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.*,	§	
	§	

PLAINTIFF MALC'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Defendants have filed a motion to dismiss pursuant to Fed. R. of Civ. P. 12(b)(1) and 12(b)(6). Defendants in their motion challenge Plaintiff's standing to bring this action; assert that Defendants are not responsible for any harm that Plaintiff claims as a result of Texas redistricting; that this Court does not have jurisdiction to hear Plaintiff's Voting Rights Act Section 5 enforcement action; and that Plaintiff has not pled sufficient facts to state a viable claim pursuant to Section 2 of the Voting Rights Act. Defendants' assertions are wrong. Defendants' motion misapplies standing standards to the facts of this case; misconstrues Plaintiff's § 1983 claims; misunderstands Plaintiff's Section 5 claim; and misplaces Plaintiff's pleading burden to state a vote dilution case. Defendants' Motion to Dismiss should be denied.

STATEMENT OF FACTS AND OF THE CASE

This case was filed on May 9, 2011 and amended on May 31, 2011. As amended, Plaintiff challenged the State's redistricting plans for the Texas House of Representatives and United States House of Representatives (Congressional districts) as well as the at-large election system used to elect members of the Texas Railroad Commission. Plaintiff alleged minority vote dilution violating Plaintiff's rights as protected by Section 2 of the Voting Rights and the 14th Amendment with regard to the newly adopted plans for the Texas House of Representatives and Congressional districts[1] and the at-large election system for the Texas Railroad Commission. Plaintiff also alleged a Section 5 violation with regard to the Texas House of Representatives since no preclearance has been secured. (Plaintiff, thus, included a Section 5 enforcement action in Plaintiff's Amended Complaint.) Finally, Plaintiff alleged a 14th Amendment one person, one vote violation with regard to the old Texas House and Congressional districts and as to the newly enacted Texas House plan. On June 28, 2011, the Defendants filed their motion to dismiss Plaintiff's Amended Complaint. On July 6, 2011 the three redistricting cases filed in the Western District were consolidated.

STANDARD OF REVIEW

Defendants' motion challenges the sufficiency of the Plaintiff's Amended Complaint allegations to establish subject matter jurisdiction and to establish standing. (Defendants' Motion to Dismiss, Doc. 17). When ruling on a Rule 12(b)(6) motion to dismiss, the court must accept as true the well-pleaded factual allegations in the complaint. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). Therefore, this Court should accept all

[1] While the new Texas House Plan was passed on May 17, 2011 and was signed into law by Defendant Rick Perry on June 17, 2011, it has not been submitted for preclearance pursuant to Section 5 of the Voting Rights Act. In addition, the new Congressional plan was passed by the Texas Legislature on June 15, 2011, but is yet to be signed by the Governor.

material allegations in the complaint as true and construe them in the light most favorable to the Plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1976). Under Rule 8(a)(2), Fed. R. Civ. P., a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The Rule 8 pleading standard does not require "detailed factual allegations" but requires more than mere formulaic recitation of the elements of a cause of action. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Still, a court accepts all well-pleaded facts as true. *Id.*

ARGUMENT

A. MALC Has Standing

The Defendants first challenge Plaintiff's organizational or associational standing. The United States Supreme Court set out a three-prong test to establish associational standing in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343(1977):

> We have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343.

1. Individual MALC members have standing.

MALC's members are members of the State House of Representatives. All MALC members are citizens, residents and voters of Texas. Most of MALC's members are Latino, and most represent Latino majority districts. As individual voters it cannot be denied that they have individual standing to challenge discriminatory election practices. *LULAC v. Clements*, 999 F.2d 831, 845-46 (5th Cir. 1993) ("We agree that the standing of voters in a voting rights case cannot be gainsaid.") Plaintiff's First Amended Complaint sets out those factual allegations. (Plaintiff's First Amended Complaint pp. 3-4.) Moreover, the Plaintiff's First Amended Complaint in fact

describes the discriminatory redistricting practices that are included in the challenged plans adopted by the State for the Texas House of Representatives, specifying districts represented by Plaintiff's members as illustrative of that discrimination. (Plaintiff's First Amended Complaint, pp. 6-10, alleging among other things that the Texas plans failed to account for the Census under-count diluting Latino voting strength in Hidalgo county, over-populating most of the Latino majority districts to avoid creating additional Latino majority districts, using the so-called "whole county rule" in a manner to eliminate a majority Latino opportunity district in Nueces County and to avoid adding Latino majority districts to Harris, Hidalgo and Cameron Counties and using traditional racial gerrymandering techniques such as packing and cracking to limit the number of Latino majority districts.)

Finally, since the rules of pleading practice in federal court are governed by Rule 8(a)(2) and, thus, Plaintiff is not required to allege more specific facts, Plaintiff did not specifically allege facts in its Amended Complaint such as: the fact that Representative Veronica Gonzales, Legal Counsel to MALC and a Democrat, has had the district she represents radically altered by the enactment of the State House redistricting plan so that the new district in which Representative Gonzales resides contains less than 2% of the geography from the district she currently represents; or that Representative Raul Torres, a Republican member of MALC, has had his district completely eliminated and is now paired with Anglo Republican Representative Connie Scott. Yet, Plaintiff's allegations clearly put the Defendants on notice of the type of facts Plaintiff will develop in furtherance of its claims. Clearly, the individual members of MALC have standing to bring these claims themselves.

2. MALC's claims are germane to its purpose and goals.

MALC has alleged that its purpose is serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas, in order to form a strong and cohesive voice on those matters in the legislative process, including redistricting. MALC has raised concerns regarding redistricting in Texas both during the legislative process and in the courts. MALC successfully challenged the 2000 redistricting resulting in greater representation for the Latino community of Texas and protecting the districts of its members. In the 2011 redistricting process, MALC again played a vital role during the legislative process and has intervened without objection from the State in *Teuber v. State of Texas*, (W.D. Tex. Civil Action No. SA-11-ca-572). Clearly, defending the integrity of its members districts and challenging redistricting plans that dilute Latino voting strength is germane to MALC's goals and purposes.

3. Individual members of MALC are not necessary parties.

MALC is only seeking injunctive and declaratory relief in this lawsuit and, therefore, the participation of MALC's individual members is not necessary. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) (noting that "if in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.")

Thus, the three-pronged test for associational standing has been met here.

B. MALC Has Named the Proper Defendants

The Defendants next assert that the Governor, the Speaker of the House and the Lieutenant Governor are not proper defendants here because they can offer no relief should

Plaintiff prevail. Plaintiff's claims against these state officials rests within its claims for violations of the United States Constitution as secured under 42 U.S.C. § 1983. Specifically, Plaintiff alleges that the plans currently in place for the Texas House and Congress and the newly adopted State House plan violate the 14th Amendment's protections from unequal population distribution between districts. The purpose of § 1983 is to interpose the federal courts between the States and the people, as guardians of the people's federal rights and to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Since 1908, the Eleventh Amendment has provided no shield for a state official confronted with a claim that his/her action deprived another of a federally protected right. *Ex parte Young*, 209 U.S. 123 (1908). Suits against state officials in their official capacities seeking declaratory and injunctive relief are appropriate under § 1983. *See Hafer v. Melo*, 502 U.S. 21 (1971).

Defendants argue that these particular Defendants, however, cannot be said to have taken any action related to the Plaintiff's allegations to have caused Constitutional harm nor are they in a position to rectify the violation should it be found. Defendants are wrong.

First, the Speaker of the House of Representatives, as was pointed out in the Plaintiff's Amended Complaint, is the presiding officer over the Texas House of Representatives.[2] As the presiding officer, the Speaker maintains order during floor debate, rules on procedural matters and questions of order, and lays business before the House in the manner prescribed by the rules.[3] The Speaker calls the Texas House of Representatives to order each legislative day and must refer all proposed legislation to an appropriate committee.[4] The Speaker **must also sign all**

[2] Rules of the House of Representatives of the Texas Legislature (82nd Legislature), Rule 1,
[3] Rules of the House of Representatives of the Texas Legislature (82nd Legislature), Rule 1, §§ 1, 3, 5 & 9
[4] Rules of the House of Representatives of the Texas Legislature (82nd Legislature), Rule 1, §§ 2, 4

bills and joint resolutions passed by the Legislature before these matters can be sent to the Governor for his approval.[5]

These responsibilities and duties make the Speaker of the House critical and indispensible to the passage of any legislation in the Texas Legislature. Texas redistricting plans are legislation passed by the Texas Legislature. Thus he is an appropriate Defendant, in his official capacity, regarding Plaintiff's claims under § 1983.

Similarly, the Lieutenant Governor is an appropriate Defendant to Plaintiff's § 1983 claims. The Lieutenant Governor is an executive officer of the state of Texas, as well as, the President of the Senate. The Lieutenant Governor is the presiding officer of the Texas Senate and must decide on all questions of order.[6]

As President of the Senate, the Lieutenant Governor calls the Senate to order and lays out the business of the day.[7] He shall also refer each bill to a proper committee or standing committee.[8] The Lieutenant Governor **must also sign all bills in the presence of the Senate before they can be deemed passed and sent to the Governor.**[9] Clearly, he too is an appropriate Defendant to this action.

The Governor is also an appropriate Defendant. The Governor has the authority to sign legislation into law and did so here. Tex. Const. art. IV, § 14. Moreover, should this Court find for the Plaintiff in this cause, the Governor is the only state official with the authority to call the Legislature into special session and to set the agenda for such special session to address the violation. Tex. Const. art. IV, § 8 and art. III, § 40. Clearly the Governor is an appropriate Defendant here.

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[5] Tex. Const. art. III, §38*; Rules of the House of Representatives of the Texas Legislature* (82nd Legislature), Rule 1, § 13
[6] Rules of the Senate of the 82nd Legislature (2011), Rule 1.01
[7] Rules of the Senate of the 82nd Legislature (2011), Rule 5.08 -5.09
[8] Rules of the Senate of the 82nd Legislature (2011), Rule 7.06
[9] Tex. Const. art. III, § 38; *see also* Rules of the Senate of the 82nd Legislature (2011), Rule 7.23

While it may be that the Plaintiff should have included the Texas Secretary of State as well, other Plaintiffs in this consolidated case have included the Secretary of State as a Defendant. Therefore any potential deficiency has been cured through the consolidation of cases and the merging of pleadings "into a single suit". *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982).

C. MALC Has Pled Sufficient Facts to Support its Vote Dilution Claim.

The Defendants next assert that Plaintiff has plead insufficient facts to support its vote dilution claim pursuant to Section 2 of the Voting Rights Act. Defendants are again wrong. As mentioned previously, Plaintiff is obligated to plead sufficient facts to give the Defendants notice of its claims. Plaintiff is required to plead a short and plain statement of the facts that support it claim for relief and need not plead detailed factual allegations. *Iqbal*, 129 S. Ct. at 1949. A Section 2 claim, in a redistricting context, requires a Plaintiff to establish the *Gingles* three pronged threshold requirements and to show that in the totality of circumstances, minority voters do not have an equal opportunity to elect candidates of their choice. *LULAC v. Perry*, 548 U.S. 399 (2006).

Here, the Plaintiff has alleged facts that meet this standard. Plaintiff has alleged the existence of racial bloc voting, the linchpin of the second and third *Gingles* threshold requirements. In addition, the Plaintiff has alleged that the State has failed to create additional viable Latino opportunity districts, the very essence of the first *Gingles* threshold requirement. Finally, the Plaintiff has plead sufficient facts as outlined by case law to establish that in the totality of circumstances, Latino voters do not have an equal opportunity to participate in the electoral process and elect candidates of their choice. (Plaintiff's Amended Complaint, pp. 8-11).

D. Defendants Misconstrue Plaintiff's Section 5 Claim.

The Defendants argue that Plaintiff's claim under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, should be dismissed because it is a "substantive" claim that cannot be instituted by private parties. (Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, at pp. 3, 10-11) Essentially, Defendants contend that Plaintiff is requesting this Court to evaluate whether the Texas House of Representative and United States House of Representative redistricting plans violate the substantive standards of Section 5 of the Voting Rights Act. Defendants' contention is simply erroneous.

Under Section 5, a covered jurisdiction, such as the State of Texas, must submit all changes affecting voting to either the United States Attorney General for approval or administrative preclearance or file a declaratory judgment action in the United States District Court for the District of Columbia to secure approval or judicial preclearance. Under either approach, only the United States Attorney General and the United States District Court for the District of Columbia can determine whether the covered jurisdiction has met its burden of demonstrating that the proposed voting change has a discriminatory effect and was not adopted pursuant to a discriminatory purpose. 42 U.S.C. §1973c. Section 5 enforcement actions filed in local federal district courts, on the other hand, are to enforce Section 5 compliance. In such actions, private plaintiffs may institute actions in local federal courts to secure compliance with the Section 5 preclearance process. In these Section 5 enforcement actions, there are three issues for a local federal district court to resolve: 1) whether the defendant is subject to the Section 5 preclearance requirement; 2) whether there has been a change affecting voting adopted within a specific time window; and 3) whether the change has secured the requisite Section 5 approval. Absent Section 5 approval, the change cannot be implemented:

> A jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance. . . . If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.

Lopez v. Monterey County, 519 U.S. 9, 20 (1996).

Plaintiff's action is a Section 5 enforcement action and thus does not seek a judicial ruling that the proposed redistricting plans are retrogressive. Rather, the Plaintiffs' Fourth Claim for Relief in its First Amended Complaint specifically states that since the Texas House of Representatives plan has not secured the required Section 5 approval, the plan violates the strict command of Section 5: A voting change cannot implemented unless the change has received the required Section 5 preclearance. Plaintiff's First Amended Complaint, ¶ 60. Accordingly, the Plaintiff's Section 5 claim is properly before the Court and is ripe for adjudication. As to whether the plan will receive approval or not, such an inquiry is irrelevant to a Section 5 enforcement action. The key determination is whether Section 5 approval has been given. If there is no Section 5 approval, the change affecting voting cannot be implemented and an injunction should issue. *Lopez*, 519 U.S. at 20. Thus, this claim presents a concrete case or controversy ready for adjudication and should not be dismissed.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this court deny Defendants' Motion to Dismiss.

DATED: July 12, 2011

Respectfully submitted,

/s/ Jose Garza
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CAUSE NO. 5:11-CV-361-OLG-JES-XR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by the Court's electronic notification system and United States certified mail return receipt requested on July 12, 2011, to counsel of record in each of the cases referenced above.

/s/ Jose Garza
Jose Garza