IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION NO. 5:11-CV-0360**
	§	
STATE OF TEXAS et al.,	§	
	§	
Defendants.	§	

MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Defendants the State of Texas, Rick Perry, David Dewhurst, Joe Straus, and Hope Andrade hereby move to dismiss Plaintiffs' First Amended Complaint with prejudice, and in support of their motion respectfully submit the following memorandum of points and authorities.

INTRODUCTION

This lawsuit is one of more than ten cases purporting to challenge some aspect of the State's redistricting efforts in the wake of the 2010 decennial census. The Plaintiffs in this case attempt to state several discrete, purely legal challenges to the redistricting plans for the Texas House and Senate recently passed by the Legislature and awaiting action by the Governor.

First, Plaintiffs complain that variation in population among the redrawn districts violates the Equal Protection Clause and its embedded principle of one person, one vote. That legal argument is foreclosed by well-settled Supreme Court precedent holding that departure from absolute population equality does not violate the Equal Protection Clause where, as here, the total deviation (i.e., the difference between the most and least densely populated districts) is less than 10% of the ideal district population. *E.g.*, *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983).

In hopes of creating a claim, Plaintiffs allege that Texas has "targeted" that 10% figure as part of its decisional calculus, but they cite no basis for the allegation and offer no fact from which one might "reasonably infer" it. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). This is not an oversight. The Plaintiffs cannot amend their Complaint to offer any such allegation because no supporting evidence exists. As a result, Plaintiffs cannot, consistent with the dictates of Rule 11, state a claim upon which relief could conceivably be granted. Dismissal with prejudice is the appropriate remedy. *Id.*

Second, Plaintiffs complain that Texas has violated state and federal law by counting prisoners as residents of the districts in which they are incarcerated. This argument, too, fails as a matter of law. While the State is prepared to stipulate that some, perhaps many, of its prisoners reside in a county not of their choosing, the decision of where their representation should lie is vested exclusively in the discretion of state lawmakers. Plaintiffs cannot cite any relevant state or federal law to support their theory. Their claim should be dismissed with prejudice.

Third, Plaintiffs complain that the proposed Texas House redistricting plan is "blatantly a political gerrymander." Complaint ¶ 18. Because they fail to allege a single fact in support of this legal conclusion, their claim must be dismissed under *Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Finally, and independent of their manifest merits deficiencies, Plaintiffs' claims fall outside the Court's subject matter jurisdiction. Plaintiffs lack standing to pursue any of their claims because they fail to identify a concrete harm suffered as a result of the redistricting plans, and they do not explain how a court could redress their purported—but unstated—injuries by granting the requested relief. Plaintiffs' challenge to the enumeration of the prison population

also presents a nonjusticiable political question. Likewise, Plaintiffs' political gerrymandering complaint is nonjusticiable because there is no legal standard applicable to that claim.

LEGAL STANDARD

Dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) is required when the court lacks constitutional and statutory power over the case. *E.g.*, *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Plaintiffs bear the burden of establishing this Court's subject matter jurisdiction, *see Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), including their own standing to sue, *see Cobb v. Central States*, 461 F.3d 632, 635 (5th Cir. 2006). To establish constitutional standing under Article III, § 2, a plaintiff must "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Under Rule 12(b)(6), the Court must accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). However, the plaintiff must provide more than conclusory factual allegations or a mere recitation of the elements of its claims. *See Iqbal*, 129 S.Ct. at 1949 "To survive a Rule 12(b)(6) motion, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). The Court is not required to accept as true a plaintiff's statements of law. *Iqbal*, 129 S.Ct. at 1950 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Because the Court must evaluate its jurisdiction before proceeding to the merits, we address the jurisdictional question first. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998).

ARGUMENT AND AUTHORITIES

I. Subject Matter Jurisdiction Is Lacking in Multiple Respects.

A. Plaintiffs Lack Standing to Pursue Any of Their Claims.

Plaintiffs cannot show an injury in fact because they do not identify any harm that befalls them because of the State's redistricting plans. To establish an injury in fact, the plaintiff must identify "a concrete and imminent invasion of a legally protected interest that is neither conjectural nor hypothetical." *Lujan*, 504 U.S. at 560. Plaintiffs do not allege that their own electoral districts are overpopulated or that they have otherwise been harmed by the challenged redistricting plans. The complete failure to identify an injury deprives Plaintiffs of standing and divests this Court of subject matter jurisdiction.

Plaintiffs also fail to show that the declaratory and injunctive relief they seek will redress any injury they might have suffered. They do not explain, for example, how the Court's declaration of "the law with respect to the appropriate allocation of the state's prison population" or "the law with respect to the requirements of one person-one vote," Complaint at 5, will correct the alleged defects in the State's electoral districts. They effectively request an advisory opinion.

As for the injunctive relief Plaintiffs seek, they do not explain what they want the Court to do about the prison population, nor do they allege that an interim electoral plan (presumably based on some alternative population base) will improve their position relative to voters in other districts. *See, e.g.*, *Kaplan v. County of Sullivan*, 74 F.3d 398, 399–400 (2d Cir. 1996) (holding that the plaintiff lacked standing to challenge the exclusion of prisoners from the county's

apportionment base because he could not show that including prisoners would strengthen his vote); *Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (holding that plaintiffs lacked standing because they could not show that adjusting the Census to exclude illegal aliens would result in more representation for their home states). Because Plaintiffs have made no effort to show injury in fact or redressability, they have not carried their burden of establishing standing, and this Court lacks subject matter jurisdiction.

B. The Classification of Prisoners Presents a Nonjusticiable Political Question.

Plaintiffs allege that the State's practice of counting prison inmates as residents of the districts in which they are incarcerated violates the one-person, one-vote principle of the Equal Protection Clause. While this claim must fail as a matter of law as discussed *infra*, it is also beyond the Court's jurisdiction because the State's choice of a population base for the purposes of drawing state legislative districts presents a nonjusticiable political question. *See Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) (characterizing the use of total population rather than citizen voting age population for local redistricting as an "eminently political question [that] has been left to the political process"); *cf. Burns v. Richardson*, 384 U.S. 73, 92 (1966) ("The decision to include or exclude any such group [of aliens, transients, temporary residents, or persons denied the vote for conviction of crime] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.").

C. The Eleventh Amendment Precludes State Law Claims.

Plaintiffs allege that the State's redistricting efforts are based on a misinterpretation of Texas Election Code § 1.015, which addresses the residence of institutional inmates for voting, not representational or redistricting, purposes. The Eleventh Amendment bars suits in federal court against a state or state officials, in their official capacities, for violation of state law. *See*

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105-06 (1984). To the extent Plaintiffs assert a claim for violation of the Texas Election Code, the Eleventh Amendment bars this Court from exercising its jurisdiction.

II. Plaintiffs Fail to State a Claim Upon Which Relief May Be Granted as a Matter of Law.

A. Plaintiffs' Request for Declaratory Relief Regarding the Standard of Population Equality Contradicts Clearly Established Law.

Plaintiffs complain that Texas has failed to make a "good faith effort to achieve population equality," instead redistricting with the "goal of achieving a deviation of 10%." Complaint ¶ 16. They imply that the Constitution requires the State to justify any deviation from precise population equality. *See id.* ¶ 18 (complaining of "utterly unjustified population deviations" in Texas House districts). This is plainly inconsistent with basic Fourteenth Amendment doctrine and Supreme Court precedent governing state legislative districts. The Supreme Court has held that the least populated district and the most populated district may deviate from the ideal district population by up to five percent—creating a total deviation of up to ten percent—without violating the Equal Protection Clause, or even compelling the state to explain the difference in population among districts. Significantly, Plaintiffs do not (and cannot) allege that the new districts enacted by the Legislature go beyond the ten percent threshold.

The constitutional obligation to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable," *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), does not require that state legislative districts contain exactly the same number of persons. The Supreme Court has expressly rejected the proposition "that *any* deviations from absolute [population] equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection

Clause." *White v. Regester*, 412 U.S. 755, 763 (1973). A deviation of less than ten percent is considered to be minor and consistent with the Constitution. *See, e.g.*, *Brown*, 462 U.S. at 842–43 ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.").

The Supreme Court's ten percent threshold operates as a burden-shifting mechanism in challenges to state legislative redistricting plans. *See Fairley v. Hattiesburg*, 584 F.3d 660, 675 (5th Cir. 2009) ("If a population deviance is less than 10%, it is considered minor and does not suffice, alone, to make out a prima facie case of discrimination."). The conclusory allegations in Plaintiffs' First Amended Complaint fail to state a prima facie case, and their claim must be dismissed.

Plaintiffs' passing reference to *Georgia v. Larios*, 542 U.S. 947 (2004), suggests that the Supreme Court has somehow altered its longstanding Equal Protection jurisprudence. But the Supreme Court simply has not changed the rule governing population deviation. In fact, *Larios* summarily affirmed a district court decision holding that legislative plans with a total deviation of less than ten percent "are presumptively constitutional, and the burden lies on the plaintiffs to rebut that presumption." *Larios v. Cox*, 300 F. Supp. 2d 1320, 1341 (N.D. Ga.), *aff'd sub nom. Georgia v. Larios*, 542 U.S. 947 (2004). The district court held that Georgia's redistricting plans violated the Equal Protection Clause because they were motivated by "deliberate regional favoritism," which "created more than a taint of arbitrariness and discrimination." *Id.* at 1347. Further, the district court found that the legislature systematically underpopulated Democratic districts and overpopulated Republican districts. *See id.* at 1348. The plaintiffs in *Larios* thus presented both allegations and evidence to rebut the longstanding—and still applicable—presumption that Georgia's plan was constitutional. The Plaintiffs make no such allegations.

Plaintiffs also suggest that the ten percent threshold has no place in the age of computerized redistricting. The Supreme Court's decisions, however, are not based on the difficulty of drawing districts with exactly the same number of inhabitants. The governing legal principle is not that all districts must have precisely the same population, but rather that each district's population be equitable. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 740–41 (1973) (holding that a total deviation of 7.83% did not state a prima facie claim, even if a smaller deviation were possible). Plaintiffs ignore not only the inherently political nature of this inquiry but the many competing legal imperatives under which the Legislature operates. *See, e.g.*, Tex. Const., Art. III, § 26 (directing the Legislature to keep counties whole whenever possible in drawing Texas House districts). In any event, the ten percent threshold remains the law until the Supreme Court says otherwise.

B. Plaintiffs' Challenge to the State's Classification of the Prison Population Lacks Any Basis in Federal Law.

Plaintiffs allege that the State's classification of prisoners results in "excessive population deviation" among electoral districts for the Texas House of Representatives. Complaint ¶ 16. Yet Plaintiffs do not even attempt to explain how prisoners should be counted, nor do they specify the deviation between the House plan's least populated and most populated districts, the House districts that are affected, or what level of deviation would be acceptable. Plaintiffs fail to state a cognizable claim for relief because they do not allege a total deviation of ten percent or more. Without an allegation of more than *de minimis* deviation—which the Supreme Court has determined is a deviation of ten percent or more—Plaintiffs do not state a prima facie claim under the Equal Protection Clause. *See, e.g.*, *Brown*, 462 U.S. at 842–43.

Plaintiffs' challenge to the enumeration of prisoners is subject to rational-basis scrutiny. *See Mahan v. Howell*, 410 U.S. 315, 326 (1973) ("[T]he proper equal protection test [of one

person one vote claims] is not framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider.'") (quoting *Reynolds v. Sims*, 377 U.S. at 580–81); *see also Daly v. Hunt*, 93 F.3d 1212, 1218 n.8 (4th Cir. 1996) (commenting on the absence of strict scrutiny review in one-person, one-vote claims under the Equal Protection Clause). Classifying a prisoner as a resident of the district in which he is incarcerated is indisputably rational because each prisoner lives in the district where his or her prison cell is located. *See Borough of Bethel Park v. Stans*, 449 F.2d 575, 578, 582 (3d Cir. 1971) (rejecting a challenge to the Census Bureau's enumeration of prisoners, college students, and military personnel as residents of the place of their respective institutions, holding that the Bureau's policy had a rational basis); *cf. District of Columbia v. United States Department of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992) (holding that the Census Bureau's usual-residence rule was not arbitrary and capricious but a rational exercise of discretion). Moreover, any alternative approach raises substantive and procedural complexity that the Legislature wisely avoids under the existing test. *See, e.g.*, Greg A. Greenberg & Robert A Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 PSYCHIATRIC SERVICES 170 (2008) (describing a study showing substantially higher rates of homelessness among jail inmates preceding incarceration compared to the general population). At all events, the Supreme Court has never suggested that the Equal Protection Clause prohibits states from counting persons as residents in the legislative districts where the persons actually live.

C. Plaintiffs' Allusion to Political Gerrymandering Fails to State a Claim.

Plaintiffs assert that the Texas House redistricting plan is "blatantly a political gerrymander." Complaint ¶18. They fail to identify the elements of their claim, however, much less allege facts supporting their legal claim. Their conclusory allegation is plainly insufficient

to state a claim. *See, e.g.*, *Iqbal*, 129 S.Ct. at 1950 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'") (quoting FED. R. CIV. P. 8(a)(2)). Moreover, in the absence of any applicable legal standard, Plaintiffs' political gerrymandering claim is not justiciable in the first place.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiffs' First Amended Complaint with prejudice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent *via* the court's electronic notification system, on June 14, 2011, to the following:

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ORDER

Before the Court is Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief May Be Granted. After considering the motion, the Court is of the opinion it should be GRANTED.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is hereby GRANTED. IT IS FURTHER ORDERED that Plaintiffs' First Amended Complaint be, and it is hereby, DISMISSED WITH PREJUDICE.

DATED:_____

_____
UNITED STATES DISTRICT JUDGE