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

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants*.	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants*.	)	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*.	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, *et al.,* *Plaintiffs,* v. RICK PERRY, *et al.*, *Defendants*.	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS, *Plaintiff*, v. STATE OF TEXAS, *et al*., *Defendants*.	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]
EDDIE RODRIGUEZ, *et al.*, *Plaintiffs*, v. RICK PERRY, *et al*., *Defendants*.	)	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR

LULAC, et. al., PLAINTIFF-INTERVENORS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR PARTIAL SUMMARY JUDGMENT

1. LULAC, et. al. Plaintiff-Intervenors' (collectively "LULAC") file this Response to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and, In The Alternative, Motion for Judgment on The Pleadings and Motion for Partial Summary Judgment.

2. For purposes of brevity and judicial economy, LULAC adopts the legal arguments of all Plaintiffs that are not inconsistent with LULAC's claims and legal arguments with respect to (a) the State Motion to Dismiss the Lt. Governor and the Speaker of the House, (b) the State Motion to Dismiss LULAC and MALC census undercount claim, (c) the

State Motion for Partial Summary Judgment on LULAC's Fourteenth and Fifteenth Amendment claims, and (d) the State Motion for Partial Summary Judgment on LULAC's Section 2 claims. In addition, LULAC would show the following;

SUMMARY JUDGMENT STANDARD

3. Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. F.R.C.P. 56(c); *Celotex Corp. v, Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is particularly appropriate when the questions to be decided are issues of law. *Flath v. Garrison Pub. Sch. Dist.*, 82 F.#d 244, 246 (8th Cir. 1996). However, the line between issues of law and issues of fact can be difficult to draw. *Pullman-Std. v. Swint*, 456 U.S. 273, 288 (1982). For example, when the application of a rule of law depends on the resolution of disputed facts, the motion for summary judgment presents a mixed question of law and fact. In this situation, summary judgment is not appropriate. *See Lujan v. National Wildlife Fed'n*, 497 U.S.871, 889 (1990). The moving party bears the burden of informing the court of the basis for its belief that there is an absence of a genuine issue of fact for trial, and identifying those portions of the record that demonstrate such an absence. *Celotex,* 477 U.S. at 323.

Subject Matter Jurisdiction

4. The Plaintiff LULAC has alleged that the use of unadjusted Census data results in the under representation of Latinos because Latinos have traditionally been undercounted. This is not a theory or a surmise, as alleged by the State, it is readily conceded by the Census that some groups such as Latinos are undercounted and others

such as Anglos tend to be over-counted. While it is true that there are yet no studies that indicate the level of undercount, no one seriously denies that it takes place, The U.S. Census concedes that the undercount exists and recognizes that there will always be an undercount and over-count. ***Wisconsin v. City of New York***, 517 U.S. 1 (1996); See also, groups.http://www.census.gov/cac/2010_census_advisory_committee/

Coverage improvement _for_the_2010_census.html.

5. Indeed the State's brief at paragraph 28 seems to concede this point, but says alas there is nothing we can do about it. In fact there is, and the State has mitigated the undercount in past years.

6. In past years, those who were involved with the actual drawing of the plans used a range of deviation wherever possible to minimize the effect of the undercount. In the redistricting of State House Districts this is limited somewhat by attempts to comply with the whole county rule and there has been a policy of zero deviation in Congressional districts. This long standing policy and procedure "practice" was not followed in the redistricting plans to which LULAC complains.

7. If one is driving a car and sees that there is a hole in the road, he/she adjusts the direction of the car to avoid the hole. The fact that someone does not know exactly how deep the hole is does not cause the hole in the road to be ignored. If all agree that an undercount of Latinos and an over-count of Anglos exist, commons sense dictates that we not ignore the problem.

8. It would be helpful to actually adjust the census, but the use of the deviation to the extent possible, minimizes the effect on Latino voters in the redistricting process. The

failure by the State to follow a long history and practice of adjusting the census data in the redistricting process is yet another of the factors that has resulted in a level of underrepresentation to the detriment of the Latino community and voter.

LULAC's Section 2 Claim

9. The State has argued that the burden is on the plaintiffs to offer plans to show that it would have been possible to draw additional districts in which protected minority voters could elect the representatives of their choice without causing retrogression in other majority minority districts. Plaintiff LULAC has delivered more than one hundred pages of Congressional and State House maps. These alternative maps do not, as alleged by the State, cause retrogression in other majority minority districts.

10. Congressional plans with alternative plans were presented to the State for the Dallas Fort Worth area, the Houston area, the South and West Texas area, the San Antonio area and the Travis County area. State House maps were offered for the Houston, Fort Bend, Bell County and South Texas areas. See affidavit of George Korbel, attached.

Fourteenth and Fifteenth Amendment Claims

15. The State argues that there is no showing of invidious discrimination on the basis of race, therefore the Plaintiffs cannot prove intent and as a result the claims under the Fourteenth Amendment should be dismissed. In support of this argument the State relies primarily on ***Rodgers v. Lodge, 458 U.S. 613*** In ***Rodgers,*** the defendant maintained an at-large election system for many years in spite of a recognition of numerous complaints that at large elections resulted in the under representation of African Americans. The

State argued that there is no way to establish why the at large election system had been adopted, "intent".

16. In ***Rodgers,*** the Court identified "maintenance" as a real factor and available as proof of intent.

17. This is exactly the practice in the Texas Legislature. In the forty years that have passed since ***White v. Register,*** the state has not once concluded a redistricting legislative session without having at least part of a plan invalidated by the Courts or administratively by the Department of Justice under the Voting Rights Act. There is an obvious "maintenance" of a process that produces Unconstitutional plans or those that violate Section 2 of the Voting Rights Act. In some instances the redistricting has been invalidated not once but twice in the same decade.

18. ***Arlington Heights and Washington v. Davis*** both rejected the notion that a law is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. ***Arlington Heights, supra, at 265; Washington v. Davis, 426 U.S., at 242.*** However, both cases recognized that discriminatory intent need not be proved by direct evidence. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.", Ibid. Thus, determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." ***Arlington Heights, supra, at 266, Rogers v. Lodge, 458 U.S. 613, 618 (U.S. 1982)***

19. Although finding that the state policy behind the at-large electoral system in Burke County was "neutral in origin," the District Court concluded that the policy "has been subverted to invidious purposes." The court found that Burke County's state representatives "have retained a system which has minimized the ability of Burke County Blacks to participate in the political system." ***Rodgers v. Lodge 458 U.S. at 626***.

CONCLUSION

20. For all the foregoing, together with all other legal arguments of all Plaintiffs not inconsistent with LULAC's claims, the Defendants Motions should be denied in their entirety.

Respectfully submitted,

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By: /s/ Luis Roberto Vera, Jr.
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ATTORNEY FOR PLAINTIFF-INTERVENORS

CERTIFICATE OF SERVICE

This is to certify that on August 23, 2011, a true and correct copy of the above and foregoing document was served on all parties in accordance with the Federal Rules of Civil Procedure.

/s/ Luis Roberto Vera, Jr.
Luis Roberto Vera, Jr.

AFFIDAVIT OF GEORGE KORBEL

THE STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, personally appeared, George Korbel, who, being by me duly sworn, deposed as follows:

1. "My name is George Korbel, I am over the age of 18 years, of sound mind and capable of making this affidavit. I have been involved in the redistricting process in Texas since 1971.

2. Initially through litigation and later through negotiation I have worked with both legislators in formulating redistricting plans and with those individuals that actually draw the lines for the redistricting.

3. I have been directly involved in redistricting immediately after the 1970, 1980, 1990, and the 2000 Census. I was also involved in the mid-decade redistricting in 2004.

4. I have testified in several cases in both State and Federal court on the redistricting process in Texas.

5. I am adjunct faculty at the University of Texas at San Antonio, teaching the redistricting process.

6. I have litigated more than 100 suits against local government and in litigation of every redistricting by the State legislature for the past 40 years.

7. I have been extensively involved in the drawing of the redistricting plans that have been adopted as a remedy.

8. In each of the redistricting in those past years, the issue of undercount was often discussed and consistent conscious efforts were made to under-populate predominantly

minority districts to account for the Census undercount.

9. At the deposition of the LULAC representative, I handed approximately 100 pages of alternative maps to the counsel for the State. These alternative maps were marked an entered as an exhibit. Within a week, and at the State request, I electronically transferred those alternative maps and others to the account of the attorney general at the Texas Legislative Council. Receipt has been indicated by Counsel for the State.

10. The State has set my deposition for this Friday, August 26th, at which time the State will seek further explanation of the alternative maps.

11. These alternative maps include Congressional proposals for the Dallas, Tarrant, Harris, Bexar, Travis and South Texas.

12 They also include State House alternative proposals for Harris, Fort Bend, Bell and South Texas were also provided.

13 Each alternative map indicate a way or ways that additional minority districts could have been drafted in the Texas Congressional and State House plans, without violating section 2 of the Voting Rights Act. "

14. The States position that LULAC has not produced any alternative maps that do not violate section 2 in other minority majority areas is flawed, incorrect and without merit."

Further, Affiant sayeth not.

/s/ George Korbel
George Korbel

SWORN TO AND SUBSCRIBED before me on the 23rd day of August, 2011 by George Korbel.

Original Signed and Sealed
Notary Public, State of Texas