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

SHANNON PEREZ et al.,	§	
	§	
Plaintiffs,	§	
	§	
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, (MALC),	§	
	§	
Plaintiff,	§	
	§	
	§	
TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*,	§	
	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	5:11-CV-0360-OLG-JES-XR
	§	(Consolidated)
STATE OF TEXAS, *et al.*,	§	
	§	
Defendants.	§	

PLAINTIFF MALC'S RESPONSE TO MOVANTS' MOTION TO PREVENT DISCLOSURE OF WRITTEN COMMUNICATIONS SUBJECT TO PRIVILEGE UNDER THE SPEECH AND DEBATE CLAUSE

1. Movants represent 23 Republican Congressmen who seek to prevent the disclosure of their correspondence with state legislators during the redistricting process of the 82nd Legislature. On August 1, 2011, the Office of the Attorney General informed the Movants that they were in possession of potentially privileged documents authored by Movants, their staff, and their counsel, which were responsive to Plaintiffs' requests for production. The Court's order denying Defendant's Motion for Protective Order was issued that same afternoon. Counsel for Movants was provided the documents on August 2, 2011. On August 4, 2011, the Texas Attorney General's office informed Counsel for Movants that, pursuant to this Court's above referenced

order, they intended to produce these documents to Plaintiffs by the close of business August 5, 2011, prompting Movants to file their motion to prevent disclosure. In accordance with the Court order, Movants provided a privilege log describing certain details of the correspondence. This Court has asked all parties to respond to this motion by close of business August 9, 2011.

2. Plaintiff Mexican American Legislative Caucus opposes this motion as an inappropriate assertion of congressional privilege. Congressional privilege has clear jurisprudential history. As asserted by the Movants, the congressional privilege stemming from the Speech and Debate Clause of the U.S. Constitution is both "absolute" and "broadly construed." The actual privilege is much more limited. The privilege is centrally concerned with matters of speech and debate on the floor of either chamber of the United States Congress.[1] In so much as it applies to any subsequent activity, it applies only as much as it applies to matters integral to the deliberative and communicative processes by which Members of Congress perform their constitutionally prescribed duties.[2]

3. *Gravel*, cited positively by Movants, draws a bright line standard between matters that are privileged and those not covered by the protections of the Speech and Debate Clause. Ancillary matters that do not stem from direct speech and debate from either chamber must be an ***integral*** part of a process by which a Member participates in committee or House proceedings with respect to: 1) consideration, passage or rejection of proposed legislation or 2) other matters which the Constitution places ***within the jurisdiction of either House***.

[1] *Gravel v. United States*, 408 U.S. 606, 625 (U.S. 1972) ("The heart of the Clause is speech or debate in either House.")

[2] *Gravel*, 408 U.S. at 625 ("Insofar as the Clause is construed to reach other matters, they must be 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 proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.")

4. The question in this case becomes: Do these documents fit within the strict parameters outlined in *Gravel*? It is important to note that the redistricting maps at issue will never be ratified, considered, rejected, or proposed in any phase of the federal Congress. Also, the communications at issue do not pertain to any part, let alone an integral part, of matters that the Federal Constitution places within the jurisdiction of either chamber of the federal Congress. In order to prove that redistricting should be considered a congressional "business," the Movants cite an amicus brief:

> "Parties to redistricting litigation will inevitably attempt to pry into politically sensitive discussions between Representatives and state legislators, other Members of Congress, constituents, party representatives and/or political consultants ... Worse, given the inherently political nature of redistricting litigation, plaintiffs unhappy with the outcome of the state legislative process may also seek to question Representatives to harass, embarrass or damage political opponents or other perceived beneficiaries of the redistricting legislation, or to obtain publicity for a political agenda. . . ."

These considerations, while valid on a policy level, are exactly the kinds of constraints that could be placed on *in camera* review of the documents. Any politically sensitivity considerations or harassing tactics by plaintiffs could be swiftly combated by the panel. Regardless of the sensitivity or propriety, it is clear that these documents do not pertain to a congressional duty or business that falls within the stated parameters of *Gravel*. As such these considerations should be put aside for argument as to admissibility as the court has already ruled pertaining to legislative privilege.

DATED: August 9, 2011

Respectfully submitted,

/s/ Jose Garza

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served electronically in compliance with Local Rule CV-5(a). As such, the foregoing document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(b)(1). Pursuant to Fed. R. Civ. P. 5(a)-(d) and Local Rule CV-5(b)(2), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 9th day of August, 2011.

/s/ Mark Kiehne
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