



# PRISON GERRYMANDERING REPORT 2021

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FOR TCRP 2021



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# Executive Summary

The purpose of the redistricting process should be to create districts that accurately reflect the communities they represent and to distribute political power across those communities. But counting incarcerated individuals at the facility where they are incarcerated, rather than their home addresses, artificially bolsters the political power of certain communities on the backs of individuals who are not truly part of those communities, while simultaneously reducing the political voices of their home communities. In Texas, there are dramatic implications, with a handful of rural regions gaining a disproportionate share of the political power over other rural regions and diminishing the true population count in certain urban areas. This under-representation only exacerbates existing problems with Census undercounts and socio-economic disparities which have a root in racial discrimination. It also deviates from how Texas law treats incarcerated populations in every other context, creating a conflict with the Texas constitution that needs to be addressed.

Traditionally, the United States Census Bureau has counted incarcerated individuals at the facility where they are housed, but the Bureau has made clear that this historical practice has persisted *only* for administrative reasons, not for legal or policy ones. Recently, the Census Bureau has evolved in its treatment of incarcerated populations, and, for the first time, will make it practical for states on tight timelines to assign incarcerated individuals to their home communities. Many states across the nation are taking advantage of this opportunity to correct for the distortions created by prison gerrymandering. In order to more accurately reflect the state's population, Texas legislators should take advantage of the Census Bureau's new tools and work with state agencies to identify those prisoners who, rightfully, should be counted at an address in their permanent community.

## **Key Takeaways:**

- **2021 will be the first time the United States Census Bureau releases group quarters information as part of the regular state redistricting data package.**
- **The Census Bureau has developed a geocoding tool and service to facilitate states in reallocating incarcerated individuals to their home addresses.**
- **Increasingly, states and local governments across the country have moved away from counting prisoners at their place of incarceration when drawing political districts.**
- **Texas lawmakers have a variety of formal, and less formal, options they can consider to balance practical and policy considerations in order to better reflect the Texas population when apportioning incarcerated populations to electoral districts in 2021 and in future decades. Non-statutory pragmatic options for 2021 include not adjusting counts for federal prison populations, counting only temporarily incarcerated individuals at their home addresses, or counting only temporarily incarcerated individuals in their home counties only for the purposes of apportioning state House of Representative seats among the counties.**

# Introduction

The Texas legislature convened for the 87th session in January of 2021, faced with a global pandemic among other unprecedented challenges. Due to an extensive delay in census data release, the painstaking process of organizing the state's many geographical, social, and cultural communities into new legislative districts has been delayed and will likely occur in a special legislative session. The goal of this process should be to create districts that are fair and accurate representations of the communities within them. However, one group of Texans will have their representation uniquely distorted, excluding their voice in the political process and denying them representation while increasing the political power of individuals with whom they have no relationship. Texas currently incarcerates approximately 112,000 people in state prisons.<sup>1</sup> These Texans—most of whom are temporarily stripped of their right to vote—are not counted within their home communities for the purposes of redistricting. Instead, they are counted wherever they are confined: communities in which they cannot participate; of which they are not legal residents; and by which they are not considered constituents of local politicians.

This misallocation has profound consequences for the political system. While incarcerated Texans hail disproportionately from the state's largest and most diverse counties, they are often incarcerated in a select few of the state's rural counties. It also unfairly harms the more rural communities which do not house prison facilities, but may nevertheless have high rates of incarceration.<sup>2</sup> They often maintain close ties to their home community throughout incarceration, *and nearly 70% will be returned to those communities before the next Census count.*<sup>3</sup> *Over 30% will already have been returned by the time the legislature even draws this decade's districts.*

Prison facilities, on the other hand, are located primarily in rural, sparsely populated, and demographically homogeneous areas of the state. By adding these non-voters to districts where they are temporarily confined, the redistricting process artificially inflates the political power of the true residents of these districts. At the same time, this lowers the population counts in the incarcerated peoples' actual communities and decreases their representation. By shifting power away from areas that truly represent these incarcerated individuals, the state undercuts the principle of one person, one vote.

This Report addresses the inequities and distortions created by prison gerrymandering in Texas. First, it looks at the the specific distortions created by counting all prisoners at their facility of incarceration in the state. Next, it reviews the administrative and legal background of how and where prison populations are counted for redistricting purposes. Lastly, the Report lays out a variety of options that the Texas legislature can take to end or mitigate the distortions of prison gerrymandering. The proposals are aimed at providing lawmakers with several viable possibilities which balance practical and policy considerations, and some of which do not require new legislation to accomplish.

## I. The Impact of Prison Gerrymandering in Texas

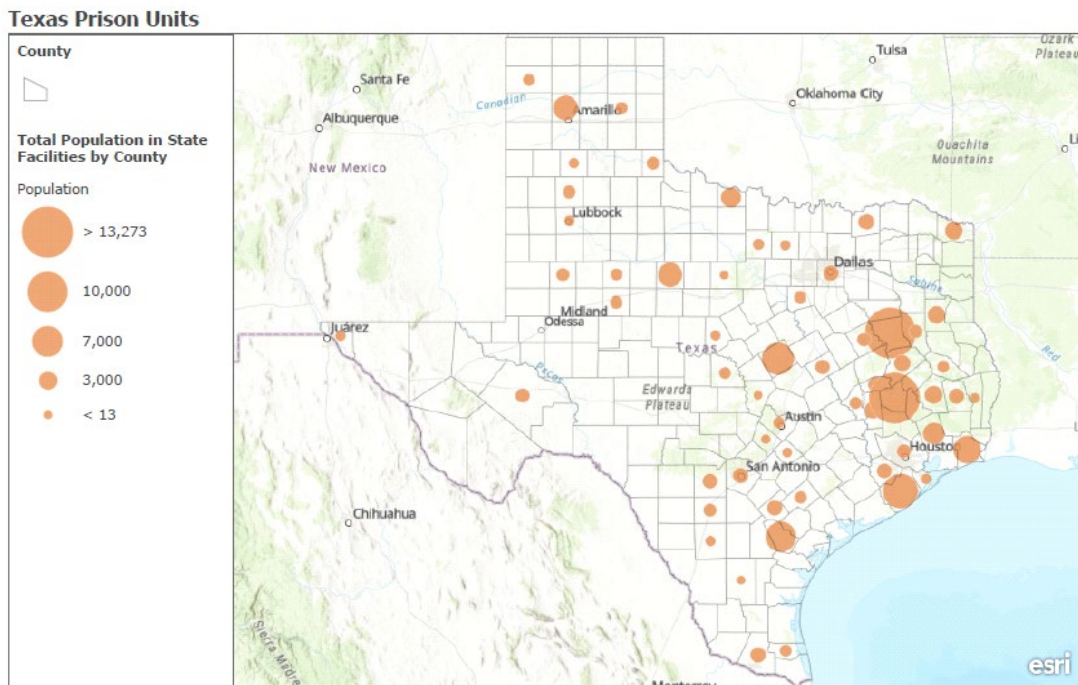
### A. Distorting Political Power

Currently, the majority of Texas prisoners hail from the most populous counties in the state. Recent TDCJ population data, obtained by TCRP in February 2021, confirms this.<sup>4</sup> Accounting for nearly 15% of the state prison population, over 16,000 currently incarcerated Texans were convicted in Harris County. This is followed by Dallas County, where 9% of TDCJ's population (over 10,000 people) were convicted.

Total Incarcerated Texans by County of Conviction (Top 15 Counties): **2021<sup>5</sup>**

<b>County Name</b>	<b># of Prisoners</b>	<b>County Name</b>	<b># of Prisoners</b>
<b>Harris</b>	16072	<b>Smith</b>	2166
<b>Dallas</b>	10146	<b>Nueces</b>	1780
<b>Bexar</b>	7990	<b>El Paso</b>	1960
<b>Tarrant</b>	7872	<b>Jefferson</b>	1634
<b>Travis</b>	2862	<b>Bell</b>	1446
<b>Hidalgo</b>	2154	<b>Lubbock</b>	1389
<b>McLennan</b>	2359	<b>Collin</b>	1418
<b>Montgomery</b>	2102		

TDCJ then sends these prisoners from the, often, urban counties in which they were convicted to prison facilities located in a handful of rural areas, hundreds of miles from the courts where they were sentenced. Texas legislators then count these prisoners within the population of the rural counties where they are held for the purposes of redistricting. While the majority of TDCJ prisoners were arrested in Harris or Dallas counties, each holds no more than 2% of the state's prisoner population. This is in stark contrast to Anderson County,<sup>6</sup> which holds most of the state's prisoners (roughly 10%) while sending less than 1% of TDCJ's population to prison.<sup>7</sup> Thus, certain rural counties are significantly overcounted, other rural counties are ignored, and urban areas are undercounted.



As the map above demonstrates, the most significant distortion in terms of over-counting occurs in rural East Texas. The impact of these disparities is most noticeable in the districts that make up the Texas House of Representatives. If its prison population were removed, Texas House District 8, for example, would "lose" 21,112 residents, making it 12.59% smaller than the average state house district. This would be well beyond the  $\pm 5\%$  deviation traditionally viewed as legally allowable for state legislative districts. This relative over-representation, occurring in a handful of districts, not only distorts the balance of power between urban and rural counties, but also gives a few rural communities greater representation in the legislature than the rest of rural Texas. In particular, rural West Texas, which faces unique issues such as drought and access to health-care, gets proportionally far less representation in legislative districts than rural East Texas.

There can be dramatic concrete implications to the practice of counting incarcerated individuals at facilities. For instance, in 2011, the exclusion of incarcerated individuals from the population count in Harris County resulted in the County losing one seat in the Texas House of Representatives.<sup>8</sup> This loss was used as a justification by state lawmakers to combine two Harris County districts with large Black and Latinx populations, resulting in an overall dilution of voting power for these historically disenfranchised communities.<sup>9</sup>

## **B. Magnifying Existing Census Undercounts and Disparate Political Treatment**

The undercounting of urban populations is often compounded by other demographic characteristics that have traditionally led to census undercounts, including race, gender, age, and renter status. After the 2010 Census, the Census Bureau noted: “[b]ecause ethnic and racial minorities disproportionately live in hard-to-count circumstances, they too were undercounted relative to the majority population.”<sup>10</sup> Because communities that have historically been undercounted are also the communities that have disproportionate numbers of residents in prison facilities, failure to count incarcerated individuals in their home districts further detracts from already underrepresented districts. Since Texas has a large group of historically underrepresented people,<sup>11</sup> the state is at a heightened risk of undercounting for national electoral votes and redistricting, social service allocation, and other government services.<sup>12</sup>

Specifically, the demographics of Texas prisons include a disproportionate number of Black and Latinx inmates, and the harm of counting them at their incarceration facilities is compounded by racial inequities in census administration.<sup>13</sup> The 2010 Census undercounted 2.1 percent of the Black population and 1.5 percent of the Hispanic population nationwide.<sup>14</sup> Indigenous people were also undercounted by 4.9 percent,<sup>15</sup> while white people were overcounted.<sup>16</sup> NPR reported that Black residents could be undercounted by as much as 3.68% nationally, roughly 1.7 million people this decade. Similarly, 2.2 million (3.57%) Latinx people around the U.S. could be undercounted.<sup>17</sup>

Moreover, men are less likely to be counted than women. In 2010, men between 18 and 29 were undercounted, while women 30-49 were overcounted.<sup>18</sup> Children under five are also chronically undercounted (in particular ~6% of Latinx children and ~8% of Black children) in the census, which can be compounded by a parent’s incarceration.<sup>19</sup> On the whole, Black children are undercounted at twice the rate of non-Black children.<sup>20</sup>



The way the State treats prison populations when drawing state and federal legislative districts contrasts with how local political subdivisions, such as counties, treat incarcerated populations. Generally, local Texas jurisdictions do not include inmate populations at the facility when redistricting. Instead, they count inmates towards the voting precinct where the inmate resided before their incarceration based on the Texas Election Code's definition of residence.<sup>21</sup> Counties with disproportionately large incarcerated populations in Texas already remove inmates from the population count for the purpose of redistricting county and local offices.<sup>22</sup> This is necessary to avoid absurd results; notably, in Concho County and Garza County, one county commissioner precinct would consist almost entirely of inmates if drawn to include the incarcerated population.<sup>23</sup> This non-uniform treatment highlights the unfairness of prison gerrymandering — the handful of small rural counties that house prisons have their political representation bolstered on the backs of the incarcerated, but the counties themselves, and other provisions of Texas law, do not consider the incarcerated population to be part of the local community.

### **C. Texas's History of Gerrymandering and Intentional Racial Discrimination**

Any discussion of redistricting in Texas necessarily takes place against the backdrop of the state's controversial history with impermissible racial gerrymandering and voting-related discrimination. The Supreme Court repeatedly struck down all-White Democratic primaries in Texas,<sup>24</sup> which paved the way for later landmark decisions that established the "one person, one vote" standard.<sup>25</sup> Testimony on anti-Latinx discrimination in Texas was a central component of expanding the coverage of the Voting Rights Act in 1975.<sup>26</sup> The Texas legislature's efforts to disenfranchise through redistricting gave the state an ignominious reputation for repeatedly engaging in racial gerrymandering. For example, in *White v. Regester*, the Supreme Court held multimember legislative districts in Dallas and Bexar Counties unconstitutional because the scheme diluted the votes of certain minority racial groups.<sup>27</sup> This ruling set the groundwork for the modern "discriminatory effects" test contained in Section Two of the Voting Rights Act.<sup>28</sup> After the Supreme Court struck down the Voting Rights Act's preclearance formula,<sup>29</sup> Section Two became one of the primary tools used to fight discriminatory redistricting practices. In every decennial redistricting cycle since 1970, courts have found Texas's proposed legislative districts to violate the Voting Rights Act of 1965.<sup>30</sup> Texas has not limited the practice of gerrymandering to legislative offices.<sup>31</sup> Countless local political subdivisions have run afoul of the United States Constitution and the Voting Rights Act.<sup>32</sup>

Given the demographic characteristics of Texas prison populations,<sup>33</sup> the choice by Texas lawmakers on where to allocate prison populations for redistricting and whether to grant prisoners voting rights cannot be considered in a vacuum. In addition to disproportionately impacting communities of color on the whole, it also has dramatic consequences for the most marginalized among us, particularly lower-income individuals who are forced to await trial in prison because they simply cannot post bail. If an individual happens to be imprisoned pre-trial during census counting, they will be counted where they are incarcerated, even if they are released soon after. This means that poor people in Texas not only suffer criminal penalties for poverty, but their communities also suffer economic and political consequences due to underrepresentation. The arbitrary timing and duration of temporary pretrial incarceration can also create a double counting problem if a prisoner is relocated or released during the count. Together, these isolated challenges have the potential to inflict a decade of harm on those who are most vulnerable and continuously ignored.

The State's official history of voting-related discrimination and racial disparities in incarceration, together with the current socio-economic conditions that produce large census undercounts in communities of color, further underscore how imperative it is to correct redistricting counts for incarcerated populations.

## **II. Administrative and Legal Framework for Counting Incarcerated Populations**

### **A. General Background on Texas Redistricting**

A mix of federal and state laws govern Texas redistricting. For the purposes of this Report, the most relevant federal legal concept is the constitutional "one person-one vote principle." The United States Supreme Court has held that electoral districts require periodic redrawing to reflect population shifts in order to ensure that political power is not disproportionately distributed.<sup>34</sup> To satisfy the one person-one vote principle, the populations of legislative districts must be roughly equal, with stricter equality requirements for federal congressional districts than state legislative districts.<sup>35</sup>

Two provisions of the Texas Constitution govern how state legislative districts are drawn. Article III, Section 25 governs how state Senate districts are drawn. The Texas Constitution sets few explicit requirements, stating only that there are to be single-member contiguous districts.<sup>36</sup>

In contrast, Article III, Section 26 establishes more robust guidelines for drawing state House of Representative districts. The provision begins the redistricting process by requiring the legislature to apportion representatives among the counties based on a county population's ratio to "the population of the State, as ascertained by the most recent United States census." Thus, prior to drawing any House districts, the legislature is supposed to first determine how many state representative seats each county is entitled to.

The first step in the actual redistricting process takes place with the decennial Census. After distributing the Census counts to the President and then Congress, the Census Bureau is legally required to produce census data to the states by April 1 in the year after the census is conducted. This deadline was rendered impossible this cycle due to the COVID-19 pandemic, and the state level data is now projected to be released in September 2021. After the detailed census numbers are released, legislators must craft redistricting plans to be passed by the Texas House and Senate. Legislators are supposed to complete this process before the end of the regular session in May, giving them only a few months to complete the entire process.<sup>37</sup> If the legislature should fail to draw new districts, the duty falls to a back-up commission called the Legislative Redistricting Board (LRB), consisting of the Attorney General, Comptroller, Land Commissioner, Lieutenant Governor, and the Speaker of the Texas House. However, again due to the census delays this cycle, redistricting will likely occur in a special session in the Fall of 2021, rendering the LRB moot. If the legislature should fail to draw new districts in the Fall, there will likely be court cases challenging the current districts on one person-one vote principles.

## **B. How and Where Prisoners Get Counted**

Facilities of incarceration—including, among others: federal and state prisons; local jails and municipal facilities; federal detention centers; correctional residential facilities such as halfway houses and mental healthcare institutions; and correctional facilities for youth and military personnel—are categorized as "group quarters" by the Census Bureau,<sup>39</sup> along with other institutional facilities such as military barracks and college dormitories.<sup>40</sup> As noted above, for "pragmatic and administrative reasons,"<sup>41</sup> the United States Census Bureau and states have historically counted incarcerated individuals at their place of incarceration.<sup>42</sup> There are no legal mandates, however, at the federal or state level requiring this practice; it was a custom born purely of convenience.

Prior to 2011, it was practically impossible for states to reapportion incarcerated populations in time for redistricting because the detailed group quarters data was not made available until many months after the initial census data was released.<sup>43</sup> This changed in late April 2011, when the Census Bureau took a small step forward by releasing early preliminary data on group quarters counts.<sup>44</sup> This gave states more discretion to “[l]eave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale.”<sup>45</sup> The 2011 release of group quarters data gave some states an opportunity to reevaluate the way incarcerated people are counted in redistricting schemes, but still was not produced quite in time for states on a strict schedule, such as Texas, to reallocate prison populations.

In providing additional detail on group quarters data, the Census Bureau acknowledged criticism that the method of counting prisoners artificially alters representation.<sup>46</sup> For 2020, the Census Bureau accepted comments on its practice of counting prisoners at the facility they are in and received over 77,000 comments in support of efforts to equitably redistribute prisoner populations.<sup>47</sup> The comments identified a myriad of benefits for prisoners, their home communities, as well as the communities where they are incarcerated.<sup>48</sup> In response, the Bureau refined its procedures to further facilitate states that wish to count incarcerated individuals at their home addresses. This includes releasing Group Quarters data at the same time as the rest of the state block-level redistricting data and creating a geocoding tool which makes it easy for states to perform the reallocation.<sup>49</sup> Thus, as a practical matter, this will be the first time Texas lawmakers are actually in a timely position to remedy prison gerrymandering by reapportioning incarcerated individuals to their home districts.

### **C. State/Federal Law Support Counting Inmates at Home**

The Census Bureau's reforms cleared the last remaining federal impediments to a more fair and equitable count of Texas prison populations. Additionally, the legal landscape is set for the Texas legislature to address prison gerrymandering. Courts at the state and federal levels have established that there are no legal obstacles to counting prisoners at their home addresses.

At the federal level, courts have been reluctant to mandate that states decide one way or the other how prison populations are treated in the legislative context, holding that it is an issue better left to state legislatures.<sup>50</sup> The United States Supreme Court found Maryland's "No Representation Without Population Act," which ended prison gerrymandering in that State, constitutional, affording protection for other states to enact similar legislation.<sup>51</sup> The Supreme Court rejected the argument that states are constitutionally required to use the data provided by the Census Bureau without adjustment in order to comply with the "one person, one vote" standard.<sup>52</sup> Thus, states are permitted to make adjustments so long as they develop a non-arbitrary systematic process for doing so. <sup>53</sup>

While federal courts have generally neither explicitly required nor forbidden counting prisoners at home, state court decisions have proven a bit more helpful. In *Little v. LATFOR*, a New York court examined the state's policy of adjusting census counts to count prisoners at home, and noted that the Census Bureau itself directed that states exercise discretion to "create their own methodology for counting inmates for apportionment purposes."<sup>54</sup> While the New York Constitution mandates the use of census data for redistricting purposes, the court found that the inmates were not within the meaning of "inhabitants" because they lacked "actual permanency" or an "intent to remain" incarcerated.<sup>55</sup> Thus, the court found that a deviation from the strict application of the census data did not violate the state's constitution.<sup>56</sup>

The Texas Constitution is similar to New York's in that they both explicitly mention federal census data for redistricting purposes.<sup>57</sup> Who counts as "population" (in Texas) or "inhabitants" (in New York) under the constitutions is the relevant inquiry though, and, consistent with other provisions of Texas law, the state legislature is free to consider inmates as belonging to the "population" of their home jurisdictions. Indeed, other provisions of Texas law clearly do not consider incarcerated individuals to constitute a population in their facilities' jurisdictions.<sup>58</sup>

Texas state courts have offered indirect insight. In *GEO Group, Inc. v. Hegar*,<sup>59</sup> a Texas Court of Appeals found that incarcerated Texans are not considered residents of correctional facilities for the purpose of tax exemptions for private prison companies. At the trial level, GEO Group, a company that manages prisons across the country, sued the Texas Attorney General and Texas Comptroller to obtain tax exemptions for the "residential use" of gas and electricity within its prison facilities. On appeal, GEO argued that, because prisoners ate, slept, and worked in their facilities, the prisoners were functionally "residents" of the

prison, making the prison itself a "residence." Analyzing the plain meaning of these terms, the appellate court found "a qualitative difference between occupying a private dwelling, such as a home or residence, and occupying a detention facility."<sup>60</sup> Affirming the earlier ruling, the appellate court agreed with the state appellees in their simple declaration: "a home is one's castle, a prison is a cage. . . . [B]ecause the prisoners have none of the fundamental rights or attributes that non-prisoners have in their homes, they do not occupy the facilities 'as a home or residence.'" <sup>61</sup>

GEO Group subsequently filed a petition for review before the Supreme Court of Texas.<sup>62</sup> In their response brief, the Texas Attorney General and Comptroller applied the 4th Amendment and its state constitutional analogue to show that, unlike one's home, prison cells were not places where prisoners could be from unreasonable searches and seizures:

*Prisoners cannot leave their living space, cannot prevent their living spaces from being searched at any time, and cannot exclude others from their living space. For these and many other reasons, prisoners do not occupy prisons as a home or residence. They have none of the kind of rights that owners or tenants have in their residences. Whether the prison is a "residence" in a general sense, or some other particular sense, is neither here nor there.*<sup>63</sup>

The Supreme Court of Texas denied the petition for review, functionally affirming the appellate and lower courts through its silence.<sup>64</sup>

#### **D. Previous Anti-Prison Gerrymandering Legislative Efforts**

Anti-prison gerrymandering advocacy is not without precedent in Texas. Incarcerated Texans, community organizations, and legislators have pursued legislation to remedy the problem. Beginning in 2001, Representative Harold Dutton submitted House Bill 2639, "relating to the inclusion of an incarcerated person in the population data used for redistricting according to the person's last residence before incarceration."<sup>65</sup> The bill outlined a process by which the state could collect, analyze, and distribute updated data for individuals incarcerated or committed to mental health institutions in the state. After the release of census data on April 1, the bill would require prison administrators to submit demographic and residential information for incarcerated people to the state comptroller by June 1. The comptroller would then be charged with adjusting population counts for those prisoners who resided in the state prior

to incarceration, functionally remedying the impact of prison gerrymandering. To ensure that the updated numbers actually serve as the basis of the redistricting, the bill included provisions which would prevent district population deviations of more than 5% from the prisoner-adjusted population count of the previous census.<sup>66</sup> H.B. 2639 was heard in the Elections Committee and was reported out favorably, with no amendments, on a 6-2 vote,<sup>67</sup> but unfortunately was never heard on the House Floor.<sup>68</sup> Since then, similar bills have been filed in advance of the 2010 and 2020 Census in order to better reflect population counts for incarcerated Texans, but have not met with ultimate success.<sup>69</sup> Given the practical hurdles previously standing in the way, this is perhaps unsurprising, but, with more legal and administrative clarity, the legislature finally stands in a position to act.

While previous litigation and policy efforts to end prison gerrymandering in Texas have fallen short, they have provided helpful insights which can be used to strengthen future advocacy on the issue. Legislators are clearly legally and administratively empowered to count prisoners as residents of their home communities, rectifying decades-long political harms. Most importantly, Texas law in every other context already prohibits treating prisoners as residents of their facilities. Now, all that remains is for the Texas legislature to use the resources at its disposal to remedy this error and usher in a decade of strengthened democracy in the Lone Star State.

### **III. Recommendations for 2021 Redistricting Cycle**

#### **Primary Recommendation:**

#### **Pass legislation to permanently fix prison gerrymandering**

To reiterate the problem, though most incarcerated Texans hail from the state's major metropolitan areas, they are often sent to prisons located in rural counties of the state. For the sake of convenience, rather than constitutional or statutory design, prisoners are subtracted from the population counts of their home counties, siphoning desperately needed resources from larger cities. Silenced through disenfranchisement, the political power of incarcerated Texans is ceded to communities that do not meaningfully represent their interests, needs, or values, and which exclude them from the local political process.

No matter the reason for incarceration, incarcerated Texans are still human beings worthy of dignity, respect, and political expression. Too often, systems of criminal injustice obscure the root causes of redressable social problems, instead serving as an easy way for lawmakers to profess “law and order” values. Prison gerrymandering is an extension of this reality, combining the horrific realities of prison life with the lingering aftereffects of resource-starved communities to become an incubator of socio-economic disparity and inequality. Legislators, spurred by clear-eyed political will and in collaboration with community stakeholders, are poised to end prison gerrymandering. Politicians, especially in Texas, frequently talk about the importance of robust investment in social and community programs aimed at rehabilitation of incarcerated individuals, or total preemption of entrance into the criminal injustice system in the first place. Addressing the often-hidden effects of prison gerrymandering is a critical step to ensure that communities receive the resources of which they have been deprived. Indeed, counting incarcerated Texans as residents of their pre-incarceration communities can directly empower formerly incarcerated individuals to succeed outside of prison walls.

With many states having already led the way and several bills already filed for the 87<sup>th</sup> Regular Session,<sup>70</sup> the only thing preventing the Texas legislature from remedying prison gerrymandering is the political willpower to set right a historically discriminatory practice.

However, to end prison gerrymandering through legislation in time for the 2021 redistricting cycle, the Legislature may need to have acted during the 86<sup>th</sup> session. Delays in the release of census data provide a possibility that, should the legislature act quickly and pass a bill with the requisite votes to make it effective immediately, it could be implemented in time for this redistricting cycle. However, the political and practical realities likely may not materialize to do so. Regardless, the Legislature should still pass legislation to address the problem in future redistricting cycles; *but even should there not be time to pass legislation which affects this cycle, there are also a variety of non-statutory possibilities legislators can pursue to remedy the problems caused by prison gerrymandering during the 2021 cycle.* Below are three recommendations available to the Legislature to act in the absence of legislation.



## **Alternative Recommendation # 1: Redistricting committees work with the Texas Department of Criminal Justice and Texas Legislative Council to reallocate prisoners to their home counties**

Even should the legislature not pass legislation to be effective in time for the 2021 redistricting process, as New York's experience demonstrates, the move to end prison gerrymandering does not require traditional legislation. As with the New York Constitution, nothing in the Texas Constitution or Texas statutes prohibits the Legislature from taking the group quarters portion of its census data and simply distributing those residents to accord with the best constitutional definition of "population."

Texas legislators in charge of drawing proposed maps can look at how prison populations are treated across other areas of state law, for instance Section 1.015(a) of the Texas Elections Code, and use that as a sufficient legal basis to allocate prisoner populations in a more equitable way. Similarly, Texas courts already consider prisoners to not acquire residence at their place of incarceration in other legal contexts.<sup>71</sup> Both the state's legislature and courts have acknowledged that prison gerrymandering is the result of practical considerations, rather than legal or ethical imperatives.

As an initial matter, policymakers can begin by deciding how to address various incarcerated populations. On a practical level, New York and Maryland encountered difficulties in attempting to address federal facilities, bumping up against federal privacy laws.<sup>72</sup> Ultimately, although their legislation intended to reapportion certain federal prisoners, they were unable to do so because federal agencies did not provide the necessary information. It is unclear how the federal Bureau of Prisons will treat the issue in 2021, but states seeking to assign federal incarcerated individuals to their home may once again encounter practical difficulties. From a policy perspective, there is also slightly less immediate need to reallocate federal prison populations because they are composed to a far greater degree of individuals from other states and outside the country. Given the tight timeline, if the Legislature chooses to pursue a remedy for prison gerrymandering during this decennial redistricting through non-statutory means, it may prove more practical to simply not count federal prison populations – thus, at the very least, not giving a handful of rural communities an unfair representational advantage over other rural communities and paralleling how local communities themselves treat these populations in local redistricting. As for local jail populations, although there is less policy

rationale for not reassigning them, given the timeline for this decennial redistricting, it would not be practical to collect the necessary individual data to do so. However, unlike federal prisoners, inmates at local jails are likely to come from the surrounding community, and due to the numerosity of local jails, it makes sense to simply leave these group quarters unchanged.

After having decided the initial parameters of which prison populations to adjust, the next step is to request that TDCJ supply the necessary data. The Senate and/or House Redistricting Committees can directly request the required data from TDCJ, as contemplated by Texas law.<sup>73</sup> Although the census timeline is still in flux, this does not prevent the TDCJ from acting immediately to conduct its portion of the process. The committee(s) should request a simple data file in .csv format, containing, at a minimum, the TDCJ identifier for each individual; their facility of incarceration, including in separate fields address and county, as of April 1, 2020; and their address prior to incarceration, if known. This file can then be formatted by either the Texas Legislative Council or the Comptroller's Office and uploaded to the Census Bureau's batch geocoding tool.<sup>74</sup> Given the current projections for when Census data will be released to the states, the Texas Legislative Select Committees on Redistricting should seek to have TDCJ provide the required information no later than August 1, 2021. This should allow the Texas Legislative Council or the Comptroller's Office sufficient time to prepare files for immediate cross-reference once final census data has been released to the states.

**Alternative Recommendation #2:  
Reapportion prisoners with projected release dates of 2025 or sooner to their home addresses.**

Every state that has attempted to address prison gerrymandering has reassigned all incarcerated individuals regardless of sentence length. This reflects the fact that, regardless of sentence length, incarcerated individuals still have more ties to their home communities than to their locations of incarceration. However, some policy makers have raised a competing policy consideration—namely that some prisoners will remain incarcerated for the entire decade, and that the counties housing the facilities may experience some unique resource considerations as a result of having large facilities in otherwise underpopulated counties. The COVID-19 pandemic has also frustrated efforts to conduct a complete census and impacted the redistricting processes in Texas and elsewhere. Due to the unique challenges facing the Texas Legislature this cycle, legislators may be keen to seek and find compromise, waiting for the next

census to implement more robust policy changes. The legislature could address these concerns by reassigning only those incarcerated individuals who have projected release dates prior to 2025. This would mean that any individuals who will physically spend the majority of the decade incarcerated would be counted as residents of the county in which they are incarcerated. This would provide these typically rural counties with additional time to prepare for changes in representative power that might occur in the next Census, when the legislature could more thoroughly analyze and reallocate prisoners based on their places of residence.

**Alternative Recommendation #3:  
Reapportion prisoners to their home address solely for the purpose of apportioning state representatives between the counties**

Even if the legislature deems it impractical to reassign individuals in time for this decennial redistricting, it can still take less intensive steps to remedy the distortions of prison gerrymandering where the impacts are most salient.

The first step in redistricting the State House of Representatives is to apportion house seats among the counties. Because county population totals do not neatly divide into the state's total population, there are inevitably surplus populations that traditionally have been rounded up or down to assign whole numbers of representatives to certain counties. In calculating the total population for each county, the Legislature can easily obtain from TDCJ the home counties for individuals prior to their incarceration (for those for whom the information exists) and reassign them from the county of their facility to their home county, solely for the purpose of apportioning House seats to each county. Because this does not require actually assigning specific individuals to exact addresses, it is far less resource-intensive and can be completed almost immediately upon receiving census data. There is already substantial leeway (+/- 5 percent from the ideal population) when it comes to equal population requirements for state legislative districts, so the Legislature already typically makes districts that vary in population by similar amounts as would result from reassigning incarcerated populations. The fact that incarcerated populations overlap so significantly with already under-counted populations only further justifies the Legislature to account for the distortions created by incarcerated populations.

As described in the preceding recommendation, the Legislature also has the option to only reassign those individuals with projected release dates prior to 2025 for the purposes of apportioning state house seats among counties. This would still be a step in the right direction towards treating incarcerated populations fairly and legally, and would set the stage for more comprehensive reform in future cycles.

## **Conclusion**

Our nation is the product of tremendous political will and imagination. Throughout its history, the United States has worked steadily to realize its highest ideals, strengthening democracy through the consent of the governed. When the rights and liberties of the most marginalized are ignored, our democracy stagnates, then withers in silence and darkness. As one of the country's largest states, Texas can rectify hidden harms by investing in tools and resources that better reflect and represent the needs of every Texan. As it has done throughout its history, Texas is now called to muster the political will and imagination necessary to end one of the final vestiges of an antebellum era which valued bodies for their utility and not their voices. As we quickly approach an unorthodox cycle of redistricting, the Texas Legislature is poised to resolve a decades-long fight to empower prisoners and the communities from which they have come.

# REFERENCES

- 1** See Email from William Overton, Asst. General Counsel, Tex. Dep't of Crim. Just., to Christopher Rivera, Outreach Coordinator & Office Manager, Tex. Civil Rights Proj. (Feb. 2, 2021, 2:53PM CST) (on file with TCRP). The total incarcerated population is down, in part due to COVID-19, as compared to recent years VERA INST. OF JUST., INCARCERATION TRENDS IN TEXAS 1 (2019)  
<https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf> ("In 2018, there were 151,213 people in the Texas prison system.").
- 2** See VERA INST. OF JUST., *supra* n. 1 at 3 ("It is critical to examine incarceration trends in every corner of the state, because although the largest counties many have the most people in jails—the highest rates of incarceration are in smaller cities and rural counties.").
- 3** Recently obtained TDCJ population data projects that over 30% of all currently imprisoned individuals will be released by the end of this year, with nearly 70% scheduled for release by the start of the next census. See Overton email, *supra* n. 1.
- 4** *Id.*
- 5** *Id.*
- 6** Anderson County, which includes the city of Palestine, is located roughly 100 miles southeast of Dallas and 150 miles north of Houston. This makes it an ideal hub for prisoners from these metropolitan areas.
- 7** See Overton email, *supra* n. 1.
- 8** See Ross Ramsey, *Prisoners Don't Vote, but They Sometimes Count*, TEXAS TRIBUNE (Sep. 30, 2011),  
<https://www.texastribune.org/2011/09/30/prisoners-dont-vote-they-sometimes-count>.
- 9** See *id.* ("On the new maps recently approved by the Republican-dominated Legislature, lawmakers drew Reps. Scott Hochberg and Hubert Vo, both Democrats, into the same district, knowing only one can survive the election year.").
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[https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-95.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html).
- 11** *Hard to Count 2020*, BERKELEY,  
[http://people.ischool.berkeley.edu/~sombiri/final\\_proj/](http://people.ischool.berkeley.edu/~sombiri/final_proj/) (Texas population is 55% minority, 35% renter, 20% no internet, 11% of residents are non-citizens).
- 12** Hansi Lo Wang, *2020 Census Could Lead to Worst Undercount of Black, Latinx People in 30 Years*, NPR (Jun. 4, 2019),  
<https://www.npr.org/2019/06/04/728034176/2020-census-could-lead-to-worst-undercount-of-black-latinx-people-in-30-years>.
- 13** TEX. DEP'T OF CRIMINAL JUSTICE, *FY 2019 Statistical Report at 1* (showing that 66.3% of prisoners are non-Anglo).
- 14** Charmaine Runes, *Following a Long History, the 2020 Census risks undercounting the black population*, THE URBAN INSTITUTE (Feb. 26, 2019),  
<https://www.urban.org/urban-wire/following-long-history-2020-census-risks-undercounting-black-population> [<https://perma.cc/2S7Y-APCV>].
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[https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-95.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html).

- 16** Hansi Lo Wang, *2020 Census Could Lead To Worst Undercount of Black, Latinx People in 30 Years*, NPR (Jun. 4, 2019), <https://www.npr.org/2019/06/04/728034176/2020-census-could-lead-to-worst-undercount-of-black-latinx-people-in-30-years>; *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census*, U.S. CENSUS BUREAU, (May 22, 2012), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-95.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html) [<https://perma.cc/4DBK-MUVJ>].
- 17** Hansi Lo Wang, *2020 Census Could Lead to Worst Undercount of Black, Latinx People in 30 Years*, NPR (Jun. 4, 2019), <https://www.npr.org/2019/06/04/728034176/2020-census-could-lead-to-worst-undercount-of-black-latinx-people-in-30-years> [<https://perma.cc/6U74-XWCK>].
- 18** See *Census Bureau Releases Estimates*, *supra* n. 15.
- 19** *Runes*, *supra* n. 14; Anna Maria Barry-Jester, *A Million Children Didn't Show Up in the 2010 Census, How Many Will be Missing in 2020* FiveThirtyEight.com (Mar. 19, 2018) <https://fivethirtyeight.com/features/a-million-children-didnt-show-up-in-the-2010-census-how-many-will-be-missing-in-2020>.
- 20** See *id.*
- 21** See TEX. ELEC. CODE ANN. § 1.015(a), (e) (West 2017) (defining domicile as "one's home and fixed place of habitation to which one intends to return after any temporary absence," and further clarifying that "[a] person who is an inmate in a penal institution . . . does not, while an inmate, acquire residence at the place where the institution is located.").
- 22** See *Fixing Prison-Based Gerrymandering After the 2010 Census: Texas*, PRISON POL'Y INITIATIVE (Mar. 2010), <https://www.prisonersofthecensus.org/50states/TX.html> [<https://perma.cc/8DK9-ABAU>] (stating Anderson, Bee, Brazos, Childress, Concho, Coryell, Dawson, Grimes, Karnes, Madison, Mitchell, Pecos, Walker, and Wood Counties excluded prison populations for County Commissioner precincts after the 2000 census, especially noting that excluding the prison population in Concho County avoided a County Commissioner precinct of only incarcerated persons).
- 23** *Id.*; Jonathan Tilove, *Prisoners Can't Vote, But They Can Subtly Shift Political Power*, AUSTIN AMERICAN-STATESMAN, <https://www.statesman.com/news/20131201/prisoners-cant-vote-but-they-can-subtly-shift-political-power> (last updated Sept. 25, 2018, 9:45 AM) [<https://perma.cc/4QRX-3N8R>].
- 24** *Nixon v. Herndon*, 273 U.S. 536, 541 (1927); *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944); *Terry v. Adams*, 345 U.S. 461, 469-70 (1953).
- 25** See *Baker v. Carr*, 369 U.S. 186, 247 (1962) (Douglas, J., concurring) (citing the White primary cases as precedent establishing the Court's authority to strike down unconstitutional electoral practices).
- 26** See Charles L. Cotrell & R. Michael Stevens, *The 1975 Voting Rights Act and San Antonio, Texas: Toward a Federal Guarantee of a Republican Form of Local Government*, 8 PUBLIUS 79, 90 (1978) (recognizing a shift from an individualistic to cultural application of the Equal Protection Clause by adding "language minorities" as a component of race).
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- 28** See *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (“Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the ‘results test,’ applied by this Court in *White v. Regester*[.]”).
- 29** *Shelby Cty. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 2631 (2013).
- 30** *Veasey v. Abbott*, 830 F.3d 216, 240 (5th Cir. 2016) (en banc) (quoting *Veasey v. Perry*, 71 F. Supp. 3d 627, 635 (S.D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part*, 830 F.3d 216 (5th Cir. 2016)).
- 31** See TOM HOWE, H. RESEARCH ORG., INTERIM NEWS, NO. 81-5, WHERE SHOULD INMATES BE COUNTED FOR REDISTRICTING? 8 (2010), <https://hro.house.texas.gov/pdf/interim/int81-5.pdf> [<https://perma.cc/CC2U-XA3F>] (indicating it can also affect precincts for county commissioners, justices of the peace, and constables).
- 32** See, e.g., *LULAC v. N.E. Indep. Sch. Dist.*, 903 F. Supp. 1071, 1093 (W.D. Tex. 1995) (finding that North East Independent School District’s at-large electoral system violated section two of the Voting Rights Act of 1965, denying Hispanics and Blacks an equal opportunity to elect school board candidates of their choice); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 674 (S.D. Tex. 2017) (holding the City of Pasadena’s map and plan for electing its city council violated section two of the Voting Rights Act and the Fourteenth Amendment because Pasadena specifically intended to dilute Latino voters).
- 33** *Supra* n. 13.
- 34** See *Reynolds v. Sims*, 377 U.S. 533, 561–66, 577 (1964).
- 35** See *id.* (holding the Equal Protection Clause of the United States Constitution requires “that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”).
- 36** TEX. CONST. art. III, § 25. Other legal principles, including one person-one vote, equal protection, and the Voting Rights Act, also govern the drawing of Texas Senate districts.
- 37** Tex. Const. art. III, § 28.
- 38** *Id.*
- 39** See Poverty: Group Quarters/Residence Rules, U.S. Census Bureau, <https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html> [<https://perma.cc/PW5H-8LCP>] (“The Census Bureau classifies all people not living in housing units (house, apartment, mobile home, rented rooms) as living in group quarters. There are two types of group quarters: Institutional such as correctional facilities . . . [and] Non-Institutional, such as college dormitories . . . [.]”). Due to the varying nature of other categories, this paper does not take a position on the treatment of other group quarters.
- 40** U.S. CENSUS BUREAU, 2020 CENSUS DETAILED OPERATIONAL PLAN FOR: 15. GROUP QUARTERS OPERATION (GQ) 2–3 tbl.1 (Sept. 2017), [https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/GQ\\_detailed\\_operational\\_plan.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/GQ_detailed_operational_plan.pdf) [<https://perma.cc/S9EN-YVTB>] (comprehensive listing of all group quarters).
- 41** *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 895 (D. Md. 2011) (concluding states’ adjustment of census data during the redistricting process is consistent with the practices of the Census Bureau itself).
- 42** U.S. CENSUS BUREAU, RESIDENCE CRITERIA AND RESIDENCE SITUATIONS FOR THE 2020 CENSUS OF THE UNITED STATES 6 (2020), <https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf> [<https://perma.cc/DQ4D-PV8L>].

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- 45** ERIKA L. WOOD, *DĒMOS*, IMPLEMENTING REFORM: HOW MARYLAND & NEW YORK ENDED PRISON GERRYMANDERING 6 (2014), <https://www.demos.org/sites/default/files/publications/implementingreform.pdf> [<https://perma.cc/CG9C-UY6E>].
- 46** *Id.*
- 47** See *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5525–28 (Feb. 8, 2018).
- 48** *Id.*
- 49** See *id.* at 5528; United States Census Bureau, Geocoding (last accessed Jan. 15, 2021) <https://geocoding.geo.census.gov/geocoder/locations/addressbatch?form>.
- 50** See, e.g., *Perez v. Texas*, No. CIV.A. 11-CA-360-OLG, 2011 WL 9160142, at \*13 (W.D. Tex. Sept. 2, 2011) (“in the face of the lack of more definitive guidance from the Supreme Court, we conclude that this eminently political question has been left to the political process.”).
- 51** *Fletcher v. Lamone*, 567 U.S. 930 (2012) (mem.).
- 52** *Fletcher v. Lamone*, 831 F.Supp.2d 887, 894–95 (D. Md. 2011) (“We believe that the plaintiffs fail to read the *Karcher* and *Kirkpatrick* statements in their fuller context. Although *Karcher* and *Kirkpatrick* do require states to use census data as a starting point, they do not hold, as the plaintiffs maintain, that states may not modify this data to correct perceived flaws. A more complete reading of the opinion in *Karcher* makes this point clear. The Court there recognized that ‘the census may systematically undercount population, and the rate of undercounting may vary from place to place.’ It cautioned, however, that ‘[i]f a State does attempt to use a measure other than total population or to “correct” the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner.’ . . . Taken together, these *Karcher* statements suggest that a State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution.”) (quoting *Karcher v. Daggett*, 462 U.S. 725, 738, 732 n.4 (1983) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 534–35 (1969))).
- 53** *Id.*
- 54** Order and Decision, *Little v. LATFOR*, No. 2310-2011, at 6 (N.Y. App. Div. Dec. 1, 2011), [https://www.brennancenter.org/sites/default/files/legacy/Decision%20and%20Order\\_1%20\(2\).pdf](https://www.brennancenter.org/sites/default/files/legacy/Decision%20and%20Order_1%20(2).pdf) [<https://perma.cc/K7YG-RV7S>] (“In March 2010, Groves stated that the Census Bureau counts individuals at their ‘usual residence’ and that, for inmates in particular, states were free to decide the manner in which prisoners were counted, namely, at the prisons, at their pre-incarceration addresses or altogether removed from ‘redistricting formulas’ where residential information was unavailable.”).
- 55** *Id.* at 5.
- 56** *Id.* at 6–7.



**57** Compare N.Y. CONST. art. III, § 4 (amended 2014) (“[E]ach federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of member of assembly and readjustment or alteration of senate and assembly districts . . .”), with TEX. CONST. art. III, § 26 (“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 . . .”).

**58** See, e.g., TEX. ELEC. §1.015 (e) (“A person who is an inmate in a penal institution or who is an involuntary inmate in a hospital or eleemosynary institution does not, while an inmate, acquire residence at the place where the institution is located.”); *GEO Group, Inc. v. Hegar*, No. 03-15-00726-CV, 2017 WL 3471057 (Tex. App. Aug. 10, 2017).

**59** *Id.*

**60** *Id.* at \*3.

**61** *Id.*

**62** Petition for Review, *GEO Group, Inc. v. Hegar*, No. 17-0757, 2017 WL 5653754 (Tex. Nov. 14, 2017).

**63** Respondents' Brief on the Merits, *GEO Group, Inc. v. Hegar*, No. 17-0757, 2018 WL3383177 at \*21-22 (Tex. Jul. 5, 2018).

**64** See Order Denying Petition for Review, *GEO Group, Inc. v. Hegar*, No. 17-0757 (Tex. Aug. 31, 2018).

**65** H.B. 2639, 77th Reg. Sess. (Tex. 2001).

**66** *Id.*

**67** See *Actions – HB2639, 77th Legislative Session*, TEXAS LEGISLATURE ONLINE, <https://capitol.texas.gov/BillLookup/Actions.aspx?LegSess=77R&Bill=HB2639>.

**68** *Id.*

**69** H.B. 672, 81st Reg. Sess. (Tex. 2009); H.B. 2855, 81st Reg. Sess. (Tex. 2009); H.B. 1227, 82nd Reg. Sess. (Tex. 2011); H.B. 329, 83rd Reg. Sess. (Tex. 2013); H.B. 684, 83rd Reg. Sess. (Tex. 2013); H.B. 1215, 81st Reg. Sess. (Tex. 2017); H.B. 104, 81st Reg. Sess. (Tex. 2019).

**70** H.B. 1448, 87th Reg. Sess. (Tex. 2021); H.B. 2518, 87th Reg. Sess. (Tex. 2021); H.B. 3463, 87th Reg. Sess. (Tex. 2021).

**71** See Section II.C *supra*.

**72** See WOOD, *supra* n. 45 at 10-11.

**73** TEX. GOV'T CODE SEC. 552.008 (“A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes.”).

**74** Further details can be found at United States Census Bureau, *Geocoding* (last accessed Jan. 15, 2021) <https://geocoding.geo.census.gov/geocoder/locations/addressbatch?form>. For an example of the geocoding rules adopted by Maryland, see Department of Planning, No Representation Without Population Act (last accessed Jan. 15, 2021) <https://planning.maryland.gov/Redistricting/Pages/2010/newLaw.aspx> [<https://perma.cc/A4W6-2M7H>].



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