

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 FOR
LACK OF SUBJECT MATTER JURISDICTION AND
FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

TO THE HONORABLE COURT:

COME NOW, Shannon Perez, Harold Dutton, Jr. and Gregory Tamez (“Plaintiffs”) and file their Response to Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State A Claim Upon Which A Claim Upon Which Relief May Be Granted, and would show the court as follows:

**I.
INTRODUCTION**

1. As of this writing, the new apportionment plan for the Texas House of Representatives has been signed into law and the new apportionment plan for the Texas Congressional seats has been enacted and awaits the Governor’s signature.

2. The Court is entitled to consider evidentiary matters on a Motion to Dismiss for Lack of Jurisdiction:

“When a party challenges subject matter jurisdiction, the court is given the authority to resolve factual disputes, along with the discretion to devise a method for making a determination with regard to the jurisdictional issue.” *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994).

With this in mind, we have attached partial extracts from two exhibits published by the Texas Department of Criminal Justice. Exhibit A reflects prisoners incarcerated as of March 31, 2011 by Texas County – for later purposes it is noteworthy that there were 13,872 prisoners on hand in Anderson County. Exhibit B reflects, according to the Department, “Offenders on Hand by County of Legal Residence” – for later purposes it is noteworthy that 29,798 of those incarcerated were deemed to be “legal residents” of Harris County.

3. Texas Election Code provides in Section 1.015 (e) in defining “residence” as “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.”

4. One aspect of plaintiffs’ case concerns the treatment of prisoners in the redistricting process and how that treatment plays out with respect to the 14th Amendment requirement of one person-one vote.

5. The State asserts that plaintiffs have failed to demonstrate a sufficient interest or injury that would entitle them to maintain this action. The argument fails to take into account the Texas Supreme Court opinion in *Terrazas v. Ramirez*, 829 S.W. 2d 712, 718 (Tex. 1991):

“Apportionment affects every person in the State...This same principle applies in redistricting suits, in which the public as a whole is peculiarly affected.”

6. With respect to alleged pleading deficiencies, Rule 8 requires only a “short and plain statement” and, under the cases, that pleadings “state a claim that is plausible on its face.” *Ashcroft v. IQBAL*, 129 S. CT. 1937, 1948 (2009). Plaintiffs’ complaint clearly suffices to meet this standard.

II. **ARGUMENT**

7. 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.

8. 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?

9. 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%.

10. 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.

11. 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).

12. 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.

13. 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.

14. 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):

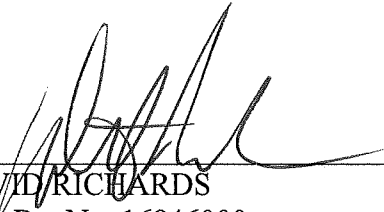
"Shortly thereafter, in *Cox v. Larios*, the Court summarily affirmed the judgment of a three-judge court that had rejected a redistricting plan of the Georgia legislature as failing to conform to the principle of one-person, one-vote. The district court held that because the legislature sought to give 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."

15. 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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ATTORNEYS FOR PLAINTIFFS

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 24, 2011, to the following:

David Schenck
Deputy Attorney General of Legal Counsel
P.O. Box 12548
Austin, Texas 78711-2548
Attorney for Defendants



DAVID RICHARDS

Texas Department of Criminal Justice
Offenders On Hand by County by Unit of Assignment
Data as of March 31, 2011

County	County Total	Unit of Assignment	Unit Total
Anderson	13,872	Beto	3,415
		Coffield	4,107
		Gurney	2,065
		Michael	3,170
		Powledge	1,115
Angelina	1,083	Diboll	517
		Duncan	566
Bee	7,297	Garza East	2,288
		Garza West	2,126
		McConnell	2,883
Bexar	2,129	Dominguez	2,129
Bowie	2,793	Telford	2,793
Brazoria	8,608	Clemens	1,116
		Darrington	1,866
		Ramsey	1,748
		Scott	1,111
		Stringfellow	1,193
		Terrell	1,574
Brazos	1,139	Hamilton	1,139
Brown	582	Havins	582
Burnet	499	Halbert	499
Caldwell	995	Lockhart	500
		Lockhart PPT	495
Cherokee	1,447	Hodge	955
		Skyview	492
Childress	1,449	Roach	1,449
Coryell	8,215	Crain	2,003
		Hilltop	532
		Hughes	2,882
		Mountain View	643
		Murray	1,290
		Woodman	865
Dallas	4,283	Hutchins	2,077
		Dawson	2,206
Dawson	2,091	Smith	2,091
Dewitt	1,320	Stevenson	1,320
Duval	514	Glossbrenner	514
El Paso	993	Sanchez	993

Texas Department of Criminal Justice
Offenders On Hand by Legal County of Residence
Data as of March 31, 2011

Legal County of Residence	Frequency
Crane	17
Crockett	51
Crosby	39
Culberson	13
Dallam	51
Dallas	19,639
Dawson	170
Deaf Smith	193
Delta	49
Denton	1,606
Dewitt	154
Dickens	22
Dimmit	38
Donley	43
Duval	53
Eastland	219
Ector	844
Edwards	11
Ellis	714
El Paso	2,414
Erath	229
Falls	135
Fannin	307
Fayette	95
Fisher	19
Floyd	42
Foard	10
Fort Bend	1,031
Franklin	71
Freestone	108
Frio	79
Gaines	81
Galveston	1,641
Garza	51
Gillespie	58
Glasscock	4
Goliad	39
Gonzales	157
Gray	191
Grayson	1,131
Gregg	1,345
Grimes	161
Guadalupe	464
Hale	335
Hall	29
Hamilton	57
Hansford	10
Hardeman	40
Hardin	239
Harris	29,798
Harrison	412

Exhibit B to Plaintiffs'
Response to Motion to Dismiss
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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CIVIL ACTION NO. 5:11-CV-0360-OLG

ORDER DENYING DEFENDANTS’ MOTION TO DISMISS

Came on for consideration the 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 by Defendants in the above entitled and numbered cause. Having considered the motion, the pleadings and other documents on file, and the arguments of counsel, the Court concludes that the motion should in all respects be Denied.

It is therefore ordered, adjudged and decreed that Defendants’ Motion to Dismiss is DENIED.

So ordered this ____ day of _____, 2011.

U.S. DISTRICT JUDGE