

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

SHANNON PEREZ, et al., )  
)  
*Plaintiffs,* )

- and - )

EDDIE BERNICE JOHNSON, et al., )

- and - )

TEXAS STATE CONFERENCE OF )  
NAACP BRANCHES, et al., )

*Plaintiff Intervenors,* )

v. )

RICK PERRY, et al., )

*Defendants,* )

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MEXICAN AMERICAN LEGISLATIVE )  
CAUCUS, TEXAS HOUSE OF )  
REPRESENTATIVES (MALC), )

*Plaintiffs,* )

- and - )

HONORABLE HENRY CUELLAR, et al., )

*Plaintiff Intervenors,* )

v. )

STATE OF TEXAS, et al., )

*Defendants,* )

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CIVIL ACTION NO.  
SA-11-CA-360-OLG-JES-XR  
[Lead case]

CIVIL ACTION NO.  
SA-11-CA-361-OLG-JES-XR  
[Consolidated case]

TEXAS LATINO REDISTRICTING TASK )  
FORCE, et al., )

*Plaintiffs,* )

v. )

RICK PERRY, et al., )

*Defendants,* )

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MARAGARITA V. QUESADA, et al., )

*Plaintiffs,* )

v. )

RICK PERRY, et al., )

*Defendants,* )

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JOHN T. MORRIS, )

*Plaintiff,* )

v. )

STATE OF TEXAS, et al., )

*Defendants,* )

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CIVIL ACTION NO.  
SA-11-CA-490-OLG-JES-XR  
[Consolidated case]

CIVIL ACTION NO.  
SA-11-CA-592-OLG-JES-XR  
[Consolidated case]

CIVIL ACTION NO.  
SA-11-CA-615-OLG-JES-XR  
[Consolidated case]

EDDIE RODRIGUEZ, et al.,	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
	)	[Consolidated case]
<i>Plaintiffs,</i>	)	
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
<i>Defendants.</i>	)	

**LATINO TASK FORCE PLAINTIFFS’ RESPONSE TO MOTION OF  
CONGRESSPERSONS LAMAR SMITH, ET AL., TO PREVENT DISCLOSURE OF  
WRITTEN COMMUNICATIONS**

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TO THE HONORABLE PANEL:

COME NOW The plaintiffs in the case originally styled *Texas Latino Redistricting Task Force, et al. v. Rick Perry*, 5:11-cv-490 (the “Latino Task Force Plaintiffs”) and respond to Congresspersons Lamar Smith, et al.’s (“Movants”) Motion to Prevent Disclosure of Written Communications.

**I. THE SPEECH AND DEBATE CLAUSE DOES NOT PROTECT THE  
DISCLOSURES SOUGHT**

The Speech and Debate Clause of the United States Constitution reads: “for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.” U.S. CONST. art I, § 6, cl. 1. Movants have identified neither (1) any Speech and Debate in the House, nor (2) any desire to “question” members of Congress.

**A. The Communications on Movants' Exhibit Lists Are Not Related to Any Speech or Debate in Either House.**

“[T]he [Speech and Debate] Clause has not been extended beyond the legislative sphere.”

*Gravel v. United States*, 408 U.S. 606, 624-25 (1972). The Supreme Court clarified the limits of this “Congressional privilege” long ago:

That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States v. Johnson* decided at least this much. “No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.”

*Id.* at 625 (quoting *United States v. Johnson*, 383 U.S. 169, 172 (1966)); *see also United States v. Brewster*, 408 U.S. 606, 515-16 (1972) (“In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process.”). Thus, “[t]he only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.” *Brewster*, 408 U.S. at 528.

The Court specifically held that “political” acts (legitimate ones, in that case) are not protected:

They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than

legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things generally done in a session of the House by one of its members in relation to the business before it, or things said or done by him, as a representative, in the exercise of the functions of that office.

*Id.* at 512-13 (quotations and internal citations omitted).

Congressional redistricting is the responsibility of the State Legislature. In the event that the Texas Legislature fails to enact a Congressional redistricting plan, Texas and federal courts remedy malapportionment. Texas redistricting is not before the United States Congress. The members of Congress who have moved for a protective order have not debated Texas redistricting in the U.S. House, and the Speech and Debate Clause does not apply to the communications sought by plaintiffs. Any communications with Texas officials regarding redistricting are nothing more than political cajoling, as described in *Gravel* almost 40 years ago. 408 U.S. at 625.

Movants' contentions to the contrary are weak and unsupported. Movants state that "[e]very member of Congress takes an interest in, and is affected by, redistricting, and as such it is an important part of congressional business." Motion, at 4 (citing an amicus brief and the inconclusive language in *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982) noting that "it simply is impossible to draw and enforce a perfect line between the official and political business of Members of Congress," which clearly does not overrule any of the Supreme Court precedent cited above). Redistricting affects reelection, and any communications between the representatives, facing reelection in 2012, and the state officials drawing the districts, fall within the category of political exhortations described in *Gravel* and *Brewster*. The Latino Task Force Plaintiffs respectfully request that the Court deny the Motion on these grounds.

**B. The Disclosure of the Requested Communications Would Not “Question” Any Member of Congress.**

No member of Congress is being asked to appear or defend himself. Movants’ contention that “[s]o far as published precedents reveal, no court has ever compelled a sitting Member of Congress, their [sic] staff, or their [sic] counsel to submit to either deposition or production of documents in a redistricting case” is thus irrelevant. Motion, at 4. The plaintiffs in this action challenge the actions of the State of Texas and various Texas officials. As far as the Latino Task Force Plaintiffs understand, there is no subpoena pending to any member of Congress. Instead, Defendants in this case are asked to disclose documents sent to them by third parties seeking to influence their action. “The privilege is not designed to protect the reputations of congressmen but rather the functioning of Congress.” *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995). Movants have not shown how disclosure of documents they sent outside the circle of their staff and relating to Texas legislation will affect the functioning of the United States House of Representatives.

Movants’ characterization of state officials as “fellow legislators representing [the same] constituents” is disingenuous. Motion, at 5. It can hardly be argued, for example, that Doug Davis is a member of Representative Lamar Smith’s staff. As decisively held in *Gravel*, a U.S. Representative’s exhortations to the Executive are not protected, even though the Executive clearly represents the same constituents as any member of the U.S. Congress. 408 U.S. at 625. Similarly, any communications between members of the U.S. Congress and members of the Texas Legislature cannot be protected, merely because all can be described as “legislators.” That is, members of the Texas House and Senate are neither agents, nor members, of the U.S. Congress.

**C. Certain Documents Are Not Privileged from the Face of the Log.**

Movants' log contains entries describing documents that cannot contain privileged information, and that do not even purport to. Dkt. 121. For example, they describe Congress004-007 as "Email-Solely consisting of forwarded email from Nina Perales to unknown individuals," and describe the privilege asserted as "None." Dkt. 121, at 3. The Latino Task Force Plaintiffs respectfully request that the Court deny the motion with regard to any document "solely consisting of [a] forwarded email" that is not otherwise privileged, as well as any documents that Movants admit are not protected by indicating "None" in the "Assertion" column.

**II. THE DOCUMENTS ARE RELEVANT**

The Latino Task Force Plaintiffs have alleged that the redistricting plans at issue discriminate against plaintiffs on the basis of race and national origin in violation of the 14th and 15th Amendments, and have the purpose and effect of cancelling out or minimizing their individual voting strength as minorities. Discussions between members of Congress and their staff and members of the Texas Legislature and their staff regarding adopted and rejected plans, demographic and election data, and the scheduling of hearings on proposed plans, as detailed in the privilege log, are all relevant to a determination whether the Texas Legislature had the intent to deny the plaintiffs an equal opportunity to elect representatives of their choice.

For the foregoing reasons, the Latino Task Force Plaintiffs respectfully request that the Court deny Movants' motion for a protective order.

Dated: August 9, 2011

Respectfully submitted,

/s/ Nina Perales

Nina Perales

Marisa Bono

Rebecca M. Couto  
MALDEF  
110 Broadway Street, #300  
San Antonio, TX 78205  
(210) 224-5476  
Fax: (210) 224-5382

Robert W. Wilson  
Mark Anthony Sanchez  
Gale, Wilson & Sanchez, PLLC  
115 East Travis, 19th Floor  
San Antonio, TX 78205  
(210) 222-8899  
Fax: (210) 222-9526

COUNSEL FOR PLAINTIFFS TEXAS LATINO  
REDISTRICTING TASK FORCE, ARMANDO  
CORTEZ, SOCORRO RAMOS, GREGORIO  
BENITO PALOMINO, FLORINDA CHAVEZ,  
CYNTHIA VALADEZ, CESAR EDUARDO  
YEVENES, SERGIO CORONADO, GILBERTO  
TORRES, RENATO DE LOS SANTOS, JOEY  
CARDENAS, ALEX JIMENEZ, EMELDA  
MENENDEZ, TOMACITA OLIVARES, JOSE  
OLIVARES, ALEJANDRO ORTIZ, AND  
REBECCA ORTIZ

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 9th day of August, 2011. The undersigned counsel hereby certifies that she caused a true and correct copy of the above and foregoing to be mailed to the persons listed below by the close of the next business day.

/s/ Rebecca M. Couto  
Rebecca M. Couto

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

Jesse Gaines

Attorney at Law  
PO Box 50093  
Ft. Worth, TX 76105

Jessica Ring Amunson  
Jenner & Block LLP  
1099 New York Ave., N.W.  
Washington, DC 20001

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  
PO Box 1088  
Austin, TX 78767-1088

Michael B. DeSanctis  
Jenner & Block, LLC  
1099 New York Ave., N.W.  
Washington, DC 20001

Paul M. Smith  
Jenner & Block LLP  
1099 New York Ave., N.W.  
Washington, DC 20001