UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, HAROLD DUTTON, JR, AND GREGORY TAMEZ Plaintiffs	§	
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, HOPE ANDRADE, in Her Official Capacity as Secretary of State of the State of Texas Defendants	§	CIVIL ACTION NO. 5:11-CV-0360-OLG

PLAINTIFFS' RESPONSE TO
MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

TO THE HONORABLE COURT:

COME NOW, Shannon Perez, Harold Dutton, Jr. and Gregory Tamez ("Plaintiffs") and file their Response to Motion to Dismiss Plaintiffs' Second Amended Complaint, and would show the court as follows:

I.
INTRODUCTION

1. The short answer to this new motion is that Defendants, wrongly and wrong headedly, assert that our complaint "presents purely legal issues." In our earlier response, we sought to flesh out the factual issues that are fairly raised and we repeat them hereafter.

2. Since the filing of this motion, the court has entered a scheduling order that puts the parties on a fast track. Included in that order is a July 19th deadline for filing motion to amend. Plaintiffs intend to tender before that deadline an amended pleading that explicitly brings forward allegations of Section 2 Voting Rights Act violations in both plans before the court. We will address, at that time, any lingering concerns about the specificity of the 14th Amendment violations we have alleged. For a more technical response to the Defendants' motion, the enacted congressional plan is still not signed into law and our pleadings more than adequately allege the unconstitutionality of the existing congressional districts.

3. By way of further response, if need be, the Court on July 6, ordered consolidation of the three pending causes "for all purposes." Presumably this means that our Plaintiffs' pleadings have merged "into a single suit," *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982). Thus, any deficiencies in our pleadings are cured by our co-Plaintiff's pleadings.

II.
ARGUMENT

4. The issues presented by these plaintiffs are by no means simplistic but they seem to us particularly inappropriate for Rule 12 (b) disposition, as we demonstrate below.

5. Texas has already determined as a matter of law that prison inmates cannot become residents at the place of their incarceration. Indeed, Texas considers them to be "legal residents" of the county where they lived at the time of their conviction. The fact that census places prison population in their place of incarceration does not dictate their inclusion in the redistricting process, indeed many, if not all, Texas counties exclude their prison population in the reapportionment of their commissioner precincts. Of course, as is evident from the attached exhibits, absolute accurate information as to this population was available during the legislative

reapportionment process. So what is the effect of treating the prison population as "residents" in the county of their incarceration?

6. Texas House District 8 includes Anderson and Freestone Counties with a prison population of 15,193, the Texas House plan wrongly treats them as residents for purposes of redistricting, with the result of significantly over representing the real residents of District 8, removal of the prison population from the count shows that the district is underpopulated by some 12%. Given that the largest legislative district, District 61, is overpopulated by 5.02% - the range of deviation in the House plan is a constitutionally unacceptable 17%.

7. There is another piece to this picture, as argued by the plaintiff Dutton to the Legislature. Of the State's prison population, 29,798 are "legal residents" of Harris County. If they had been properly allocated to Harris County, under the State's formula for determining the number of legislative seats assigned to the urban counties, Harris County would have been entitled to an additional seat in the Texas House.

8. Furthermore, similar constitutional deficiencies infect the recently enacted Congressional apportionment plan. Congressional District 8 includes Walker, Grimes, Houston and Madison counties, and some 21,239 incarcerated prisoners. Under Texas law, these prisoners cannot be residents of these counties and they were wrongly included as part of the population of the district for purposes of determining deviation from the ideal district of 698,488. As a result, the true deviation of the district is an underpopulation of 3.04%. A deviation which exceeds constitutional minimum, *White v. Weiser,* 412 U.S. 783 (1973). Of course the election of federal officers has even far greater Constitutional concerns, *compare Cook v. Gralike*, 531 U.S. 510 (2001).

9. The state relies on the 4th Circuit opinion in *Daly v. Hunt,* 93 F.3rd 1212 (4th Cir. 1996). Of course, *Hunt* concerned reapportionment of county commissioner precincts, not federal officers. There is language in that opinion that may prove helpful to the State on the merits of this cause but it hardly warrants Rule 12 disposition.

10. Indeed, there is language that is supportive of our view, to wit: "...courts should generally defer to the state to chose (sic) its own reapportionment base, provided that such method yields acceptable results." *Hunt* at 1225. We say, of course, that the State's treatment of the prison population has yielded unacceptable results under the 14th Amendment.

11. The State in its motion has trivialized our reading of the *Larios* decision saying "...the Supreme Court simply has not changed the rule governing population deviation..." at p. 7. The State's argument runs directly counter to the reading that Judge Higginbotham placed on *Larios* in the last decade's round of redistricting litigation. See, *Henderson v. Perry*, 399 F. Supp. 2d 756,759 (2005):

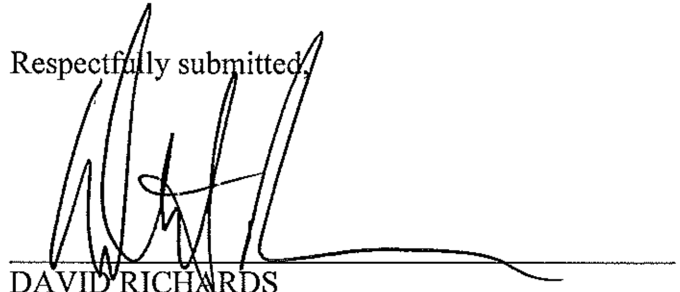
> "Shortly thereafter, in *Cox v. Larios*, the Court summarily affirmed the judgment of a three-judge court that had rejected a redistricting plan of the Georgia legislature as failing to conform to the principle of one-person, one-vote. The district court held that because the legislature sought to give advantage to certain regions of the state and to certain incumbents in an effort to help Democrats and hurt Republicans, Georgia was not entitled to the 10% deviation toleration normally permitted when a state is drawing lines for its legislature."

12. This precisely what plaintiffs allege here. The House reapportionment plan we assail contains essentially a 10% deviation range, and was designed to protect certain incumbent Republicans and hurt certain Democrats. Obviously, we are entitled to make our proof in this regard.

III.
CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny the Defendants' motion in its entirety.

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 July 11, 2011, to the following:

David Schenck
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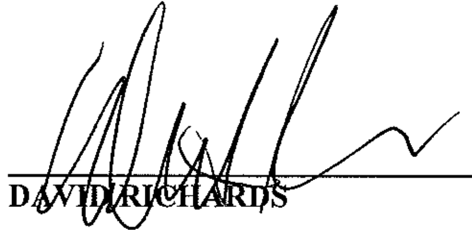

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