

IN THE UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF TEXAS
 SHERMAN DIVISION

KAAREN TEUBER;
 JIM K. BURG;
 AND RICKY L. GRUNDEN,

Plaintiffs

vs.

Civil Action No. 4:11-CV-00059-RAS

STATE OF TEXAS; RICK PERRY, in his
 official capacity as Governor of the State of
 Texas; DAVID DEWHURST, in his
 official capacity as Lieutenant Governor
 and Presiding Officer of the Texas Senate;
 JOE STRAUS, in his official capacity as
 Speaker of the Texas House of
 Representatives; HOPE ANDRADE, in her
 official capacity as Secretary of State of the
 State of Texas; BOYD RICHIE, in his
 official capacity as Chair of the Texas
 Democratic Party; STEVE MUNISTERI,
 in his official capacity as Chair of the
 Texas Republican; GARY LOCKE, in his
 official capacity as United States Secretary
 of Commerce; and ROBERT GROVES, in
 his official capacity as Director of the
 United States Bureau of the Census,

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Defendants

DEFENDANT, BOYD RICHIE’S,
MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Defendant, BOYD RICHIE, in his official capacity as Chairman of the Texas Democratic Party and files this his Motion to Dismiss and in support thereof would show the following:

I.

BACKGROUND

Plaintiffs have filed suit challenging the would-be redistricting plans that may or may not be adopted by Texas authorities. Suit was filed only a few weeks into the Texas Legislative Session. This lawsuit was filed prior to substantive Census numbers being presented to the state in order to begin serious consideration of a redistricting plan. At the present time, state authorities, and other interested parties, have only had access to detailed Census figures for a few weeks. In short, if there were a hundred steps to the redistricting process, Texas is at step 7.

Notwithstanding these preliminary activities, Plaintiffs ask this Court to strike down the purported procedures under which Texas authorities may choose to draw new districts. Plaintiffs have asked for a panel of three judges.

The Original Complaint was filed on February 10, 2011. As of this date, none of the Defendants have appeared. The Mexican American Legislative Caucus, Texas House of Representatives (MALC) filed a Motion to Intervene on February 22, 2011. Along with the Motion to Intervene, MALC is urging dismissal of this case for lack of subject matter jurisdiction and for failure to state a claim.

Boyd Richie now appears for the first time in this case to urge dismissal of the action in its entirety because the Court lacks subject matter jurisdiction. The issues raised in this proceeding are not ripe. Furthermore, Plaintiffs have failed to state a legally cognizable claim.

II.

LEGAL STANDARD

This Motion is made pursuant to FED. R. CIV. PRO. 12(b)(1) & (6). A Motion to Dismiss based upon subject matter jurisdiction must be given immediate attention by the Court and the Court must satisfy itself both of its jurisdiction and of the parties. *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998). The federal court must address jurisdiction when it arises. *See Herrick Co. v. SCS Comms.*, 251 F.3d 315, 321 (2nd Cir. 2001). The Court cannot hold the case in anticipation of the jurisdictional defects being cured in the future. *See Balderas v. Texas*, No. 6:01-CV-158 (E.D. Tex., order filed July 23, 2001); *Mayfield v. Texas*, 206 F. Supp. 2d 820, 823-24 (E.D. Tex. 2001); and *Manley v. Texas*, No. 6:01-CV-231 (E.D. Tex., ordered filed July 23, 2001).

A Motion to Dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of Plaintiffs' statements of its claim for relief in the Complaint. *See Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). The Court must dismiss Plaintiffs' claims if they are not based upon applicable and current law. *See Kirksey v. RJ Reynolds Tobacco Co.*, 168 F.3d 1039, 1041-42 (7th Cir. 1999). The Court must also

dismiss the claims if the Plaintiffs are unable to present evidence to support their claims. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III.

ARGUMENT

A. The Court lacks subject matter jurisdiction because the matter in dispute is not yet ripe for consideration.

“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Accordingly, a district court has a duty to inquire into whether jurisdiction is proper, and to dismiss an action if it is not. *See* FED. R. CIV. PRO. 12(h)(3). The ripeness doctrine implicates the jurisdictional “case or controversy” requirement of Article III. *See Nat’l Park Hospitality Ass’n v. Dept. of Interior*, 538 U.S. 803, 808 (2003). In determining whether a matter is ripe, the court must “decide whether the issue is substantively definitive enough to be fit for judicial decision and whether hardship will result from withholding court consideration.” *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 602 (4th Cir. 1997) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *modified on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). “A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties.” *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006); *see also Texas v. United States*, 523 U.S. 296, 300-13 (1998). Hardship is determined by “the immediacy of the threat and the burden imposed

on the petitioner who would be compelled to act under threat of enforcement of the challenged law.” *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992).

A federal court lacks jurisdiction to consider claims that are contingent upon future events. *See Texas v. United States*, 523 U.S. 296, 300 (1998). It is well settled law in redistricting cases that claims filed before redistricting plans have been adopted, jump the gun, and are not ripe for consideration. *See Mayfield*, 206 F. Supp. 2d at 823-24; *Lee v. Texas*, No. 6:01-CV-98 (E.D. Tex., order filed April 26, 2001); and *Associated Republicans of Texas v. Texas*, No. W01-CA-083 (W.D. Tex., order filed March 9, 2001).

This case, if it were based upon appropriate law and legitimate claims, can only be adjudicated by consideration of detailed facts and circumstances that have not yet occurred.

B. Plaintiffs’ claims should be dismissed because they have failed to state a claim upon which relief can be granted.

Plaintiffs claim they expect the state to violate Plaintiffs’ constitutional rights by using Census figures that include state residents who are non-citizens. Plaintiffs claim the state is constitutionally required to draw districts giving only consideration to those persons that are U.S. citizens. Plaintiffs offer the Court no guidance how the state would perform such an analysis given that the data required is not available. The Fifth Circuit has recently been critical of redistricting claims filed outside the limit of federal court

jurisdiction and that also involve claims of redistricting based upon data not available. *See Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010).

Plaintiffs' lawsuit asks this Court to usurp the authority of Texas officials and determine the proper data and methodology used in drawing electoral districts. Such a claim has been rejected by the federal courts. *See Burns v. Richardson*, 384 U.S. 73, 92 (1966) and *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000). Furthermore, at least one Texas court has found the redistricting methodology proposed by Plaintiffs unconstitutional. *See Terrazas v. Clemons*, 581 F. Supp. 1319, 1328 (W.D. Tex. 1983).

Even if Plaintiffs could prove facts (most of which have not occurred) to support its claim, there is no such claim under the law. The Court should dismiss Plaintiffs' case for failure to state a claim.

C. The Court can, and should, grant Motion to Dismiss without impaneling three judges.

Pursuant to 28 U.S.C. § 2284, Plaintiffs have requested a three judge panel. A district court consisting of three judges must be empanelled to grant injunctive relief or judgment on the merits in cases challenging the apportionment of any statewide legislative body. 28 U.S.C. §§ 2284(a), 2284(b)(3). "Upon filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit," who must then empanel the court. *Id.* § 2284(b)(1).

However, three judges are not required where the complaint “does not state a substantial claim for injunctive relief.” *Md. Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 611 (4th Cir. 1970). Where the court lacks jurisdiction, the claim is by definition insubstantial and a single district judge may dismiss the case. *See Ex Parte Poresky*, 290 U.S. 30, 31 (1933) (“the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction.”); *Md. Citizens*, 429 F.2d at 611; *Atkins v. Bd. of Educ.*, 418 F.2d 874, 875 n.1 (4th Cir. 1969).

III.

CONCLUSION

For the foregoing reasons, the Court should dismiss this case.

Dated this 24th day of March, 2011

Respectfully submitted,

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party

By: /s/ Chad W. Dunn
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ATTORNEYS FOR DEFENDANT
BOYD RICHIE

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2011, I electronically filed the foregoing document with the Clerk of the United States District Court, Eastern District of Texas, Sherman Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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I hereby certify that a true copy of the foregoing instrument has been directed to all counsel of record and/or all interested parties, as listed below, by facsimile transmission, by certified mail, return receipt requested, and/or by regular U.S. first class mail on this the 24th day of March, 2011.

State of Texas
Hon. Rick Perry, Governor of the State of Texas
Hon. Hope Andrade, Texas Secretary of State
Hon. David Dewhurst, Lt. Governor of the State of Texas
Hon. Joe Straus, Speaker, Texas House of Representatives
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