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 FOR *AMICI CURIAE* THE HISPANIC NATIONAL BAR ASSOCIATION, THE NATIONAL BAR ASSOCIATION, AND THE SOUTH ASIAN BAR ASSOCIATION OF NORTH AMERICA IN SUPPORT OF APPELLEES

Robert T. Maldonado
President
Cynthia D. Mares
Immediate Past President
Hispanic National Bar Association
1020 19th Street, N.W.
Suite 505
Washington, D.C. 20036
(212) 278-0509

Peter Karanjia*
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 973-4200
peterkaranjia@dwt.com

Counsel for *Amici Curiae*
*Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

The membership of *amicus curiae* the Hispanic National Bar Association ("HNBA") comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. HNBA regularly petitions Congress and the Executive on behalf of all members of the communities it represents, including immigrants and children.

The National Bar Association ("NBA") is the Nation's oldest and largest national association of predominantly African-American lawyers, judges, educators, and law students. It has 84 affiliate chapters throughout the United States, Canada, the United Kingdom, Africa, and the Caribbean. The NBA also represents a professional network of more than 65,000 lawyers, judges, educators, and law students. Since its founding in 1924, the NBA has been deeply committed to advancing the civil rights of African-Americans, including their rights to fully participate in the democratic process of government.

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[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

The South Asian Bar Association of North America ("SABA North America") is a voluntary bar organization that serves as an umbrella organization to 26 chapters in the United States and Canada representing over 6,000 lawyers, judges and law students. SABA North America is a recognized forum for the professional growth and advancement for South Asian lawyers in North America and seeks to safeguard the civil rights and liberties of the South Asian community across the continent. Members of SABA North America regularly interact with government officials on issues affecting the South Asian community, and both SABA North America and its chapters have filed *amicus curiae* briefs in this Court.

Amici support affirmance of the decision below on the ground that the Texas plan under review meets the constitutional requirements of equal protection by using a total population basis for districting. Rather than repeating the arguments of Appellees and other *amici* addressing Texas' plan under the Equal Protection Clause of the Constitution, however, this brief highlights the important First Amendment principles at stake in this case, which reinforce the constitutionality of the Texas districting plan.

SUMMARY OF ARGUMENT

The right to petition the government, enshrined in the First Amendment, is a bedrock American value. Unlike the right to vote, it has historically been open to all—not just citizens and voters, but

women, children, immigrants, Native Americans, slaves, and individuals with felony convictions.

While the early American form of petitioning is no longer common in modern government, it remains a core principle of American representative democracy that even those who cannot exercise the right to vote—whether it be due to age, immigration status, or a felony conviction—are constituents of their representatives and have a right to political expression and access. The right to petition is vitally important to groups that historically have been excluded from the political process, including the Latino and African-American communities and other minority groups. Members of *amici* regularly petition legislative bodies on major issues of the day, including immigration and criminal justice.

Appellants urge this Court to hold that a state legislative districting plan must be based upon voter population, rather than total population. But such a plan would result in districts with unequal constituencies, leaving residents of more heavily populated districts with less meaningful access to their representatives. That outcome cannot be squared with the First Amendment right of *all* individuals, whether voters or not, to petition their representatives in government. "[U]nder our democratic system of government," *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring), a right to petition nominally enjoyed by all—but without any commitment to representative government—would be nothing more than an empty promise.

As a result, "[i]nterference with individuals' free access to elected representatives impermissibly burdens their right to petition the government." *Garza v. City of L.A.*, 918 F.2d 763, 775 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). These First Amendment principles buttress the constitutionality of Texas' efforts to ensure evenly balanced districts based on total population. It would indeed be odd for the Equal Protection Clause to compel a result that is inconsistent with the fundamental purposes of the First Amendment right to petition. By creating districts populated by an equivalent number of constituents, the State of Texas maintains these avenues for political speech and the airing of grievances to one's representative in government, without regard to their voting status. Guarding against the "diminution of access to elected representatives," *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), the Texas plan rests on a bedrock of sound First Amendment principles.

ARGUMENT

I. THE RIGHT TO PETITION BELONGS TO ALL CONSTITUENTS, REGARDLESS OF VOTER STATUS

The right of all individuals to petition the government has been a core value in this country since the colonial era, forming the heart of the Declaration of Independence and the capstone of the First Amendment. The text of the First Amendment guarantees "the right of the people . . . to petition the government for a redress of grievances." "The reference to 'the right of the people' indicates that

the Petition Clause was intended to codify a pre-existing individual right, which means that we must look to historical practice to determine its scope." *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part) (citing *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008)).

The historical antecedents of this right "run deep, and strike to the heart of the democratic philosophy." *Adderley v. State of Fla.*, 385 U.S. 39, 51 n.2 (1966) (Douglas, J., dissenting). When the Founders declared independence from the British crown, it was a lack of political access that motivated their manifesto. After cataloging the grievances of the colonists, the Founders declared:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

The Declaration of Independence, para. 30 (U.S. 1776).

Since its inception, the right to petition has been broadly construed and available to all, without reference to citizenship or enfranchisement. In this way, "[p]etitions allowed participation in democratic governance even by groups excluded from the franchise." *Guarnieri*, 131 S. Ct. at 2499-500. These broad contours are reflected in the Massachusetts

Body of Liberties, adopted in 1641, which provides that "[e]very man whether Inhabitant or fforeiner, free or not free shall have libertie to come to any publique Court, Councell or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question or to present any necessary motion, complaint, petition, Bill or information." Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2177 (1998). In keeping with this expansive understanding, petitions were accepted from women, Native Americans, free blacks, and slaves, as well as from white men who did not have the right to vote, such as prisoners and those who did not own property. Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667, 688 (2003).

Records of non-citizen immigrants petitioning local authorities date back to at least 1621, when a "Dutchmen's son" petitioned the Virginia Assembly for permission to return to the Netherlands. *Id.* at 689-90. When Acadian refugees were deported from Nova Scotia to the American colonies, they petitioned local colonial authorities for permission to travel, to be reunited with family members, and even to determine their citizenship status. *Id.* Individual immigrants petitioned for naturalization, and the passage of the Naturalization Act in 1798 unleashed a "flood" of petitions from immigrants seeking relief from the law's provisions. *Id.* at 710-11.

Historical records also show petitions from women—nearly two hundred years before they received the right to vote—on a variety of matters,

including business licenses, pensions and financial assistance for widows, and in at least one instance, inappropriate behavior by a local minister. Mark, *supra*, at 2184. "[P]etitions by women seeking the vote" thus played an important "role in the early woman's suffrage movement." *Guarnieri*, 131 S. Ct. at 2500. Similarly, Native Americans petitioned local authorities regarding tribal lands, and slaves petitioned for emancipation. Mark, *supra*, at 2185-86. Indeed, the right to petition played a "central role . . . in abolitionist thought and practice in the antebellum era." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 32 (Yale Univ. Press 2000) (citation omitted); *see also Guarnieri*, 131 S. Ct. at 2499 (noting significance of petitions to the National Legislature "in the legislative debate on the subject of slavery in the years before the Civil War.").

For these unrepresented groups, "[t]he right to petition vested [them] with a minimum form of citizenship: petitioning meant that no group in colonial society was entirely without political power." Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 153 (1986-1987). "Like the other provisions of the First Amendment, the clause [was] not primarily concerned with the problem of overweening majoritarianism; it [was] at least equally concerned with the danger of attenuated representation." Amar, *supra*, at 31 (citation omitted). Indeed, the text of the Petition Clause—"the right of *the people*"—"decisively signals its connection to popular-sovereignty theory." *Id.* at 30. The right to petition thus "ensured that topics of

concern to the unrepresented were raised in a body that purported to represent *all* the people, even a body lacking representatives of all segments of the population." Mark, *supra*, at 2194 (emphasis added).

Looking at legislative districting cases (such as this case) through the lens of the Petition Clause is particularly fitting because the paradigmatic exercise of the right to petition during the colonial era involved petitioning legislative bodies. "Petitions to the colonial legislatures concerned topics as diverse as debt actions, estate distributions, divorce proceedings, and requests for modification of a criminal sentence." *Guarnieri*, 131 S. Ct. at 2498 (citing Higginson, *supra*, at 146). Indeed, by 1781, "seven state constitutions protected citizens' right to apply or petition for redress of grievances," and "all seven referred . . . to *legislative* petitions." *Id.* at 2503 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added). Moreover, petitions frequently spurred legislative action. In 1770, for example, Connecticut's Assembly acted on over 150 individual petitions, while enacting only 15 laws on its own initiative. Higginson, *supra*, at 146 (citing William Hamersley, *Connecticut—The Origins of Her Courts and Laws*, in *The New England States* Vol. 1, 472-98 (William Thomas Davis ed. 1897)). And, "[i]n eighteenth-century Virginia, . . . more than half of the statutes ultimately enacted by the legislature originated in the form of popular petitions." Amar, *supra*, at 31 (citation omitted). As explained below (note 2, *infra*), the right to petition also contemplated a responsive and accountable legislative body (including the right to some form of fair hearing); it was not an empty

right to be ignored. *But see* Br. for Appellants at 40; Br. for Appellees at 47.

While the colonial form of petition is no longer a central feature of modern American government, its tradition continues in the robust protections for petitioning directed at government representatives. Even those without the political power of the vote have the right to call, write, email, or visit their representative to voice their concerns and share their opinions on particular issues. In this way, the right to petition—like its "cognate rights," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), under the other clauses of the First Amendment—"embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586-87 (1980) (Brennan, J., concurring in the judgment); *see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("the rights to assemble peaceably and to petition for a redress of grievances are . . . intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press," so that "'[a]ll these [rights], though not identical, are inseparable.'") (quoting *Collins*, 323 U.S. at 530); *Guarnieri*, 131 S. Ct. at 2494 (noting that "the rights of speech and petition share substantial common ground"). It is therefore not surprising that this Court has described the right to petition as "one of the most precious of the liberties safeguarded by the Bill of Rights . . . and . . . implied by '[t]he very idea of a government, republican in

form.'" *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524-25 (2002) (quoting *Mine Workers*, 389 U.S. at 222).

For this right to be "something more than an exercise in futility," individuals must have a "*meaningful* opportunity" to communicate with their government and express their views. *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 308-09 (1984) (Stevens, J., dissenting). "In a representative democracy such as this," legislative bodies "act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Indeed, "'a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring) (quoting 1 William Blackstone Commentaries on the Laws of England, editor's app. (St. George Tucker ed., Philadelphia, Birch & Small 1803)).

The rule urged by Appellants would devastate this right to meaningful access. Districting based solely on voter population would dilute the access of nonvoter constituents, undermining their exercise of this fundamental right. That this is accomplished by indirect means—rather than, say, a law that nakedly prohibits the right to petition—is no less an assault upon the Bill of Rights. "The First Amendment would . . . be a hollow promise if it left

government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *Mine Workers*, 389 U.S. at 222.

II. FIRST AMENDMENT PRINCIPLES CONFIRM THE CONSTITUTIONALITY OF USING TOTAL POPULATION AS THE BASIS FOR LEGISLATIVE DISTRICTS

The principles undergirding the First Amendment right to petition fully support the constitutionality of Texas' efforts to ensure that legislative districts contain equivalent populations of constituents. It would indeed be odd—and contrary to fundamental canons of constitutional construction—for the Equal Protection Clause to compel states to ignore these First Amendment principles and create districts with unequal channels for political speech and access. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute . . . an intent to invade these freedoms." *Noerr Motor Freight*, 365 U.S. at 138; *see also Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 174, 2 L. Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Wright v. United States*, 302 U.S. 583, 588 (1938) (it is the "first principle of constitutional interpretation" that "every word must have its due force, and appropriate meaning") (citation omitted).

The Ninth Circuit highlighted the interplay between the Petition Clause and the Equal Protection Clause in *Garza v. County of Los Angeles*,

where it held that a districting plan based on *voting* population rather than *total* population "would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative." 918 F.2d 763, 775 (9th Cir. 1990). Recognizing that equal representation intertwines with the First Amendment right to petition, the court explained:

> Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government. . . . Since 'the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives', this right to petition is an important corollary to the right to be represented.

Id. at 775 (citing *Noerr Motor Freight*, 365 U.S. at 137). As the California Supreme Court has recognized, "[c]rucial though voting is as a method of participation in representative government, access to elected officials is also an important means of democratic expression—and one that is not limited to those who cast ballots." *Calderon v. City of L.A.*, 4 Cal. 3d 251, 259 (1971) (citations omitted).

Consistent with the Petition Clause, a plan based upon total population allows all individuals to exercise their petition rights through local representatives, regardless of voter status. Minors and non-citizens, for example, may not have the right to vote, but they have a right to political

expression and to petition their representatives. *See Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503, 511-13 (1969). As taxpayers, students, neighbors and workers, they have a stake in their local communities. They attend local schools, work in local businesses, and seek medical care from local hospitals. "As such, they have a right to petition their government for services and to influence how their tax dollars are spent." *Garza*, 918 F.2d at 775.

While voters may exercise their political speech at the ballot box, the right to petition is available at any point in the political process, and on any topic of importance to the speaker. A plan that deliberately constricts this access, making it harder for certain voices to be heard—invariably, the voices of those already disadvantaged in the political process—would impermissibly burden this core First Amendment right. As the California Supreme Court noted in *Calderon*, "[a]dherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government." 4 Cal. 3d at 258-59. The court explained:

> [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.
>
> Furthermore, much of a legislator's time is devoted providing services and information to

> his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens.

Id. Such diminished access is at odds with the First Amendment, "which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (quoting *Sullivan*, 376 U.S. at 266, 269); *see also Mine Workers*, 389 U.S. at 222 (noting "inseparable" nature of inter-related First Amendment rights) (citation omitted). "'It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances.' Both speech and petition are integral to the democratic process." *Guarnieri*, 131 S. Ct. at 2495 (citation omitted).

While the First Amendment may not require legislators to *listen or respond* to petitioning speech under this Court's precedents, *Minnesota State Bd. for Cmty. Colls.*, 465 U.S. at 285,[2] it does require an

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[2] Commentators have persuasively argued that, based on its original meaning, the right to petition entailed a broader right to a response from the government. *See, e.g.*, Higginson, *supra*, at 155 ("That the Framers meant to imply a corresponding governmental duty of a fair hearing seems clear given the

audience, thereby protecting the channels of communication between the people and their representative government. *See* Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* at 40 (Louisiana State University Press 1969) ("the petitioning of a legislative body would seem to be an inherent part of its relation with its constituency"). By creating districts populated by an equivalent number of constituents, the State of Texas maintains these avenues for political speech and the airing of grievances to one's representative in government, without regard to whether one did not (or could not) vote for that representative. Guarding against "diminution of access to elected representatives," *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), the Texas plan rests on a bedrock of sound First Amendment principles.

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history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances") (citations omitted); Amar, *supra*, at 31 ("the clause was originally understood as giving extraordinary power to even a single individual, for the right to petition implied a corresponding congressional duty to respond, at least with some kind of hearing") (citing Higginson, *supra*, at 155-58).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Western District of Texas.

Respectfully submitted,

Robert T. Maldonado
President
Cynthia D. Mares
Immediate Past President
Hispanic National Bar Association
1020 19th Street, N.W., Suite 505
Washington, D.C. 20036
Tel: (212) 278-0509
Fax: (202) 503-3403

Peter Karanjia*
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, D.C. 20006
Tel: (202) 973-4200
peterkaranjia@dwt.com
Counsel for *Amici Curiae*
*Counsel of Record

Benjamin Crump
President
National Bar Association
1225 11th Street, NW
Washington, D.C. 20001
Tel: (202) 842-3900
Fax: (202) 289-6170

Anuradha Gwal
President
South Asian Bar Association of North America
423 Cadberry Ct.
Pittsburgh, PA 15241
Tel: (779) 316-9018

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