 (Tex. 2001) .....	9, 13
<i>Perry v. Perez</i> , 565 U.S. 388 (2012) .....	4, 11, 12
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	1
<i>Terrazas v. Ramirez</i> , 829 SW 2d 712, 717 (Tex. 1991) .....	13
<i>Texas v. United States</i> , 887 F.Supp.2d 133 (D.D.C. 2012) (3-judge court) .....	7
<i>Vera v. Richards</i> 861 F.Supp. 1304, 1314 (S.D. Tex. 1994) (3-judge court) .....	7
<i>Wise v. Lipscomb</i> , 437 U.S. 535, 539 (1978) .....	2

### Statutes

Tex. Const. art. III § 1 .....	11
Tex. Const. art. III, § 28 .....	1, 9, 10

### Other Authorities

Order on Request for § 3(c) Relief, <i>Perez v. Abbott</i> , Civil Action No. SA-11-CV-360 (W.D. Tex. 2019) .....	3
1945 Tex. Op. Att’y Gen. O-6488 .....	9

## **I. INTEREST OF THE AMICUS CURIAE**

The League of Women Voters Texas (“League”), an affiliate of the League of Women Voters of the United States, is a non-profit membership organization dedicated to nonpartisan, grassroots civic engagement to encourage its members and all Texans to be informed and active participants in democracy, including elections and the legislative redistricting process. A bedrock principle of the League is the “one person, one vote” guarantee of *Reynolds v. Sims*, 377 U.S. 533 (1964), which requires both equal population in congressional districts and near equal population in state legislative districts, as well as, in effect, the right to an effective vote and responsive representation. The League has a long history of advocating for fair, transparent, and accountable redistricting practices in Texas to ensure that the vote of each Texan counts equally. The League is therefore deeply interested in the outcome of this case because without judicial intervention, Governor Abbott’s veto of appropriations for the legislative branch will deprive Texas citizens of a timely and fair process for the redrawing of federal congressional and state legislative maps.

By defunding the Texas Legislature, its staffers, and nonpartisan legislative agencies, Governor Abbott’s veto subverts the Texas Legislature’s central role in the redistricting process mandated by not only the United States Constitution, but also the Texas Constitution. Tex. Const. art. III, § 28 (“Legislature shall . . . apportion the state into senatorial and representative districts”). In fact, the veto effectively eliminates that legislative process entirely. The effect of the veto, then, is to turn the process over to the

courts, where redistricting proceedings will, by definition, not allow widespread citizen participation.

The redistricting process conducted by the Legislature as mandated by the Texas Constitution is an essential part of ensuring that each Texan's vote counts. In offering this amicus brief, the League seeks to raise for the Court's attention a significant consequence of the Governor's veto and further the League's mission of fighting against attacks on the fundamental constitutional right to fair and equal representation guaranteed to all citizens by the United States and Texas Constitutions. The League has obtained *pro bono* counsel for this brief.

## **II. INTRODUCTION**

The Governor's veto of funds for the Texas Legislature starting in September of this year means that the Legislature will not be able to perform its functions and serve the people of Texas as they were elected to do. Of particular concern is the impact of the veto on the upcoming redistricting efforts, mandated by the United States and Texas Constitutions. The legislative branch of government plays the "primary role" in redistricting. *LULAC v. Perry*, 548 U.S. 399, 415 (2006) (addressing congressional redistricting). "[R]edistricting . . . legislative bodies is a legislative task." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (J. White opinion announcing judgment). Redistricting, in fact, is one of the central duties and functions of the legislative branch. "[R]edistricting 'involves lawmaking in its essential features and most important aspect.'" *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 807 (2015).

The Census data used in drafting new political maps is scheduled to arrive in mid-August.<sup>1</sup> In light of the significant population changes in Texas from 2010 to 2020—an additional 4 million residents and the apportionment of two new congressional seats—the Texas Legislature must draw new federal congressional and statewide legislative maps to ensure Texas’s democracy is fair and equal across the state. The Governor has publicly stated that he plans soon to *force* the Texas Legislature into the redistricting process in a special session this fall. Yet, he has simultaneously acted unilaterally to deprive the Legislature of the ability to undertake and perform the very task he insists he is going to compel it to begin. Without any funds, the Legislature will not be able to conduct the redistricting process, nor allow for citizen engagement, which a federal court suggested strongly is necessary to ensuring that Texas does not repeat the mistakes of last cycle. Order on Request for § 3(c) Relief, *Perez v. Abbott*, Civil Action No. SA-11-CV-360 (W.D. Tex. 2019). Among the legislative groups defunded by Governor Abbott’s budget veto is the Texas Legislative Council, a nonpartisan agency that plays a pivotal role in the redistricting process by providing expert technical and legal assistance to the Texas Legislature. Simply put, without the Legislative Council, the Legislature will not be able to begin, let alone complete, the task. There can be no clearer example of a violation of the fundamental

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<sup>1</sup> *New Demonstration Data Will Feature Higher Privacy-loss Budget, Satisfies Redistricting Accuracy Targets*, U.S. Census Bureau, <https://content.govdelivery.com/accounts/USCENSUS/bulletins/2cdb999> (last visited July 5, 2021).

governmental principle of separation of powers: Governor Abbott’s veto destroys the Legislature’s ability to complete one of its essential functions.

Moreover, by effectively destroying the Legislature’s ability to draw new maps for the 2022 elections, Governor Abbott’s veto virtually ensures there will be state and federal constitutional violations, forcing redistricting out of legislative hands and into the courts. Although courts have long stepped in to handle redistricting disputes, federal courts are generally quite reluctant to create redistricting plans in the first instance. *Ely v. Klahr*, 403 U.S. 108, 115 (1971) (redistricting is a “legislative task[] in the first instance”); *Perry v. Perez*, 565 U.S. 388 (2012) (setting aside interim judicial map because of lack of requisite deference to Texas legislature). If there is one thing that the separation of powers principle ensures, it is this: the State’s executive branch cannot prevent the Legislature from performing one of its constitutionally mandated functions, and then unilaterally delegate this function to the judiciary.

### **III. WITHOUT FUNDING, THE LEGISLATURE WILL NOT BE ABLE TO REDISTRIBUTE.**

On June 18, 2021, Governor Abbott vetoed Article X of Senate Bill 1 (87R), which budgeted approximately \$410.4 million for the Legislature, including the Senate, the House of Representatives, and various nonpartisan offices, including the Legislative Council. By defunding the Legislature, Governor Abbott has effectively crippled the legislative branch so that it cannot function and carry out its duties beginning on September 1, 2021.

Governor Abbott’s action will immediately impede the redistricting process as soon as the decennial Census data is published in mid-to-late August. This redistricting cycle is

especially important in light of the significant population changes in Texas from 2010 to 2020. With an additional 4 million residents, Texas has gained two Congressional seats.<sup>2</sup> The Texas Legislature will need to draw new federal congressional and statewide legislative maps to ensure Texas's democracy is fair and equal across the state.

Redistricting is a complex, technical process that requires various types of expertise, including data analysis, demography, and map drawing, and must conform to numerous federal and state legal requirements. To complete this process, the Legislature requires the aid of the Legislative Council, a nonpartisan legislative agency that provides technical and legal support. In fact, the map-drawing process cannot even start until the Legislative Council's Information Systems staff verifies the federal Census data, enters it into a computer program called RedAppl, and tests it to make sure it is accurate, complete, and ready for use. Once uploaded and verified, Legislators (and the public) may use RedAppl to begin drawing draft maps.<sup>3</sup> The Legislative Council's Information Systems also provides technical assistance for legislators, including computer and IT support, and is responsible for maintaining and monitoring the hardware and software for redistricting.<sup>4</sup>

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<sup>2</sup> 2020 Apportionment of Congressional Seats, National Conference of State Legislatures, <https://www.ncsl.org/research/redistricting/2020-apportionment-of-congressional-seats.aspx> (last visited July 5, 2021).

<sup>3</sup> Redistricting Process, *Guide to 2021 Redistricting*, Texas Legislative Council (Jan. 2021), [https://redistricting.capitol.texas.gov/docs/guide\\_to\\_2021\\_redistricting.pdf](https://redistricting.capitol.texas.gov/docs/guide_to_2021_redistricting.pdf) (last visited July 3, 2021).

<sup>4</sup> About the Council, *Texas Legislative Council*, <https://tlc.texas.gov/about> (last visited July 3, 2021).

The Legislative Council also maintains and updates several important online tools that all Texans, including legislators, can access and use during redistricting.<sup>5</sup> For example, the Legislative Council maintains a public website, DistrictViewer, which shows all current and proposed maps, along with the demographic and election reports, and provides updated public redistricting proposals. DistrictViewer is a sophisticated tool with useful features, such as the ability to overlay one plan on another to compare the two.<sup>6</sup> *Id.* Another important website is Texas Redistricting, which the Legislative Council customarily updates regularly throughout the redistricting process with information, such as meeting dates, redistricting plan maps and reports, and any other important news.<sup>7</sup> Legislative committees also generally gather public comments before and after the Census data is released.<sup>8</sup> Without these tools, the public will be prevented from adequately participating and unable to provide the crucial input necessary for an accurate, fair, and equitable redistricting process.

In addition to offering technical assistance during redistricting, staff from the Legislative Council also provide essential legal counsel and analysis regarding the various criteria that apply to congressional and legislative districts.<sup>9</sup>

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<sup>5</sup> Redistricting Process, *supra* n. 3.

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

<sup>7</sup> *Texas Redistricting*, The Texas Legislative Council, <https://redistricting.capitol.texas.gov/> (last visited July 3, 2021).

<sup>8</sup> *Texas Redistricting*, *supra*.

<sup>9</sup> About the Council, *supra* n. 4.; *see also, e.g., State and Federal Law Governing Redistricting in Texas* prepared and published by the Texas Legislative Council, August 2011, [https://tlc.texas.gov/docs/policy/State\\_Federal\\_Law\\_TxRedist.pdf](https://tlc.texas.gov/docs/policy/State_Federal_Law_TxRedist.pdf) (last visited July 3, 2021).

Once maps are drawn and finalized, redistricting bills follow the same process as all other legislation.<sup>10</sup> Again, Legislative Council staff assists legislators with drafting and finalizing redistricting bills before enacted.

The Legislative Council's vital role in redistricting is well chronicled in federal court cases spanning the last several decades. Just a few examples suffice. In the early 1990s, the Legislative Council provided the legislature advice on legal issues and developed and maintained software necessary for modern-day redistricting. *Vera v. Richards*, 861 F. Supp. 1304, 1314 (S.D. Tex. 1994) (3-judge court). After the 2010 Census's publication, the Legislative Council prepared extensive and detailed technical analyses and necessary comparisons to be used by the Legislature in performing its redistricting duties consistent with constitutional and other voting rights requirements. *Perez v. Texas*, 970 F. Supp. 2d 593, 607 (W.D. Tex. 2013) (3-judge court). And as reflected in decisions in the long-running litigation over redistricting after the 2010 census, the entire legislative process was permeated with data, advice, and other input from the Legislative Council. *See, e.g., Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (3-judge court), *vacated and remanded*, 133 S. Ct. 2885 (2013); *Perez v. Abbott*, No. SA-11-CV-360, 2017 WL 1406379 (W.D. Tex. April 20, 2017) (3-judge court).

In short, funding and functioning of Legislative Council is necessary to enable Legislature's performance of the quintessential legislative task of redistricting. Staff from

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<sup>10</sup> Redistricting Process, *supra* n. 3.



the nonpartisan Legislative Council are crucial at every step of redistricting, from processing the Census data and uploading it into RedAppl, and continuing until the passing of redistricting bills. Without the Legislative Council, the public cannot access timely redistricting information and thus they are severely limited in their ability to participate in the redrawing of congressional and statewide legislative districts. By defunding the Legislature, including the Legislative Council, Governor Abbott has effectively prohibited the Legislature from undertaking the redistricting process in September after the release of the Census data.

**IV. GOVERNOR ABBOTT’S VETO VIOLATES THE SEPARATION OF POWERS CLAUSE BECAUSE IT INTERFERES WITH THE LEGISLATURE’S CONSTITUTIONAL OBLIGATION TO REDISTRIBUTE.**

Governor Abbott’s veto is unconstitutional because it unduly interferes with the Legislature’s powers. This violates the separation of powers clause enshrined in Article 2, Section 1 the Texas Constitution, which “reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government.” *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1991). The separation of powers clause is violated when one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers.” *Id.* The undue interference test is intended to account for “incremental effect of interbranch intrusions” and does not require that “one branch completely disrupt[] another branch’s ability to function”. *Id.* (quoting N. McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges*

*to Speedy Trial and Speedy Disposition Provisions*, 62 Temple L. Rev. 177, 218 (1989)). Here, the Governor’s veto does reflect the extreme situation in which one branch completely disrupts another branch’s ability to function. There can be no question, then, that the veto constitutes a violation of the separation of powers clause because by defunding the Legislature, it “cannot effectively exercise its constitutionally assigned power” to redistrict.

The Legislature is the department constitutionally responsible for apportioning the State into federal congressional legislative districts. *See Perry v. Del Rio*, 67 S.W. 3d 85, 91 (Tex. 2001). The Texas Legislature is constitutionally obligated to redistrict all congressional and legislative districts after the publication of the decennial Census data. Tex. Const. art. III, § 28 (2001). The Texas State Legislature may not abdicate this duty. As stated in a 1945 Texas Attorney General opinion, “the legislature is powerless to absolve itself from the performance of [its reapportionment] duty *by any act whatsoever*.” 1945 Tex. Op. Att’y Gen. O-6488 (emphasis added). The Opinion continues to explain that “the redistricting of the state is a continuing duty of the legislature until such time as the state has been redistricted.” *Id.*

Article III, Section 28 of the Constitution provides that if the Legislature fails to enact any valid redistricting legislation by the end of the first regular session following the release of the Census data, then the Legislative Redistricting Board must do so. *Id.* The Legislative Redistricting Board is composed of the lieutenant governor, speaker of the House of Representatives, Attorney General, Comptroller, and Land Commissioner. *Id.* Although the

Lieutenant Governor and Attorney General take part, the Legislative Redistricting Board is a constitutional body within the Legislative Branch. It does not reflect an intention to share the redistricting powers with the executive branch. *See Perry v. Del Rio*, 67 SW 3d at 92 (explaining that Attorney General is a member of the Executive Department so that he may not effectuate a valid redistricting plan himself). Governor Abbott and the Executive Department therefore may not engage in the redistricting process in the event that the Legislature is defunded.

Governor Abbott previously announced that he planned to call a special session in September or October for redistricting after the Census data is released.<sup>11</sup> But he then, in every practical, real sense, negated that plan by vetoing the Legislature’s budget, because the Legislature cannot meet and perform the task of redistricting with no funding. Even if there is no special session, the Legislature will have to take up redistricting by its first regular session in January of 2023. Tex. Const. art. III, § 28 (legislature “must” take up state legislative redistricting at first regular session after publication of census data). In either situation—special session or regular session—without funding for the next two years, the Texas Legislature will not be able to perform its constitutional duty to redistrict. Because the Legislature cannot redistrict without proper funding, and because it has not and cannot absolve itself of the duty to redistrict, it will be in violation of Article III, Section 28, of the

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<sup>11</sup> Cassandra Pollock, *Texas Gov. Greg Abbott sets July 8 date for special legislative session on voting bill, other issues*, The Texas Tribune (June 22, 2021), <https://www.texastribune.org/2021/06/22/texas-greg-abbott-special-session/> (last visited July 3, 2021).

Texas State Constitution. Consequently, Governor Abbott's veto violates the separation of powers clause in the Texas Constitution because it obstructs the Legislature from exercising a core legislative power and performing its constitutional duties. Indeed, the veto represents the very type of threat to liberty that the separation of powers clause is intended to defeat.

**V. GOVERNOR ABBOTT'S VETO VIOLATES THE SEPARATION OF POWERS CLAUSE BECAUSE IT EFFECTIVELY DELEGATES REDISTRICTING TO THE COURTS.**

Should the Governor's actions continue to prevent the Legislature from redistricting, the courts will be forced to undertake the "unwelcome obligation" of creating an interim plan for Texas's next statewide elections. *Perry v. Perez*, 565 U.S. 388, 392 (2012) (quoting *Connor v. Finch*, 431 U.S. 406, 414-15 (1977)). The veto is therefore also unconstitutional because it unnecessarily forces the judiciary to assume responsibility for redistricting. Tex. Const. art. III § 1; see also *Armadillo Bail Bonds v. State*, 802 S.W.2d at 239 ("[The separation of powers provision] is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more properly attached to another branch.") (internal quotations omitted).

Make no mistake: redistricting must happen in the very near future, and certainly during the time period in which the legislature will be defunded. The Equal Protection Clause of the Fourteenth Amendment requires jurisdictions to design legislative districts with equal populations pursuant to the one-person, one-vote principle. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123-1125 (2016). Current population data indicate that Texas must draw a new federal congressional map and almost certainly must redraw statewide

legislative maps to comply with the Equal Protection Clause. From 2010 to 2020, Texas’s population has increased by almost 4 million, from about 25 million to 29 million residents.<sup>12</sup> As a result of this dramatic increase, Texas will gain two federal congressional seats and must redraw its congressional maps accordingly.<sup>13</sup> Furthermore, Texas’s population has not increased uniformly across the state. Among Texas’s 254 counties, estimated population changes since 2010 vary dramatically, from -33.6% (Concho County) to 48.7% (Comal County).<sup>14</sup> The projected uneven distribution of population gains throughout the State will almost certainly require significant modifications to the State Senate and House of Representative districts to comply with the Equal Protection Clause, as it did in the last redistricting cycle. *See Perry v. Perez*, 565 U.S. at 390-93 (noting that an enormous increase in Texas’ population of over four million required “sweeping changes to the State’s current districts” which “could not be used, because population growth had rendered them inconsistent with the Constitution’s one-person, one-vote requirement”).

Failure to redistrict will undoubtedly violate the one-person, one-vote requirement established by the Fourteenth Amendment. This will inevitably lead to lawsuits. “When the

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<sup>12</sup> See United States Census Bureau, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment* (Apr. 26, 2021), <https://www.census.gov/library/stories/2021/04/2020-census-data-release.html> (last accessed July 1, 2021).

<sup>13</sup> *Id.*

<sup>14</sup> See Texas Demographic Center, *Estimates of the Total Populations of Counties and Places in Texas for July 1, 2019 and January 1, 2020* (November 2020), [https://demographics.texas.gov/Resources/TPEPP/Estimates/2019/2019\\_txpopest\\_county.pdf](https://demographics.texas.gov/Resources/TPEPP/Estimates/2019/2019_txpopest_county.pdf) (last visited July 3, 2021).

Legislature does not act, citizens may sue and, then, it is the judiciary's role to determine the appropriate redistricting plan.” *Perry v. Del Rio*, 67 S.W.3d at 91. As this Court explained, such role is limited and should not be expanded to redistricting in the first instance without deference to the Legislature: “The responsibility for apportioning the State into legislative districts belongs primarily to the Legislature. The judiciary, however, is both empowered and, *when properly called upon*, obliged to declare whether an apportionment statute enacted by the Legislature is valid.” *Terrazas v. Ramirez*, 829 S.W. 2d 712, 717 (Tex. 1991) (emphasis added). Judicial relief is proper ““when a legislature fails to reapportion according to . . . constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”” *Id.* (quoting *Reynolds*, 377 U.S. at 586).

A court may assess the constitutionality of a redistricting plan in the same way it does any other statute. *Id.* But it must give the Legislature its due deference, especially in cases “involv[ing] the highly politically charged subject of apportionment.” *Id.* That is why this Court cautioned that while courts “may order apportionment, that power ought to be used only after . . . due deference to the Legislature to rectify its own statutes . . . .” *Id.* at 718; *see also Maryland Comm. For Fair Repr. v. Tawe*, 377 U.S. 656, 676 (1964) (“[T]he Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so.”). The Legislature is tasked with redistricting because it is inherently a legislative process that affects all Texans. Courts, on the other hand, handle suits brought by “very few” parties. *Id.* at 720.

This Court has recognized that under the Texas Constitution, its role in the redistricting process is secondary to assess the constitutional validity of the Legislature's actions *after* the Legislature has been given sufficient opportunity to do so. Governor Abbott may not prevent the Legislature from doing its job and thus unilaterally delegating the legislative task of redistricting to the courts. Such improper delegation is a violation of the separation of powers clause.

## **VI. CONCLUSION**

Governor Abbott's veto of the legislative budget is a violation of the constitutional requirement of separation of powers, and it is a violation of the most fundamental kind. The Texas Constitution requires that the Texas Legislature must be given the opportunity to perform its constitutional duty to redistrict congressional, legislative, and state educational board seats. The League urges the Court to, at a minimum, hold the veto void to this extent.

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*/s/ Renea Hicks*  
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Renea Hicks

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