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AT _____ O'CLOCK _____ M

APR 05 2011

No. C-902-11-C

MEXICAN AMERICAN LEGISLATIVE §
CAUCUS, TEXAS HOUSE OF §
REPRESENTATIVES, (MALC) §
Plaintiff §

v. §

STATE OF TEXAS, RICK PERRY, §
In His Official Capacity as Governor of the §
State of Texas, DAVID DEWHURST, In His §
Official Capacity as Lieutenant Governor of §
the State of Texas, and JOE STRAUS, In His §
Official Capacity as Speaker of the Texas §
House of Representatives. §
Defendants §

DISTRICT COURT
LAURA HINOJOSA, CLERK
District Courts, Hidalgo County
By _____ (Deputy #51)

OF HIDALGO COUNTY, TEXAS

139th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

To the Honorable Court:

This is a redistricting lawsuit. Plaintiff brings this action against Defendants because the population being used for the State's 2011 redistricting efforts severely undercounts Latinos. The 2010 Census process and procedures resulted in substantial omissions in Latino population, particularly in the border region of Texas, including Cameron, Hidalgo, Starr, Webb and El Paso Counties, as well as urban areas in Dallas and Houston. In the 2011 redistricting of Texas House of Representatives, Texas Senate, United State House of Representatives and Texas State Board of Education, the Defendants are using this defective data to determine the number of representatives that will be apportioned to Texas Counties as well as to determine compliance with the equal population requirements of the Texas and United States Constitutions. Use of this data will undervalue Texas Latinos and limit the number of majority Latino districts which can be drawn. In addition, Plaintiff brings this action since the current election districts for the Texas

House of Representatives, Texas Senate, United States House of Representatives in Texas and the State Board of Education currently contain substantial population disparities in violation of the equal population requirements of the Texas Constitution.

The creation of redistricting plans for Texas election districts using the defective 2010 census data discriminates against Latino voters and is not legally enforceable. Moreover, the current districts are out of compliance with Texas requirements for equal population between districts and are not legally enforceable. The Defendant's actions violate Article I, §§3, 3a, and 19 of the Texas Constitution, and §106.001 of the Texas Civil Practice and Remedies Code. In addition, Plaintiffs seek a declaration of their rights as protected by the Texas Statutes and Constitutional provisions as authorized by §37.003 of the Texas Civil Practice and Remedies Code.

DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery under Texas Rule of Civil Procedure, Level 2.

PARTIES

2. Plaintiff, Mexican American Legislative Caucus, Texas House of Representatives, (hereinafter MALC) is the nation's oldest and largest Latino legislative caucus. MALC is a non-profit organization established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas, in order to form a strong and cohesive voice on those matters in the legislative process, including redistricting. Many of its members are elected from and represent constituencies in majority Latino districts and many of its members are Latino. Moreover, some of the members reside in over-populated Texas House Districts, Texas Senate Districts, United States House of Representative Districts,

and State Board of Education Districts.

3. Defendants are the State of Texas and officials of the State of Texas who have duties and responsibilities under the laws of the state to redistrict congressional, state legislative, and state board of education election districts. Defendants may be served by delivery of the petition and summons on the Texas Secretary of State at P. O. Box 12887, Austin, Texas 78711-2887 or at 1019 Brazos Street, Austin, Texas 78701.

4. Defendant, Rick Perry is the Governor of the State of Texas and under Article IV, Section 1, of the Texas Constitution, he is the chief executive officer of the Defendant State of Texas. He is sued in his official capacity. Defendant Perry may be served by delivering a copy of this Plaintiff's Original Petition and summons to the Texas Secretary of State at P. O. Box 12887, Austin, Texas 78711-2887 or at 1019 Brazos Street, Austin, Texas 78701.

5. Defendant, David Dewhurst is the Lieutenant Governor of Texas. Under Article IV, Section 16, of the Texas Constitution he is the President of the Texas Senate. He is sued in his official capacity. Defendant Dewhurst may be served by delivering a copy of this Plaintiff's Original Petition and summons to the Texas Secretary of State at P. O. Box 12887, Austin, Texas 78711-2887 or at 1019 Brazos Street, Austin, Texas 78701.

6. Defendant, Joe Straus is the Speaker of the Texas House of Representatives and is the presiding officer over the Texas House of Representatives. He is sued in his official capacity. Defendant Straus may be served by delivering a copy of this Plaintiff's Original Petition and summons to the Texas Secretary of State at P. O. Box 12887, Austin, Texas 78711-2887 or at 1019 Brazos Street, Austin, Texas 78701.

VENUE AND JURISDICTION

7. Venue is proper in Hidalgo County. Many of the events or omissions giving rise to this case arose within the Court's jurisdiction; and the relief sought is within the jurisdictional limits of the Court.

STATEMENT OF FACTS

8. Plaintiff, MALC, is the nation's oldest and largest Latino legislative caucus. MALC is a non-profit organization established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas, in order to form a strong and cohesive voice on those matters in the legislative process, including redistricting. Many of its members are elected from and represent constituencies in majority Latino districts and many of its members are Latino. Some of the members of MALC reside in and represent districts that have population substantially greater than the ideal district size for those types of districts.

9. On or about February 17, 2011, the United States Department of Commerce and the United States Census Bureau released to the State of Texas the population data gathered as a result of the conduct of the 2010 census.

10. The information released to the State of Texas showed that the population of Texas had increased to 25,145,561 for 2010. The population of Texas, according to the 2010 Census, had thus increased over the decade by about 20% from the 2000 population of 20,851,820.

11. According to the 2010 Census, the Hispanic population of Texas grew to 9,460,921 from 6,669,666 in the 2000 census. This was an increase of about 42%. Moreover, according to

the 2010 Census, Hispanic growth accounted for about 65% of the overall growth of Texas.

12. According to the 2010 Census, Hidalgo County now has a population of 774,769. In 2000, its population was counted at 569,463 persons by the U.S. Census Bureau. Thus according to the Census Bureau, Hidalgo County grew by over 200,000 persons, or over 36%.

13. The numbers released to the State of Texas by the Census Bureau in February of 2011 are now being used to redistrict the Texas House of Representatives, the Texas Senate, United States House of Representatives and the Texas State Board of Education. This data has already been used to determine the apportionment of Texas House of Representatives to Texas Counties and to apportion United State House of Representative seats to Texas.

14. Historically, there has never been a completely accurate census in the United States. Moreover, the undercount of population has weighed more heavily on racial and ethnic minorities. That is, while many people simply were not counted, among certain groups, blacks and Latinos e. g., the level of undercount has been more severe than with whites. This disparate impact of the undercount is often referred to as the "differential undercount".

15. Historically, American censuses result in more accurate counts for whites than they do for racial and ethnic minorities. *See:* National Research Council, *Modernizing the U.S. Census* 32, 33 (Barry Edmonston & Charles Schutze eds., 1995).

16. The Census Bureau has recognized that in Texas certain populations are more difficult to count than other populations. For example, people in poor urban communities are harder to count, as are people who live in poor suburban unincorporated subdivisions primarily located along the Texas-Mexican border and often referred to as "colonias". In Texas, this

means an undercount of racial and ethnic minorities.

17. The traditional difficulties of accurately counting were compounded by the manner in which the Census Bureau actually conducted the census in Hidalgo County and other border area counties. After promoting and advertising and educating the community in these counties of the use of the “mail-out, mail-in” counting strategy the Census Bureau announced on the day the Census was to commence that this strategy would not be employed for the “colonias”. The decision to forego one of the most relied upon strategies for the very population known to be hardest to count, after an extensive media and educational campaign to secure compliance, had a devastating effect on the ability of securing a complete count.

18. Upon information and belief, the resulting undercount of Latinos along the border region of Texas was between 4% and 8% of the population for the region.

19. The use of the inaccurate 2010 Census numbers for redistricting of Texas House of Representatives, Texas Senate, Texas State Board of Education and United States House of Representative districts will diminish the voting strength of Latino voters of Texas.

20. According to the 2010 Census, the Texas House of Representative districts have population disparities between the most and least populated district or a “top to bottom deviation” of over 109%. This population disparity far exceeds the allowable deviation under the Texas Constitution. The overpopulated districts for the Texas House of Representatives includes districts such as District 40 in Hidalgo County, with a deviation of over +28%, and District 36 in Hidalgo County, with a deviation of over +20%.

21. According to the 2010 Census the Texas Senate districts have population disparities

between the most populated and least populated districts or “top to bottom” deviation of over 46%. This population disparity far exceeds the allowable deviation under the Texas Constitution.

22. According to the 2010 Census, the Texas Congressional districts have population disparities between the most populated and least populated districts or “top to bottom” deviation of over 48%. This population disparity far exceeds the allowable deviation under the Texas Constitution. The overpopulated districts for the United States House of Representatives includes districts such as District 15 in Hidalgo County, with a deviation of over +12%, and District 28 in Hidalgo County, with a deviation of about +22%.

23. According to the 2010 Census, the Texas State Board of Education districts have population disparities between the most populated and least populated districts or “top to bottom” deviation of over 29%. This population disparity far exceeds the allowable deviation under the Texas Constitution.

24. The United States Supreme Court recently explained and articulated that the standard for compliance with the one person, one vote principle, does not provide a complete safe harbor, even when a plan has less than a 10% total deviation. Unless the jurisdiction can articulate a legitimate non-racial, non-political reason for its deviation, districts should be as equal in population as is practicable. *Cox v. Larios*, 159 L. Ed. 2d 831, 833 (2004).

25. The State’s redistricting plans contains deviations that far exceed permissible limits under the Texas Constitution.

26. Elections in Texas continue to be racially polarized.

27. Latinos generally vote as a group and are politically cohesive.

28. African Americans in Texas generally vote as a group and are politically cohesive.

29. Latinos and African Americans in Texas generally vote as a group and are politically cohesive.

30. Anglos in Texas generally vote as group, are politically cohesive and vote sufficiently as a block to defeat the preferred candidate of Latino and African American voters absent fair and equitable majority-minority single member districts.

CAUSES OF ACTION

I. VIOLATION OF EQUAL PROTECTION PROVISION OF THE TEXAS CONSTITUTION

31. The Texas Constitution (Article I, §3) guarantees a free and equal vote in Texas elections:

All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.

32. Defendants, in their official capacities, are responsible for ensuring that all election procedures comply with the Texas Constitution. The Constitution requires that equality of rights include political rights. See: *Burroughs v. Lyles*, 181 S. W. 2d 570 (Tex. 1944). Moreover, it requires that election districts have as equal population between districts as is practicable. *Avery v. Midland County, Tex.* 430 S.W. 2d 487 (Tex. 1968)(on remand from *Avery v. Midland County, Tex.* 390 U. S. 474 (1968)).

33. The plans currently in place in Texas for the House of Representatives, the Senate, the United State House of Representatives and the State Board of Education have impermissible

Plaintiff's Original Petition

population deviations between their largest and smallest district in violation Plaintiffs' rights as protected by the Texas Constitution, Art. I, §3. *Cox v. Larios*, 159 L. Ed. 2d 831, 833 (2004).

34. Article VI, §2(c) of the Texas Constitution provides the "... suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence in elections from power, bribery, tumult, or other improper practice." Failure to comply with Article I §3 of the Constitution, as alleged in this suit, is a violation of this provision, as well.

II. VIOLATION OF RIGHT TO BE FREE FROM DISCRIMINATION

35. The Texas Constitution (Article I, §3a) guarantees equality under the law regardless of race, sex, color, creed, or national origin:

Sec.3a. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operating.

36. Texas Courts have determined that Article I, §3a (the Texas Equal Rights Amendment, ERA) prohibits election practices that adversely affect Hispanic voters. See: *Del Valley Independent School District v. Lopez*, 863 S. W. 2d 507, 515 (Tex. App. – Austin, 1993, writ denied)

37. The use of redistricting data that undervalues Latino population by the Defendants gerrymanders the Hispanic voters of Texas and limits their ability to participate equally in the electoral process in violation of Article I, §3a of the Texas Constitution.

38. Article VI, §2(c) of the Texas Constitution provides that the "... suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue

influence in elections from power, bribery, tumult, or other improper practice.” Failure to comply with Article I § 3a of the Constitution, as alleged in this suit, is a violation of this provision, as well.

IV. VIOLATION OF §106.001, TEXAS CIVIL PRACTICE AND REMEDIES CODE

39. Section 106.001(a)(6) of the Texas Civil Practice and Remedies Code provides:

“(a) an officer or employee of the state or of a political subdivision of the state who is acting or purporting to act in an official capacity may not, because of a person’s race, religion, color, sex, or national origin:

(6) impose an unreasonable burden on the person”

40. The use of redistricting data that undervalues Latino population by the Defendants, gerrymanders the Hispanic voters of Texas and limits their ability to participate equally in the electoral process and places an unreasonable burden on Hispanic voters, in violation of Section 106.001(a) (6) of the Texas Civil Practice and Remedies Code.

DECLARATORY RELIEF

41. This suit involves an actual controversy within this Court’s jurisdiction, and the Court should, as authorized by the Texas Declaratory Judgment Act, §37.003, Texas Civil Practice and Remedies Code, declare the violation of Plaintiffs’ rights under the Constitution and laws of Texas, including the Texas Civil Practice and Remedies Code, and declare the suffrage rights of Plaintiffs under the Constitution and laws of Texas, and require enforcement of the same.

TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

42. Defendants have failed to perform their clear statutory obligations under Tex. Const. Art. I § 3 and 3a, Art. VI, §2(c), 3 and Tex. Civil Practice and Remedies Code §106.001(a)(6), and

continue to do so. They thus, are violating, and continue to violate, Plaintiffs' fundamental state constitutional and statutory rights. Without injunctive relief by the Court, Defendants will continue to violate Plaintiffs' constitutional and statutory rights, for which there is no adequate relief in damages.

43. The Court should issue a Declaratory Judgment that Defendants are violating and continue to violate Plaintiff's rights and order the Defendants to develop redistricting plans that provide Latino voters and voters generally an equal opportunity to participate in the electoral process.

ATTORNEYS' FEES AND COSTS

44. Plaintiffs are entitled to reasonable attorneys' fees and costs pursuant to the Texas Declaratory Judgments Act, (CPRC §37.009) as well as pursuant to §106.002 (b), Texas Civil Practice and Remedies Code.

CONCLUSION AND PRAYER FOR RELIEF

THEREFORE, Plaintiffs pray that this Court enter judgment against Defendants, as follows:

A. Enter declaratory judgment that Defendants are violating and continue to violate Plaintiffs' fundamental voting rights, guaranteed under the Texas Constitution and Texas Civil Practice and Remedies Code.

B. Temporarily and permanently enjoin Defendants from continuing to use, or permitting the use of any districting plan that does not account for the undercount of Latinos.

C. Order Defendants to conduct a special election using an election plan approved by this Court that will: afford minority voters an equal opportunity to elect candidates of their choice; that accounts for the undercount of Latinos; and complies with the Texas Constitution and Texas statutes.

D. Award Plaintiffs reasonable attorneys' fees and costs from Defendants, pursuant to the Declaratory Judgments Act and the anti-discrimination statutory provisions, and

E. Grant all other additional relief to which Plaintiffs may be entitled, at law or equity.

Dated: April 5, 2011.

Respectfully Submitted,



Jose Garza

Texas Bar No. 07731950

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