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

SHANNON PEREZ, ET AL., *Plaintiffs* VS. STATE OF TEXAS, ET AL., *Defendants.*	§	Civil Action No. 11-CV-360-OLG-JES-XR [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, (MALC) *Plaintiff,* VS. STATE OF TEXAS, ET AL., *Defendants*.	§	Civil Action No. 11-CV-361 OLG-JES-XR [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, ET AL., *Plaintiffs,* VS. RICK PERRY, *Defendant*.	§	Civil Action No. 11-CV-361-OLG-JES-XR [Consolidated Case]
MARGARITA V. QUESADA, ET AL., *Plaintiffs,* VS. RICK PERRY, ET AL., *Defendants.*	§	Civil Action No. 11-CV-592-OLG-JES-XR [Consolidated Case]

JOHN T. MORRIS, *Plaintiff,*	§	
VS.	§	Civil Action No. 11-CV-615-OLG-JES-XR [Consolidated Case]
STATE OF TEXAS, ET AL., *Defendants.*	§	
EDDIE RODRIQUEZ, ET. AL., *Plaintiffs,*	§	
VS.	§	Civil Action No. 11-CV-635-OLG-JES-XR [Consolidated Case]
RICKY PERRY, ET. AL. *Defendants.*	§	

TEXAS DEMOCRATIC PARTY, BOYD RICHIE AND THE QUESADA PLAINTIFFS' JOINT RESPONSE TO THE REPUBLICAN CONGRESSIONAL DELEGATIONS' MOTION TO PREVENT DISCLOSURE OF WRITTEN COMMUNICATIONS

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Texas Democratic Party and Boyd Richie, in his capacity as Chair of the Texas Democratic Party (hereinafter collectively referred to as "TDP") and the Quesada Plaintiffs, in the above entitled and numbered cause, and file this Joint Response to Motion of Congresspersons Lamar Smith, Joe Barton, Louis Gohmert, Ted Poe, Samuel, Johnson, Ralph Hall, Jeb Hensarling, John Culberson, Kevin Brady, Michael McCaul, Michael Conaway, Kay Granger, William Thornberry, Ronald Paul, Bill Flores,

Randy Neugebauer, Pete Olson, Francisco Canseco, Kenny Marchant, Michael Burgess, Blake Farenthold, John Carter and Pete Sessions (hereinafter referred to as "Movants" and/or "Republican Congressional Delegation") to Prevent Disclosure of Written Communications Subject to Privilege Under the Speech and Debate Clause, United States Constitution, and would show this Honorable Court as follows:

I.

INTRODUCTION

The Republican Congressional Delegation has filed a Motion to Prevent Disclosure of Written Communications on the basis of privilege afforded under the Speech and Debate Clause to the United States Constitution. TDP incorporates by reference its earlier brief filed on the issue of legislative privileges in this case as most of the authorities cited therein apply to the determination of this Motion as well. TDP argues the Republican Congressional Delegation is not entitled to withhold disclosure of written communications from Republican Congressional members and staff to other persons as they relate to redistricting and may be relevant to determination of this Voting Rights Act case. The communications requested do not concern official activities of the United States Congress.[1]

[1] Movants do not distinguish between written communications and compelling the oral testimony of a Member of Congress. What authority Movants do cite, if it is compelling, is only compelling to quash oral depositions and not production of written communications.

II.

ARGUMENT

A. The Speech and Debate Clause does not apply to these circumstances.

The purpose of the Speech and Debate Clause is to prevent intimidation of legislators by the executive and accountability before a possible hostile judiciary." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). It is designed to prevent disruption of congressional operations by preventing "distractions or interference with ongoing activity." *In Re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987). The immunity accomplishes these goals by protecting Congressmen and their aides from suit through absolute immunity. *See id.* at p. 953. The privilege extends to protect members of Congress in civil actions as well. *See Eastland*, 421 U.S. at 503. The overwhelming majority of on-point cases cited in TDP's earlier brief are in favor of allowing the discovery in Voting Rights Act cases.[2]

When depositions are scheduled of members concerning activities on the floor of either federal House, the protections clearly apply. To determine whether the privilege applies outside of official "speech and debate," the Court must consider whether "the particular activities other than speech or debate fall within the 'legitimate legislative sphere' [and then] see whether the activities 'in a session of the House by one of its

[2] In the time allowed for this round of briefing, counsel has been unable to locate an on-point decision in redistricting cases concerning written communications. Those authorities relied upon by Movants are either opinions that deal with this issue in passing, they are unreported and/or unreasoned opinions and/or they deal with scheduling the oral deposition of the member. More often than not, decisions on these subjects are not reported by the District Court. Therefore, it is not accurate to declare as Movants' papers do at page 5 that "every" subpoena of Member of Congress has been quashed in past redistricting cases. Even if that were true, it speaks nothing of the merits of a subpoena of state officers for communications in their possession.

members in relation to the business before it.'" *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). More specifically, the Court must determine:

> "An integral part of the deliberative and communicative processes by which members participate in Committee and House proceedings with respect to the consideration and passage or rejection of purposed legislation or with respect to other matters which the constitution places within the jurisdiction of either House."

Doe v. McMillan, 412 U.S. 306, 313 (1973). Redistricting is plainly not within the jurisdiction of the Congress as it is a matter left for states to consider. Texas is one of 36 states that requires the Legislature, not Congress, to perform redistricting.

Other than summary statements and general legal authorities in the footnotes of their brief, the Republican Congressional Delegation fails to describe how communications with state officials concerning redistricting matters is a concern of either of the federal Houses of Congress. Moreover, the federal Congress has no business or authority over district lines for members of a state legislature. There is simply no reason to prevent disclosure of communications with members of the legislature concerning redistricting proposals for one constituent, a member of Congress, and not afford the protection to the other public constituencies.[3] Members of Congress and their staff who chose to express opinions regarding redistricting matters before the Texas Legislature did not do so with respect to any official activity or matter before the United States Congress.

[3] *Bastien v. Office of Campbell*, 390 F.3d 1301, 1305-6 (10th Cir. 2004) ("As we read the Supreme Court's opinions on the Speech or Debate Clause, the Clause protects only "legislative" acts by a member of Congress or an aide, and only official, formal acts (or perhaps their functional equivalent) deserve the adjective "legislative." In particular, Plaintiff's informal contacts with constituents and other sources of information and opinion were not legislative in nature.")

The Supreme Court has ruled communications by Members of Congress to agencies are not protected and Movants have failed to establish communications with a state legislature are different. *See United States v. Johnson,* 383 U.S. 169 (1966).[4] When Members of Congress or their staff communicated with state officers they were doing so as nothing more than constituents and their communications should be produced in a Voting Rights Act case.

B. The communications are relevant.

Next, the Republican Congressional Delegation argues the communications sought are not relevant to any matter in dispute. As noted in the earlier brief, both the effect of redistricting alternatives and the intent behind them are to be determined in a Voting Rights Act challenge. A redistricting plan that has the intent to discriminate is unlawful. The privilege log produced by the Republican Congressional Delegation indicates detailed discussions including proposed maps and demographic data, exchanged between Congressional members or their staff and Texas Legislative members or staff. To the extent such proposed maps and/or analyses were adopted in the final plan, they are relevant to determination of the Texas Legislature's intent. Furthermore, these communications are specifically relevant to TDP's claim of political gerrymandering. To the extent these communications reveal that a principal motivation regarding redistricting

[4] *See also, United States v. Brewster,* 408 U.S. 501, 512 (1972) ("In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."); and *Hutchinson v. Proxmire*, 443 U.S. 111, 126 (1979) ("[T]his privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty.")

plans was to secure or protect a Republican Congressional majority, those communications are directly relevant to the determination of an issue of fact raised by TDP's cross claims as well as the claims of other Plaintiffs.[5]

C. The privilege does not apply in the Voting Rights Act context.

The Republican Congressional Delegation fails to explain how the Speech and Debate Clause privilege should apply when Congress, through a legislative enactment, has expressly required the consideration of the intent of the legislature in determining the legalities of a redistricting plan. Here, Congress voted that the intent of the legislature alone could lead to invalidation of the state districting proposal. Congress understood that communications with members of the legislature would be considered in determination of Voting Rights Act claims - or at least knew they could be subject to disclosure before the communications were made. Movants have presented no reasoned opinion where courts have granted such blanket immunity in Voting Rights Act cases. Given that the Congress that enjoys the immunity raised adopted the very statute giving rise to this case, there is a clear presumption Congress did not intend or expect the immunity to apply to these suits. *See In Re Subpoena Duces Tecum,* 145 F.3d 1422, 1424 (D.C. Cir. 1998).

[5] Indeed, some testimony reveals the Members of Congress agreed to a plan and then persuaded the Legislature to adopt that plan into law.

III.

CONCLUSION

The Court has adopted a reasonable process in handling privilege matters in this expedited case. Disclosure should be made and the parties may choose whether to use a particular document at trial. At such time, the Court can determine if the admissibility of that evidence is suitable given privilege issues. The Republican Congressional Delegation has failed to meet its burden to establish that communications involved in this claim are privileged because they are related to a matter under consideration by the United States Congress. The Court should deny the Motion to Prevent Disclosure of Written Communications.

Dated this 9th day of August, 2011.

Respectfully submitted,

By: */s/ Chad W. Dunn*
Chad W. Dunn – Attorney In Charge
State Bar No. 24036507
General Counsel
TEXAS DEMOCRATIC PARTY
BRAZIL & DUNN
K. Scott Brazil
State Bar No. 02934050
4201 FM 1960 West, Suite 530
Houston, Texas 77068
Telephone: (281) 580-6310
Facsimile: (281) 580-6362
chad@brazilanddunn.com

ATTORNEY FOR INTERVENOR TEXAS DEMOCRATIC PARTY AND BOYD RICHIE, IN HIS CAPACITY AS CHAIR OF THE TEXAS DEMOCRATIC PARTY

By: */s/ J. Gerald Hebert (by permission)*
J. GERALD HEBERT
191 Somervelle Street, #405
Alexandria, VA 22304
(703) 628-4673

ATTORNEY FOR QUESADA PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2011, I electronically filed the foregoing document with the Clerk of the United States District Court, Western District of Texas, San Antonio Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means. All attorneys who have not yet registered to receive NEFs have been served via first –class regular mail, postage prepaid and addressed as follows:

David Escamilla
Travis County Asst. Attorney
P. O. Box 1748
Austin, TX 78767

Joaquin Guadalupe Avila
P. O. Box 33687
Seattle, WA 98133

John K. Tanner
John Tanner Law Office
3743 Military Rd. NW
Washington, DC 20015

Karen M. Kennard
City of Austin Law Department
P. O. Box 1088
Austin, TX 78767-1088

/s/ Chad W. Dunn
Chad W. Dunn