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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 22-0008

IN THE SUPREME COURT OF TEXAS

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JOHN SCHOTT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF TEXAS; THE STATE OF TEXAS,
Appellants,

v.

MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES; ROLAND GUTIERREZ; SARAH ECKHARDT; RUBEN CORTEZ, JR.; TEJANO DEMOCRATS,
Appellees.

On Direct Appeal
From the Special Three-Judge District Court
For the 126th and 250th Judicial District Courts, Travis County

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BRIEF ON THE MERITS OF APPELLEES ROLAND GUTIERREZ, SARAH ECKHARDT, RUBEN CORTEZ, AND THE TEJANO DEMOCRATS

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STATEMENT OF THE CASE

Nature of the Case:	Suit under the Uniform Declaratory Judgments Act to invalidate redistricting maps for the Texas House and Senate because they violate Article III, §§26 and 28 of the Texas Constitution; *ultra vires* suit against state officials to prevent enforcement of Texas House map because it violates Article III, §26.
Trial Court:	Special three-judge district court appointed under §22A.002 of the Texas Government Code; Judge Karin Crump, Judge Emily Miskel, and Justice Ken Wise
Parties in the Trial Court:	*Plaintiffs*: Mexican American Legislative Caucus, Roland Gutierrez, Sarah Eckhardt, Ruben Cortez, Jr., and the Tejano Democrats *Defendants*: the State of Texas; Governor Greg Abbott and Secretary of State John Schott, in their official capacities
Trial Court's Disposition:	Granted Defendants' plea to the jurisdiction in part, dismissing request for temporary injunction under UDJA; denied Defendants' plea to the jurisdiction in all other respects; denied Plaintiffs' request for temporary injunction

ISSUES PRESENTED

1. Is Plaintiffs' challenge to the Texas House and Senate maps moot because those maps were in effect for the 2022 primary election, when they could still be declared invalid before the general election or subsequent elections?

2. Does a sitting Texas Senator have standing to challenge electoral maps when the enactment of those maps makes it more likely that his constitutionally-mandated four-year term will be truncated?

3. Does a Cameron County voter and candidate for the Texas House have standing to challenge the House map when that map will likely (1) increase the time and money he must spend on his campaign, (2) change his electorate in a manner that is likely detrimental to his candidacy, and (3) dilute his vote as a resident of Cameron County compared to the residents of other counties?

3. Does Article III, §28 of the Texas Constitution, which requires the Legislature to apportion Texas House and Senate seats in the first *regular* session after the decennial census, prohibit apportionment from being conducted in a special session that predates the first regular session after the census?

3. Does Article III, §26 require invalidation of a Texas House map that, with respect to a county whose population entitles it to two districts (a) fails to draw two districts wholly contained within county boundaries, and (b) fails to join residual territory with only one district in an adjacent county?

STATEMENT OF FACTS

The State's brief correctly states the factual and procedural history.

SUMMARY OF THE ARGUMENT

The Texas Legislature must reapportion districts every ten years, after the Census is performed. The Texas Constitution restricts how and when the Legislature fulfills this duty. For Texas House of Representatives and Texas Senate Districts, the Constitution provides that the Legislature has the power to reapportion "at its first *regular* session after the publication of each United States decennial census." TEX. CONST. art. III, §28 (emphasis added). The Legislature deliberately added the "regular session" restriction in an amendment before sending the measure to the voters for ratification.

Since the 1948 ratification, the Census has been published during or before the regular session following the census year. But in 2020, for the first time, the Census was published on August 12, 2021—after the regular session concluded and 16 months before the next regular session would convene. The Legislature, in direct defiance of §28, reapportioned districts in a special session, before a regular session had convened, and before the LRB's authority had expired.

The Legislature had never before taken such action in the 70 years since ratification. This Court has held that such a consistent historical practice is an "established practical construction"—a strong indicator of the limits on the

Legislature's power. *See Walker v. Baker*, 196 S.W.2d 324, 327 (Tex. 1946) (orig. proceeding); *see also Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 506 (Tex. 1992).

Under §28, reapportioning Texas House and Senate districts must await the 2023 regular session. Only after that regular session ends, and then only if the LRB fails to act, is the Legislature empowered to apportion during a special session. Because the constitutionally required preconditions are missing, the Legislature's redistricting maps, drawn in HB 1 and SB 4, are invalid.

HB 1 also violates the "whole county line rule." *See* TEX. CONST. art. III, §26. Under that rule, the Legislature was obligated to draw two House districts wholly within the boundaries of Cameron County and allocate Cameron County's remainder population to one additional district in an adjacent county. Cameron County had the required configuration under the old maps. But 2021 special session, District 37—one of the two districts wholly contained within Cameron County—was reconfigured to also encompass Willacy County. Cameron County was left with only one district (38) wholly contained within its borders and two districts (35 and 37) that also include territory from neighboring counties. This Court should not accept the State's invitation to forgive the violation on the grounds that the violation occurs only once or because this Court's established precedent is outdated or merely aspirational.

The Gutierrez Plaintiffs have standing to bring this challenge, and the State's assertion of mootness fails. The challenge to these maps is not rendered moot by the fact that they were in place during the 2022 primary election. The courts retain jurisdiction to consider Plaintiffs' claims for declaratory relief invalidating the maps, and for injunctive relief, if appropriate, regarding the general election or a future election. This Court should, therefore, affirm the special three-judge district court's denial of the plea to the jurisdiction.

ARGUMENT

I. The standard of review requires the State to disprove jurisdiction as a matter of law.

The Gutierrez Plaintiffs have pleaded facts and presented evidence establishing their standing to bring this challenge. The State nonetheless contends that its plea to the jurisdiction should have been granted. But the standard of review (1) requires this Court to assume that the Gutierrez Plaintiffs' factual allegations are true unless disproven, and (2) allows dismissal only "if the plaintiff's pleadings affirmatively negate the existence of jurisdiction" or "if the defendant presents undisputed evidence that negates the existence of the court's jurisdiction." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). The three judge panel correctly held that the Gutierrez Plaintiffs' have established jurisdiction, as their pleadings and evidence demonstrate the court's power to entertain the suit. Thus, the

State was required to negate jurisdiction with undisputed evidence. It did not meet that high standard.

II. The State cannot show that the Gutierrez' Plaintiffs' claims are moot.

According to the State, Plaintiffs "have withdrawn any request for relief in advance of the 2022 elections," and thus mooted the controversy. Appellants' Br. at 17 (citing Resp. Stmt. Jur. at 4). The State misinterprets both the Plaintiffs' Response to the Statement of Jurisdiction and its effect on justiciability. First, the Plaintiffs did not announce a withdrawal of all claims for relief in advance of the 2022 elections. Rather, they clarified the scope of relief they were requesting from *this* Court:

> no one asks *this Court* to disturb the *current election cycle* at this point in the litigation and in light of the Court's opinion in *In re Khanoyan*, __ S.W.3d __, No. 21-1111, 2022 WL 58537 (Tex. Jan. 6, 2022).

Resp. Stmt. Jur. at 4 (emphasis added). This clarification was necessary to distinguish this appeal from *Khanoyan*, a mandamus proceeding asking *this Court* to enjoin election maps for the Harris County Commissioners Court on the eve of the primary election. *See In re Khanoyan*, 637 S.W.3d 762, 764 (Tex. 2022). In *Khanoyan*, the Court denied mandamus relief without regard to the merits, declining to disturb the primary by imposing injunctive relief—especially without a factual record from a trial court. *Id*. at 769.

This proceeding, by contrast, is not a mandamus; it is an interlocutory appeal from the denial of a plea to the jurisdiction. This Court may affirm or reverse the

trial court's denial of the plea; an injunction is not an available disposition. Plaintiffs sought to enjoin the primary in the trial court, but that court denied or dismissed all claims for injunctive relief, MALC.CR.515, and neither plaintiff has appealed those rulings.

In this appeal, therefore, the Court was not asked to enjoin the primary because (1) that relief was not available on interlocutory appeal, and (2) *Khanoyan* foreshadowed the futility of that plea. Plaintiffs' remark that "no one asks this Court to disturb the current election cycle at this point in the litigation" did not moot the dispute but merely ensured that the Court understood the existing procedural posture and its contrast to *Khanoyan*.

Khanoyan itself made clear that a failure to obtain injunctive relief for the primary election did not foreclose a challenge to a map that "will govern … elections for the rest of the decade." 637 S.W.3d at 770; *see also Gray v. Sanders*, 372 U.S. 368, 375–76 (1963) (holding that challenge to statute establishing "county unit" system governing election was not mooted by decision to hold primary on popular vote basis because county unit system would continue to govern future elections).

MALC's and Gutierrez's claims for declaratory relief invalidating the maps are, therefore, live disputes. The trial court retains jurisdiction to declare the maps unconstitutional and then consider the propriety of permanent injunctive relief. Even if *Khanoyan* would prevent injunctive relief before the 2022 general election, which

Plaintiffs do not concede, the decision would not bar an injunction to prevent use of the invalid maps in a future election.

To that point, the State incorrectly pronounces that the 2022 election cycle is "the only election cycle to which this map will apply." Appellants' Br. at 26. That assertion is speculative. There is no guarantee that new maps will be drawn during the 2023 session. The speculation, instead, surrounds the State's assertion that the existing maps will *not* govern the 2022 election and subsequent elections. The State is arguing not that this case is moot, but that it *might become moot* in the future, *if* new maps are adopted in 2023.

The State's assertion of mootness thus fails. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (holding that a defendant asserting mootness has the "formidable burden" to prove that it is "absolutely clear" the challenged injury will not occur); *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016) (following *Laidlaw* and calling the defendant's burden to establish mootness "heavy").

III. Plaintiffs have standing.

The case may proceed if any plaintiff has standing to pursue each claim:

> [W]here there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief[,] ... the court need not analyze the standing of more than one plaintiff—so long as that plaintiff has standing to pursue as much or more relief than any of the other plaintiffs.

Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 77-78 (Tex. 2015) (quoting *Heckman*, 369 S.W.3d at 152 n.64). The State has not met its burden of negating the standing of each and every Plaintiff.

A. The State cannot negate Senator Gutierrez's standing to bring the Article III, §28 claim.

Roland Gutierrez is a State Senator who was first elected in 2020. Under the Texas Constitution, a Texas State Senator has a right to a four-year term, except after apportionment, when all Senators must stand for re-election under new maps. *See* TEX. CONST. art. III, §3. Because—under Article III, §28—the first legitimate opportunity for the Legislature to reapportion is in 2023, Senator Gutierrez's tenure is protected until 2024, when his four-year term expires. The Legislature's unconstitutional 2021 apportionment unconstitutionally deprives Senator Gutierrez of his right to a four-year term by forcing him to stand for re-election in 2022, which will require his time, emotional and professional exertions, as well as the significant expense associated with such a campaign. Gutierrez.CR.5; 3RR116.

"[T]o challenge a statute, a plaintiff must [both] suffer some actual or threatened restriction under the statute" and "contend that the statute unconstitutionally restricts the plaintiff's rights." *Patel*, 469 S.W.3d at 77 (quoting *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995)). The State asserts that the exertions and expense of an additional campaign are not cognizable injuries, Appellants' Br. at 27, but it does not explain why. They are

certainly more than "an identifiable trifle," which is all that is required. *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 689 n.14 (1973).

The State also argues that Senator Gutierrez's injury is not traceable to the challenged maps or redressable via their invalidation. Appellants' Br. at 27-28. According to the State, Senator Gutierrez's injury is traceable only to the Texas Constitution, which requires a new election after an apportionment. *Id*. at 27. Thus, the State insists, regardless of whether the Legislature or a court draws new maps, or whether they are drawn during a regular or special session, all Senators must stand for re-election in 2022 anyway. *Id*.

The State's argument is incorrect because it depends on a combination of two different redistricting scenarios, one of which is not implicated by this suit. Senator Gutierrez has standing because the challenged maps triggered the requirement that all Senators, including Senator Gutierrez, must stand for election in 2022. Traceability requires only that the challenged action be a cause-in-fact of the injury, not the proximate or sole cause. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). If the Constitution had been honored and the challenged maps had not been adopted, Senator Gutierrez would not have to endure a 2022 campaign for reelection. Therefore, his injury is traceable to the challenged map.

This traceability is not diminished by the fact that if the new maps are invalidated, the old maps would then be subject to challenge under one-person-one-

vote principles and might have to themselves be redrawn by the courts, which *might* force Senator Gutierrez to run in 2022 regardless. This conjecture does not defeat traceability, and it is speculative—courts have allowed elections to proceed even under invalid maps. *See, e.g.*, 1 GEORGE D. BRADEN, R. STEPHEN BICKERSTAFF, *et al.*, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 149 (1977) (noting that 1966 election was permitted to proceed under map that violated one-person, one-vote rule).[1]

A federal court drawing maps has discretion to fine-tune its remedy, curing glaring one-person-one-vote violations and otherwise preserving the status quo. A court could thus have limited new elections to only the affected districts. This is what took place in 1997. *See Thomas v. Bush*, No. 1:95-cv-00186-SS, ECF No. 105 (W.D. Tex. Sept. 15, 1995) (adopting new maps and, rather than ordering all senators to stand for reelection, providing "[t]hat the 1996 elections of state senators shall be in accordance with the drawing of lots on 1/11/95"); *see also* Redistricting History,

[1] *See also, e.g., Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991) ("We emphasize that, in declining to order a court-fashioned plan for use in the upcoming elections, this court is not abdicating its responsibility to enforce the provisions of the Voting Rights Act and the constitutional requirement of one-person, one-vote. Far from it. We have retained jurisdiction of this action. We would not consider—nor would the parties suggest—use of the 1982 plan if we were implementing a permanent plan. However, this court has been presented with a range of untenable options; and we conclude that conducting elections under the existing plan is the lesser of the available evils."), *aff'd in part, vacated in part*, 502 U.S. 954 (1991) *Covington v. N. C.*, No. 1:15CV399, 2018 WL 604732, at *1 (M.D.N.C. Jan. 26, 2018) (per curiam).

1990s, Texas Redistricting, https://redistricting.capitol.texas.gov/history (last visited Mar. 1, 2022).

Thus, whether and how reapportionment might have occurred absent the challenged maps is speculative and cannot defeat Senator Gutierrez's standing, which "is determined at the time suit is filed." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 n.9 (Tex. 1993); *see also Heckman*, 369 S.W.3d at 157 (explaining that "subsequent events have no effect" on standing) (citing *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710 (Tex. 2001)). Also, Senator Gutierrez was not required to prove to an absolute certainty that he would be injured. "A substantial risk of injury is sufficient." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. The pleadings and the evidence establish Senator Gutierrez's standing. The State has not met its burden to negate standing through undisputed evidence.

B. The State does not negate Ruben Cortez's standing to bring the Article III, §26 claim.

Ruben Cortez is a Cameron County voter and current candidate for House District 37. Under Article III, §26 of the Texas Constitution, termed the "whole county line" rule, Cameron County's population entitles it to two state house districts wholly contained within Cameron County lines, with any surplus population joined to one other adjacent district in another county.

Cameron County had just this configuration under the old maps. *See* 4.RR.MALC.Ex.2. But during the September/October 2021 special session, District

37—one of the two districts wholly contained within Cameron County—was reconfigured to encompass Willacy County as well. *See* 4.RR.MALC.Ex.9. The reconfiguration left Cameron County with only one district (38) wholly contained within its borders and two districts (35 and 37) that also include territory from neighboring counties, *id.*, a map that violates the whole county line rule.

As a candidate for District 37, Ruben Cortez is injured by the challenged maps. Instead of running in a district wholly contained within Cameron County, he must now run in a much larger geographic territory consisting of a greater portion of Cameron County and also a large adjacent county—Willacy. Because of the new maps, Cortez, who is from Cameron County, must engage the voters in a different county, raising and expending funds and pursuing in-person contact with those constituents to attract their votes. *See* 2.RR.160-61. Keeping communities of interest together is one of the interests furthered by the whole county line rule. *See* BRADEN, *infra*, at 154.

The State labels Cortez's evidence of injury "vague," arguing that it establishes merely the need to reallocate—rather than spend additional—campaign funds to campaign in Willacy County. Appellants' Br. at 24. But Cortez explicitly stated that, under the new maps, he would be required to "frequently" travel to Willacy County. 2.RR.160. Cortez lives in Brownsville, on the southern edge of Cameron County. 2.RR.159. Willacy County lies due north of Cameron County. *See*

4.RR.MALC.Ex.9. Frequent travel from his home in Brownsville to and throughout Willacy County will plainly entail a significantly greater expenditure of Cortez's time and money that should have been devoted exclusively to voters wholly within Cameron County.

Moreover, Cortez need not show with absolute certainty that he will be injured. "A substantial risk of injury is sufficient." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. And, for standing, an injury need be no more than "an identifiable trifle." *Students Challenging Regul. Agency Procs.*, 412 U.S. at 689 n.14; *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (holding that the injury requirement "is qualitative, not quantitative").

Cortez also has standing as a Cameron County resident and voter. The whole county line rule ensures that Texans have equal representation not only as Texans, but as residents of their respective counties. The new maps dilute Cortez's vote, therefore, compared to voters in other counties that have the correct number of House districts contained within their boundaries. *See* MALC BOM.

In two previous decisions, this Court has enforced the whole county line rule, invalidating maps in challenges brought by public officials and voters. *See Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981); *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971). Because this Court has an obligation to consider its standing, those decisions must be treated as precedent establishing Plaintiffs' standing here.

The State's urging of an extreme, cramped view of standing would, if accepted, abrogate *Clements* and *Smith* and make the whole county line rule entirely unenforceable. This Court should not accept the State's invitation to retreat from established constitutional precedent, especially when the result would be to effectively nullify a provision of the Texas Constitution.

Finally, echoing their mootness argument, the State contends that Cortez no longer has standing for the prospective relief he seeks because the Legislature must "reassess the lines of H.D. 37 during its regular session in 2023." Appellants' Br. at 25. The State is wrong for multiple reasons. First, a plaintiff's standing is evaluated at the time of suit, regardless of subsequent events. *Tex. Ass'n of Bus*, 852 S.W.2d at 446 n.9; *see also Heckman*, 369 S.W.3d at 157 (citing *M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 710). Second, there is no guarantee the Legislature will draw new maps during the 2023 session. And, even if the Legislature enacts new maps, nothing guarantees that those maps will change the configuration of Cameron County to conform to the whole county line rule. The State cites no authority to the contrary and has failed to meet its burden to negate Cortez's standing.

IV. The challenged maps violate Article III, §28 of the Texas Constitution.

The Legislature enacted new maps in the September/October 2021 special session in contravention of the Texas Constitution. Article III, §28 establishes a

specific schedule for apportionment of state legislative districts, pursuant to which the Legislature cannot apportion until its next regular session in 2023.

A. The text of Article III, §28 requires that the first apportionment after the Census occur in a *regular* session of the Legislature.

In a section titled "Time for Apportionment," the Texas Constitution dictates a step-by-step procedure for the first apportionment after each decennial census:

> The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts...."

TEX. CONST. art. III, §8. This provision was adopted in 1947 by the 50th Texas Legislature. 4.RR.Gutierrez.Ex.3. It was filed that year as Senate Joint Resolution 2 ("SJR 2") and, once enacted and ratified by the people, it amended the Texas Constitution. *Id.*

SJR 2 was read for the first time and referred to the Committee on Constitutional Amendments on January 16, 1947. *See id.* at 9. As introduced, SJR 2 did not differentiate between regular and special sessions, but mandated that "the Legislature shall, at its first *Session* after the publication of each United States decennial census, apportion the state into senatorial and representative districts." *Id.* at 1. It also provided for the creation of a Legislative Redistricting Board should the Legislature fail to adopt apportionment plans. *Id.*

S. J. R. NO. 21 By: Moffett

A JOINT RESOLUTION

PROPOSING an amendment to Section 28, of Article III, of the Constitution of the State of Texas, so as to provide for a Board, for apportioning the State into senatorial districts and representative districts in the event the Legislature fails to make such apportionment; providing for the issuance of the necessary proclamation by the Governor; and making an appropriation.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. That Section 28, of Article III, of the Constitution of the State of Texas be amended so as hereafter to read as follows:

"Sec. 28. The Legislature shall, at its first Session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provi-

But the Committee on Constitutional Amendments in the Senate deliberately altered the provision, requiring that the Legislature apportion only after the first *regular* session after the decennial census. *See* 4.RR.Gutierrez.Ex.3 at 3-4.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. That Section 28 of Article III of the Constitution of the State of Texas be amended so as hereafter to read as follows:

"Section 28. The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative

The Texas Legislature passed the revised SJR 2 by a two-thirds vote in each chamber, *id*. at 9, and the amendment was sent to the voters for ratification. On November 2, 1948, the voters of Texas ratified SJR 2 by a greater than 3 to 1 margin—528,158 votes for adoption compared to 153,704 votes against.[2] The State's assertion that the Legislature has unbridled discretion to apportion however and whenever it desires ignores the purposeful insertion of "regular" into Article III, §28. That term—which the Legislature thought important enough to specifically insert—must be given meaning.

B. This Court's decisions confirm the constitutional text: "regular" is an important qualifier.

After ratification, timely legislative apportionments followed for three decades, until the 1970s. In 1971, the Census was published during the pendency of the 62nd Regular Session, giving this Court its first opportunity to construe Article III, §28. *See Mauzy v. Legis. Redistricting Bd.*, 471 S.W.2d 570 (Tex. 1971).

During that session, the Texas House adopted an apportionment plan, but because the Texas Senate did not, the LRB was obligated to apportion. TEX. CONST. art. III, §28 ("In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such

[2] Legis. Reference Library of Tex., Election Details, SJR 2, 50th R.S., available at https://lrl.texas.gov/legis/billSearch/amendmentdetails.cfm?legSession=50-0&billtypeDetail=SJR&billNumberDetail=2&billSuffixDetail=&amendmentID=180 (last visited Mar. 1, 2022).

apportionment, same shall be done by the Legislative Redistricting Board of Texas.").

Before the LRB met to adopt a Senate apportionment plan, Representative Tom Craddick successfully challenged the Texas House apportionment for violating the Texas "whole county line rule" (TEX. CONST. art. III §26), and the Texas House map's implementation was enjoined. *See Smith*, 471 S.W.2d at 378-79. When the LRB declined to reapportion the House, this Court granted mandamus relief compelling the LRB to draw new Texas House and Senate maps. *Mauzy*, 471 S.W.2d at 573, 575.

Construing Article I, §28, the Court held: "We are convinced that the overriding intent of the people in adopting Sec. 28 was to permit apportionment of the state into legislative districts at the *regular* session of the Legislature which is convened in January following the taking of the census if the publication is either *before* convening *or during* the session." *Id.* at 573 (emphasis added).

Mauzy concerned whether the Legislature had the power to apportion when the Census was published *during*, rather than *before*, a *regular* session. *See id.* While its holding thus does not directly answer whether the Legislature may apportion for the first time in a *special* session, its language strongly supports the notion that §28 imposes a single, binding schedule for apportionment, rather than the free-for-all proposed by the State.

This reading is further bolstered by this Court's decision in *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991). There, this Court faced a question reserved in *Mauzy*: whether the Legislature could apportion in a special session if the Legislature failed to act in the first regular session after the publication of the Census and the LRB also failed to act. *See id* at 726. The Court answered in the affirmative, holding that "[a]lthough article III, section 28 of the Texas Constitution explicitly requires the Legislature to reapportion legislative districts in the first regular session after each United States decennial census is published, neither that section nor any other constitutional provision prohibits the Legislature from acting in *later* special or regular sessions *after* the constitutional authority of the Legislative Redistricting Board has expired." *Id.* (emphasis added).

Thus *Terrazas*, like *Mauzy*, confirms that Article III, §28 establishes a specific schedule for apportionment following publication of the Census: first, the Legislature must have the opportunity to act during a regular session; second, if it fails, the LRB has an opportunity to act; and third, only if the LRB fails to act, may the Legislature act during a special session. *See id.* at 726 (holding that the Legislature can act during a special session "*after*" the LRB's authority expires (emphasis added)).

Nothing in either *Mauzy* or *Terrazas* supports the State's novel theory that it has unrestricted power to apportion at any time and in any session. The timing is

constitutionally confined to the first *regular* session after the Census, and after the LRB's authority has expired.

The Legislature's deliberate choice of a regular session makes sense. Unlike a special session, a regular session does not depend upon the will of the Governor to convene. A regular session also affords the Legislature more time to conduct public hearings and gather evidence to ensure rational lines are drawn that comport with the Constitution. Additionally, in a regular session, members are free to make trades and seek legislative compromise on their districts as part of all legislative matters in consideration, opportunities that are absent in a special session devoted to few, or even one, topic. Designating the first regular session as the time for apportionment ensures an orderly, deliberate process.

C. Scholars agree that the first reapportionment after the Census must occur in a regular session.

In 1972, Texas voters approved a revision of the State's constitution. As part of that process, a collection of scholars and experts, including members of the Texas Legislative Council and the late R. Stephen Bickerstaff, one of the most distinguished lawyers in Texas redistricting history, annotated the Texas Constitution to assist delegates to the Constitutional Convention. This seminal publication described the origins, history, and contemporary meaning of each section of the Texas Constitution. This Court has relied on this work at least forty times and

has called it the Constitution's "prevailing understanding." *In re Abbott*, 628 S.W.3d 288, 294 (Tex. 2021) (orig. proceeding).

The authors, after acknowledging that Article III, §28 prohibits apportioning legislative districts for the first time during a special session, implored the Legislature to remove that limitation:

> To begin, the legislature ought to be allowed to reapportion itself in special session. A revision of Section 28 ought not specify any session, of course, but simply direct the legislature to reapportion when necessary and at least every ten years.

1 GEORGE D. BRADEN, R. STEPHEN BICKERSTAFF, *et al.*, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 159 (1977). The delegates declined this invitation, intentionally retaining the Constitution's strict procedure for apportionment. This Court subsequently clarified that apportionment in a special session was allowed under Article III, §28 *after* the first regular session and *after* the LRB's authority had expired, *see Terrazas*, 829 S.W.2d at 726. The scholars' view that reapportionment may not occur at any time, and in any manner, that the Legislature desires (as the State urges here) remains unchallenged.

D. Article III, §28 restrains legislative power.

The Texas Constitution vests legislative power in the Legislature. *See* TEX. CONST. art. III, §1. But the Legislature may not exercise a power the Constitution withholds. In dozens of instances, Article III uses the word "shall" to empower the legislature, but each express grant of authority carries with it an explicit constraint:

that the Legislature may not act otherwise than the Constitution permits it. Section 28 is no different. As the Attorney General recognized before this litigation commenced, "[i]n enacting [Art. III, §28], the people specifically provided for the procedure to be followed to achieve equal apportionment and did not see fit to leave it within the discretion of the Governor to call a special session for such a purpose." TEX. ATT'Y GEN. OP. No. M-881 (1971).

1. Under *Walker v. Baker*, Article III, §28 does not allow deviations from the schedule for apportionment.

When the Constitution provides a specific process for accomplishing an end, that process is exclusive. In 1946, the year before the enactment of Article III, §28, this Court considered whether the Texas Senate could convene at its own will to vote on the Governor's recess appointments. *See Walker*, 196 S.W.2d at 324. The Senate had done so in January 1946. In the context of a mandamus over payment of the printing bill for the Senate journal, this Court held that the Senate had no power to convene itself. *Id.* at 328.

Walker was grounded in a fundamental rule of constitutional interpretation:

> "It is a rule for the construction of Constitutions, constantly applied, that where a power is expressly given and the means by which, or the manner in which, it is to be exercised is prescribed, such means or manner is *exclusive* of all others.' 'When the Constitution defines the circumstances under which a right may be exercised ***, the specification is an implied prohibition against legislative interference to add to the condition."

Id. at 327 (quoting *Parks v. West*, 111 S.W. 726, 727 (Tex. 1908)).

Pointing to the Constitution's specific provisions for regular sessions and special sessions called by the Governor, the Court held that any other manner of convening the Legislature was prohibited: "[S]ince the Constitution specifies the circumstances under which the Senate may defeat the Governor's appointments, there is an implied prohibition against its power to add to those circumstances." *Id.* at 328. Thus, the Senate had no power to convene itself outside the process specified in the Constitution, *i.e.*, a regular session or a special session called by the Governor, even though the Constitution did not specifically prohibit the Senate's convening at will. *Id.*

Likewise, no deviation is allowed from the Constitution's specified process for apportionment. The Constitution granted the Legislature primary authority to apportion itself, but it placed that authority within clearly articulated limits: it may be exercised in the first regular session after the Census, or else after the LRB's jurisdiction expires. Because the Constitution specifies the circumstances under which the Legislature may apportion, there is an implied prohibition against its power to apportion at other times or in other manners. *See id.*

The State's attempt to constrain *Walker* to issues of separation of powers (or "governmental structure"), rather than legislative authority, fails. *See* Appellants' Br. at 46-47. In the first place, there *are* structural concerns at stake. The Constitution divides apportionment authority between the Legislature and the LRB, defining by

the other's actions when each may exercise its authority. Recognizing the State's proposed unrestricted power to apportion outside the circumstances permitted by §28 would upset this constitutional balancing. Indeed, the Constitution's grant of apportionment authority to the LRB shows that it was not a given that the Legislature should have apportionment power at all, contrary to the State's theory that the Legislature retains residual and unrestricted apportionment powers.

In any event, *Walker* is much broader than the State admits. It rests on separation-of-powers concerns *and* constitutional limits on legislative authority. In 1946, the Texas Senate, without a call by the Governor, tried to invoke a special session on its own initiative. This Court held "that the power [to convene on its own motion] here asserted d[id] not exist." *Walker*, 196 S.W.2d at 329. Elaborating on its reasoning, the Court invoked the principle on which Plaintiffs rely—the rule of implied exclusion:

> It is *a rule for the construction of Constitutions, constantly applied*, that where a power is expressly given and the means by which, or the manner in which, it is to be exercised is prescribed, such means or manner is exclusive of all others. When the Constitution defines the circumstances under which a right may be exercised * * *, the specification is an implied prohibition against legislative interference to add to the condition.

Id. at 327 (emphasis added). The Court then "appli[ed]" that rule of construction "to this case":

> Since a meeting of the Legislature is a meeting of the Senate, these provisions furnish a regular session of the Senate every two years and

> a special session at such other times as the Legislature may be convened by the Governor. The means being thus expressly provided for the Senate to be in session and thereby to have an opportunity to consider the Governor's appointments, it follows that any authority in the Senate to convene itself at other times for that purpose is excluded.

Id. at 328.

The Court addressed separation of powers only to augment its constitutional-construction holding, explaining that the Legislature's exclusive power to make law was not infringed because the power to call a special session was an executive, not legislative, power. *Id*. (citing cases). The Court then returned to its primary rationale, invoking the rule of implied exclusion to show that Article III, §1 would not even control under its own terms: "In other words, since the Constitution specifies the circumstances under which the Senate may defeat the Governor's appointments, there is an *implied* prohibition against its power to add to those circumstances." *Id.* (emphasis added).

The cases *Walker* cites confirm that the rule of implied exclusion does not hinge on separation of powers. *Parks v. West* invoked the rule to invalidate a statute creating a school district that included parts of several counties, based upon the Texas Constitution's authorization of single-county districts. 111 S.W. at 727-28. *Parks* did not involve separation of powers. Neither did *Houchins v. Plainos*, 110 S.W.2d 549, 553 (Tex. 1937), which used the rule of implied exclusion to invalidate a local-option law that did not comply with the Constitution's manner of voting on

such laws. Nor did *Arnold v. Leonard*, 273 S.W. 799 (Tex. 1925). That case invoked the rule of implied exclusion to invalidate a statute adding to the classes of property constituting a wife's separate estate because the Constitution *defined the process*—there, the manner in which a wife's separate estate would be determined. *Id.* at 802.

The State's argument—that the rule of implied exclusion, as applied in *Walker*, pertains only to separation of powers—thus proves too much. Article III contains dozens of restrictions on legislative power. Under the State's view, these restrictions are meaningless because they do not involve separation of powers. This is plainly not the case. For example, Article III, §5(b) establishes the order of business that the Legislature "shall" observe. TEX. CONST. art. III, §5(b). But subsection (c) confers authority to deviate from the required order: "Notwithstanding Subsection (b), either House may determine its order of business by an affirmative vote of four-fifths of its membership." *Id.* §5(c). The authority to deviate in subsection (c) would be illusory if subsection (a) were merely aspirational, as the State's argument would require, because the order of business in subsection (b) does not implicate separation of powers.

Also, Article III, §9(b) requires that the Speaker of the House of Representatives be elected from the House's membership: "The House of Representatives shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a Speaker from its own members." *Id*. §9(b). This

provision also does not implicate separation of powers. If the State is correct that such a provision does not prevent the House from performing the same duty in another manner, then the House is free to elect a speaker who is *not* a House member as long as this is not done "when [the House] first assembles." *Id*. The State's attempt to restrict *Walker*'s reach to provisions implicating separation of powers, therefore, fails. *Walker* applies to Article III, §28, and the Legislature is bound by the provision's procedural limitations.

Thus, applying this Court's "rule for the construction of Constitutions," *see Walker*, 196 S.W.2d at 327, repudiates the State's argument that the Gutierrez Plaintiffs seek to insert the word "only" into the constitutional text. *See* Appellants' Br. at 41-42. It is the State's argument that distorts §28's text. Under the State's construction—where the Legislature can apportion at any time, in any session—*Walker* is ignored, and the Legislature's deliberate amendment of "session" to "regular session" is rendered meaningless.

2. The Legislature has never before exercised the authority it now claims, casting doubt on such authority's existence.

The State argues for unconstrained apportionment authority, but the Legislature's own historical practice demonstrates otherwise. Ever since Article III, §28 was amended in 1948, the Legislature has *never* first reapportioned state legislative districts in a special session. Reapportionment plans have been adopted in special sessions only after the Legislature acted, or had an opportunity to act, in

the first regular session after publication of the Census, and after the LRB's authority expired. The examples of special session reapportionments the State cites either fall into those categories or involved congressional, rather than state legislative, districts.

Enactment of Redistricting or Apportionment Legislation during a Special Session

Session	Year	Bill	Caption	Comment
83-1	2013	SB 2	Relating to the composition of districts for the election of members of the Texas Senate.	Adopted the court-approved interim map after legislatively adopted map failed to obtain pre-clearance.
83-1	2013	SB 3	Relating to the composition of districts for the election of members of the Texas House of Representatives.	Adopted the court-approved interim map after legislatively adopted map failed to obtain pre-clearance.
72-3	1992	SB 1	Relating to apportionment of the state into senatorial districts.	Adopted apportionment plans after the plans adopted in the Regular Session were enjoined.
72-3	1992	HB 1	Relating to apportionment of the state into state representative districts.	Adopted apportionment plans after the plans adopted in the Regular Session were enjoined.
67-1	1981	HB 162	Relating to the composition of State Representative Districts 23, 38, 81, 83, 86, 87 and 88.	The Special Session was called for July 1981. The House adopted a map in the regular session and HB 162 made adjustments to the districts.
62-1	1971	SR 29	Relating to the composition of Senatorial Districts 23, 16, 8 and remainder of Dallas County.	Non-binding resolutions directing the LRB concerning certain districts.
62-1	1971	SR 31	Relating to the composition of Senatorial Districts 19 and 26 in Bexar County.	Non-binding resolutions directing the LRB concerning certain districts.
62-1	1971	SR 35	Relating to the composition of State Senatorial Districts for Harris County.	Non-binding resolutions directing the LRB concerning certain districts.
62-4	1972	HB 12	Relating to the composition of state representative districts 32 and 42.	Changes made to districts after the expiration of the LRB's authority.

2021 is the first time the Legislature has ever attempted to flout §28's plain text. The "established practical construction"—the Legislature's consistent historical practice—is a strong indicator of the limits on the Legislature's power. *See Walker*, 196 S.W.2d at 327; *see also Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 506 (Tex. 1992) ("We are supported in this construction by the additional fact that in the eight decades since ratification of the 1909 amendment, the Legislature has never acted as if this amendment authorized local ad valorem taxes without voter approval."). It is the State, therefore, that invokes a power that no prior Legislature has ever auditioned.

3. The State's erroneous interpretation of Article III, §28 would lead to absurd results.

The State has asserted that although Article III, §28 requires apportionment during the first regular session following publication of the Census, it does not prohibit apportionment at other times. Appellant's Br. at 41. The Constitution's structure belies this permissive reading, which would allow the Legislature to flout specific provisions regarding the terms of office for State Senators.

Texas State Senators serve "the term of four years." TEX. CONST. art. III, §3. Texas's Constitution provides a complicated procedure for determining when those four-year terms begin. "[A] new Senate shall be chosen after every apportionment"—in other words, each of Texas's 31 Senate seats must be elected anew after any apportionment. *Id.* After that first post-apportionment election, the

Senators draw lots and are divided into two classes: "The seats of the Senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one half of the Senators shall be chosen biennially thereafter." *Id.* Thus, each seat eventually settles into four-year terms—though for one half of the Senate, there is an intervening two-year term. This process—including new elections for all 31 Senators—usually follows every apportionment.

If Article III, §28 allows the Legislature to apportion in the first regular session following the Census, and no earlier, this rigorous procedure works. Two years after apportionment, every Senator is either beginning or in the midst of the constitutionally mandated four-year term, and most of the time each seat will be occupied for two four-year terms before the next apportionment—consistent with the Constitution's requirement that Senators serve four-year terms.

Because of the map passed during the 2021 special session, every Senate seat will be up for election in 2022. If the Legislature apportions again in 2023, every Senate seat will again be up for election in 2024. Then, and only then, will the Senators of the 89th Legislature draw lots to determine which portion of that senatorial class will stand for election in the next election cycle. TEX. CONST. art. III, §3.

In other words, the entire Senate will be elected in two consecutive election cycles—2022, following the special session apportionment; and 2024, following a regular session apportionment. And several unlucky Senators will likely have to run for election in *four* sequential election cycles:

- In 2020, at the expiration of their regular terms.
- In 2022, with the entire Senate following the 2021 special-session redistricting.
- In 2024, with the entire Senate following a regular session apportionment.
- In 2026, if a member of the class of Senators elected in 2024 drew a two-year term.

This interpretation means that about half of the Texas Senate will have only one four-year term over the next decade.

Under the State's view of legislative power, the Legislature could perpetually frustrate the constitution's text regarding senatorial terms by minimally altering legislative districts. If Texas received redistricting data from the U.S. Census bureau in December of 2030 just before the start of the 91st Legislature, the Legislature could apportion, then, in a special session before the 2031 regular session. Imagine a primary that ousted a majority of incumbents of both parties, could those incumbents pass a map in the middle of the election cycle and seek new elections? Such an absurd abstraction would be possible under the State's permissive view of Article III, §28.

The State's answer is that these calamities have never occurred. Appellants' Br. at 47-48. But that proves nothing—the Legislature has never before asserted an unlimited power to reapportion, nor attempted to exercise that power before the first regular session after the Census. The State also asserts that the same ill effects are also possible under the Gutierrez Plaintiffs' construction of Article III, §28. *Id*. That is incorrect; the Legislature would be prohibited from reapportioning in the time between the publication of the Census and the first regular session.

Through Article III, §28, the People placed important limitations on the power to apportion. These limitations are written plainly in the Texas Constitution and have been acknowledged in every Texas Supreme Court precedent interpreting the meaning, timing, and import of the provision. And, ever since Article III, §28 was amended in 1948, *no Legislature* has ever done what the Legislature attempts now—to first apportion in a special session. Texas may not apportion until 2023, and challenged maps are therefore invalid.

V. House Bill 1 also violates Article III, §26 of the Texas Constitution—the "Whole County Line Rule."

A. The Rule requires a set number of House districts wholly contained within each county, depending on the county's population.

Article III, §26 of the Texas Constitution—also called the "whole county line rule"—restricts how the Legislature may apportion the Texas House of Representatives. "[W]henever a single county has sufficient population to be entitled

to a Representative, such county shall be formed into a separate Representative District." TEX. CONST. art. III, §26.[3] If two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other. *Id*. When a county has sufficient population to be entitled to one or more Representatives, then that county shall be apportioned those Representatives. *Id*. And, any surplus in those counties shall be adjoined to in a Representative district with other counties. *Id*.

MALC provides a detailed explanation of the whole county line rule, and the Gutierrez Plaintiffs incorporate the MALC briefing by reference. To summarize: first, the populations of Texas counties are divided by the ideal population for a state house district. Then, each county is apportioned those districts "as nearly as may be." TEX. CONST. art. III, §26. There are four kinds of districts: (1) districts that are wholly contained within one county, (2) districts that are made up of one county, (3)

[3] The entire text of Article III, §26 is as follows:

> The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more representatives, such representative or representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

districts that are comprised of multiple whole counties, and (4) districts made up of one or more counties connected to the unused surplus population of another county.

This Court has enjoined plans that violate §26 on two occasions. In *Smith v. Craddick*, the Court considered the interrelationship between the state constitutional provisions governing Texas House redistricting plans and federal law. The Court held that the Legislature's 1971 house redistricting plan failed to comply with the Article III, §26 because the plan impermissibly split several counties. *Smith*, 471 S.W.2d at 378-79. Although Article III, §26 could be abridged to the extent necessary to comply with federal law, the State had not shown any federal-law justification for the violation. *Id*.

A decade later, in *Clements v. Valles*, this Court invalidated the Legislature's 1981 house redistricting plan. *See* 620 S.W.2d at 114. Citing *Smith*, the Court reaffirmed that plaintiffs may establish a *prima facie* violation by showing that the adopted plan divides one or more counties between Texas House districts in violation of §26. *Id*. Then, the burden shifts to the State to prove that each county split is necessary to comply with federal law. *Id*. In *Clements*, this Court rejected the State's extra-constitutional rationale and permanently enjoined the plan's implementation. *Id*. at 114-15.

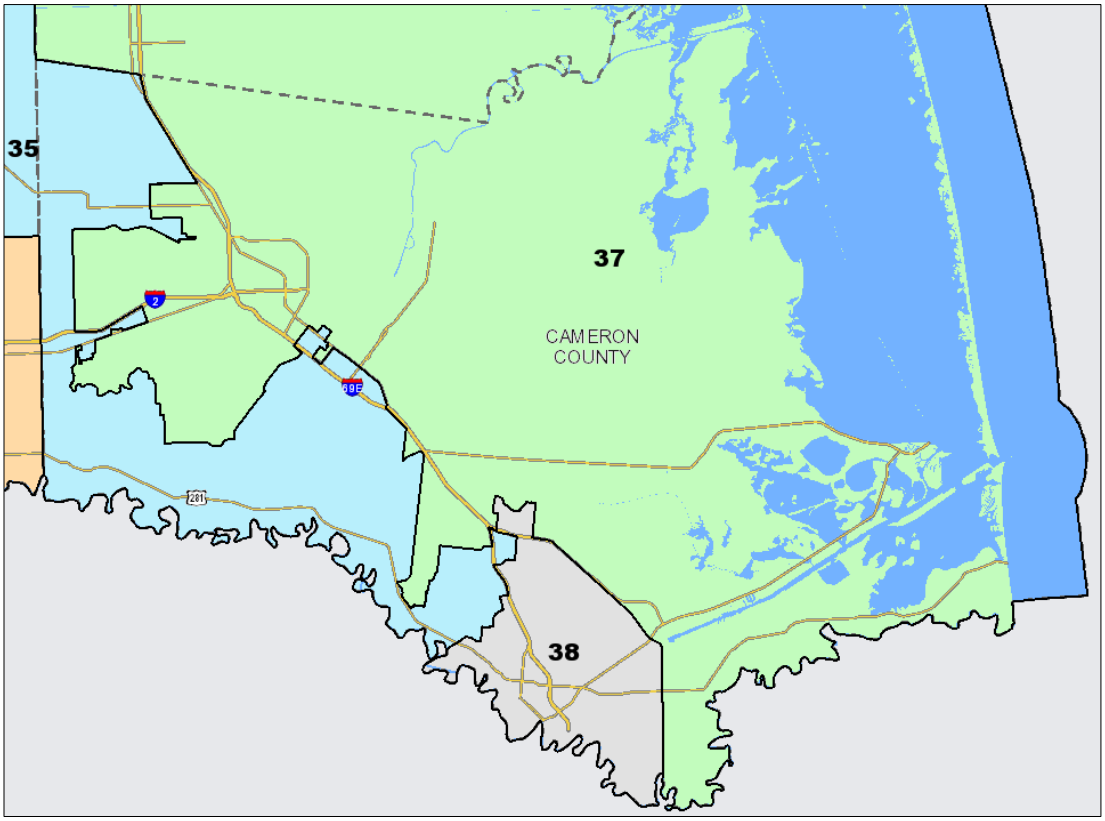
B. HB 1 violated the "whole county line" rule.

HB 1 violates section 26 without any plausible explanation based on federal law. First, HB 1 failed to allocate Cameron County two districts that are wholly contained within Cameron County. *See* 4.RR.MALC.Ex.9. Second, even if the State had properly apportioned those districts, the remainder population in Cameron County has been split between two other districts, instead of allocated to one district, as Article III, §26 requires. *Id.*

The population of Cameron County is 421,017. 4.RR.Gutierrez.Ex.7. The ideal population for a Texas House of Representatives district is 194,303. 4.RR.Gutierrez.Ex.8. Dividing the total population of Cameron County by the ideal population of a state house district yields a "ratio of representation" of 2.16. This means that, under the whole county line rule, Cameron County must have *two* state house representatives wholly contained within its bounds—not merely one, as the State argues—with the surplus joined to one other adjacent district. *See Smith*, 471 S.W.2d at 378 ("It is still required that a county receive the member *or members* to which that county's own population is entitled when the ideal district population is substantially equalled or is exceeded.") (emphasis added).

During the debate on the House floor for HB 1, the House adopted a late amendment that radically altered the configuration of the Cameron County districts. Amendment 36 (PLAN H 2261) by Rep. J.M. Lozano eliminated one House district

that had been wholly contained within Cameron County and joined that territory with Willacy County. This amendment was adopted by the House and passed with the rest of HB 1. 4.RR.MALC.Ex.9.



There is no plausible reason for deviation from the whole county line rule, as several amendments that were rejected by the House contained two districts wholly contained within the bounds of Cameron County, including PLAN H 2224.[4]

[4] *See* https://dvr.capitol.texas.gov/House/4/PLANH2224 (last visited Mar. 2, 2022); https://dvr.capitol.texas.gov/House/16/PLANH2133 (last visited Mar. 2, 2022); https://dvr.capitol.texas.gov/House/4/PLANH2192\ (last visited Mar. 2, 2022); https://dvr.capitol.texas.gov/House/4/PLANH2249 (last visited Mar. 2, 2022).

Even if the State had maintained two districts wholly contained within Cameron County as required by Article III, §26, it would still have mis-apportioned the surplus population in Cameron County. When a county that is entitled to one or more state house districts has surplus population, that surplus must be "joined in a Representative District with any other contiguous county or counties." TEX. CONST. art. III, §26. (emphasis added). "A Representative District" means *one* Representative District, not multiple districts. *See, e.g.*, *Clements*, 620 S.W.2d at 114. ("In addition, three counties, Nueces, Denton and Brazoria, which are entitled to one or more representatives, are cut so that their surplus populations are joined to two, rather, than one adjoining district.").

In HB 1, the surplus population in Cameron County has been split between two House districts, 35 and 37. 4.RR.MALC.Ex.9. This configuration violates Article III, §26. There is no plausible federal-law justification for this violation of the State Constitution, and the State has advanced none.

The State's defense rests almost entirely on the *degree* of the constitutional violation, not its existence. The State relies on the fact that prior invalidation of maps based on violations of the whole county line rule involved violations in multiple counties, while this violation occurs in one. *See* Appellants' Br. at 50-51. But no rule of law forgives a constitutional violation simply because its transgression is confined.

Moreover, in arguing that Article III, §26 does not entitle *any* county to more than *one* House District entirely within its borders, the State gives short shrift to *Clements*, in which this Court discussed the calculation of the ideal population of each district, and the constitutional obligation to allot House Districts to each county in keeping with that population:

> [T]hree counties, Nueces, Denton and Brazoria, which are entitled to one or more representatives, are cut so that their surplus populations are joined to two, rather, than one adjoining district. *Nueces County, with a population of 268,215 entitling it to 2.82 representative districts, is given only one district wholly within its boundaries.*

620 S.W.2d at 114 (emphasis added). The State argues that this Court's discussion of the violation in Nueces County was "a stray statement," and did not "constitute[] a separate violation of section 26." Appellants' Br. at 51. But the Court confirmed this constitutional defect with regard to Nueces County:

> Finally, the failure of the plan in House Bill 960 to allot two representative districts to Nueces County is not justified by the necessity of complying with the Voting Rights Act, 42 U.S.C. s 1973 et seq., as appellants contend. Appellees introduced evidence of two alternate plans which created two districts wholly within Nueces County and maintained the voting strength of the Hispanic population, as required by the Voting Rights Act.
>
> Although a legislative enactment is entitled to a presumption of validity, it is our opinion that House Bill 960 violates the Texas Constitution and must be declared invalid in its entirety.

Clements, 620 S.W.2d at 115.

The State also suggests that *Smith* and *Clements* are distinguishable because they "addressed a historical anomaly": the advent of one-person, one-vote, and the potential clash of that rule with §26, requiring apportionment by county. *See* Appellants' Br. at 51-52. But this Court fully reconciled §26 with one-person, one-vote, holding that §26 must be obeyed unless it conflicted with federal law. *See Smith*, 471 S.W.2d at 377. The State suggests that one-person, one-vote nullified §26, but this Court rejected that very argument:

> We understand some of the difficulties of every undertaking to redistrict this state. However, this court may not abrogate any provision of the constitution for the sake of simplicity. *The federal requirement of equal representation clearly has not nullified Section 26 of Article III in its entirety.* Then certainly this court may not choose to do so.

Id. at 379 (emphasis added).

The State alternatively asserts that *Smith* and *Clements* "were wrong and should not be extended beyond their contexts." *Id*. at 52-53. The State provides no valid reason for discarding settled precedent, and this Court should decline the invitation. HB 1 plainly violates the whole county line rule and is, therefore, invalid.

PRAYER

Appellees respectfully request that the Court affirm the order of the special three-judge district court denying Appellants' plea to the jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 8,944 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Wallace B. Jefferson
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Bar No. 19
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Associated Case Party: The State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
William Thompson	24088531	will.thompson@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Patrick Sweeten	798537	Patrick.Sweeten@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Judd Stone	24076720	judd.stone@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Eric Hamilton	24127287	Eric.hamilton@oag.Texas.gov	3/2/2022 2:22:39 PM	SENT
Jack DiSorbo		jack.disorbo@oag.texas.gov	3/2/2022 2:22:39 PM	SENT

Associated Case Party: Greg Abbott

Name	BarNumber	Email	TimestampSubmitted	Status
William Thompson	24088531	will.thompson@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Judd Stone	24076720	judd.stone@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Patrick Sweeten	798537	Patrick.Sweeten@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Jack DiSorbo		jack.disorbo@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Eric Hamilton	24127287	Eric.hamilton@oag.Texas.gov	3/2/2022 2:22:39 PM	SENT

Associated Case Party: John Scott

Name	BarNumber	Email	TimestampSubmitted	Status
William Thompson	24088531	will.thompson@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Patrick Sweeten	798537	Patrick.Sweeten@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Judd Stone	24076720	judd.stone@oag.texas.gov	3/2/2022 2:22:39 PM	SENT
Eric Hamilton	24127287	Eric.hamilton@oag.Texas.gov	3/2/2022 2:22:39 PM	SENT
Jack DiSorbo		jack.disorbo@oag.texas.gov	3/2/2022 2:22:39 PM	SENT

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Case Contacts

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William FCole		William.Cole@oag.texas.gov	3/2/2022 2:22:39 PM	SENT

Associated Case Party: Mexican American Legislative Caucus, Texas House of Representatives

Name	BarNumber	Email	TimestampSubmitted	Status
Nicole Pioli		npioli@textrial.com	3/2/2022 2:22:39 PM	SENT
Sean Joseph McCaffity	24013122	smccaffity@textrial.com	3/2/2022 2:22:39 PM	SENT
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