

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

KAAREN TEUBER, et al.,	§	
	§	CIVIL ACTION NO.
<i>Plaintiffs,</i>	§	11-CV-00059 RAS
	§	
v.	§	
	§	
STATE OF TEXAS, et al.,	§	
	§	
Defendants,	§	

**PLAINTIFFS’ RESPONSE TO DEFENDANT BOYD RICHIE’S
MOTION TO DISMISS**

TO THE HONORABLE COURT:

COME NOW Kaaren Teuber, Jim K. Burg, and Ricky L. Grunden (“Plaintiffs”), and file this Response to the Motion To Dismiss filed by Defendant Boyd Richie in his official capacity as Chairman of the Texas Democratic Party (“Richie”). In support thereof, Plaintiffs would show as follows:

INTRODUCTION

Plaintiffs’ Original Complaint complains that the 2010 Census data used for redistricting purposes provides information only with respect to the total Texas “population” (including this state’s sizeable pool of undocumented immigrants), rather than the eligible voting population, and that the use of such data without correcting for the eligible voting population leads to unfairly skewed results which threaten the constitutional guarantee of “one-person, one-vote.”

Plaintiffs request that the Court take judicial notice of the facts that (1) the great majority of undocumented immigrants in Texas are of Hispanic descent, and (2) such immigrants are more populous in areas where greater numbers of United States citizens

of Hispanic descent likewise reside. With this foundation in place, let us assume two Texas districts, X and Y, each holding 700,000 persons—the approximate, ideal size of Congressional House Districts based on the 2010 Census—and having an adult (i.e. voting age) population of 400,000. Let us further assume that 25% of the population of District X (with many Hispanic citizens) is made up of undocumented immigrants, compared to only 5% of the population of District Y (with far fewer Hispanic citizens). Accordingly, despite the equality of their *total* populations and residents of voting age, the actual *voting-eligible* population of District X is 300,000, whereas that of District Y is 380,000. Given that each of these Districts elects a House representative, it is clear that each vote in District X is of proportionately greater weight than one cast in District Y.

All three Plaintiffs herein currently reside in congressional districts with comparatively low populations of both Hispanic citizens and undocumented immigrants and are, therefore, harmed by the application of the 2010 Census data. In their lawsuit, Plaintiffs request scrutiny of the challenged methodology of using Census data to draw congressional districts, naming as defendants herein every relevant link in the procedural chain from data to district, including the federal officials responsible for generating the Census data, the “State Defendants” who are utilizing it for redistricting purposes, and the “Party Defendants” such as Richie who will conduct primary elections within the districts drawn using the Census data. As set out below, Plaintiffs’ claims are ripe, and Plaintiffs’ Original Complaint does not fail to state a claim upon which relief may be granted.

ARGUMENT

1. Legal Standards

At page 3 of his Motion, Richie states that he seeks dismissal pursuant to both FRCP 12(b)(1) (alleging lack of subject matter jurisdiction), and FRCP 12(b)(6) (failure to state a claim).

As to Richie's FRCP 12(b)(1) challenge, because Richie has mounted only a "facial" attack, this Court must accept the allegations in Plaintiffs' Complaint as true, and must construe them most favorably to Plaintiffs. See 2 Moore's Federal Practice (3rd ed.) §12.30[4] (citing *Vander Zee v. Reno*, 73 F.3d 1365, 1368 (5th Cir. 1996)). Accordingly, dismissal on 12(b)(1) grounds is proper "only if it appears beyond doubt that [Plaintiffs] can prove no set of facts which would entitle [them] to relief." *Vander Zee*, 73 F.3d at 1368; *Naranjo v. Univ. Surety*, 679 F. Supp. 2d 787, 792 (S.D. Tex. 2010).

As noted in 2 Moore's Federal Practice (3rd ed.) §12.30[4], Richie's Rule 12(b)(6) motion is likewise decided on a highly similar standard, under which this Court must accept "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). Moreover, to survive a Rule 12(b)(6) dismissal motion, Plaintiffs need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Finally, in bringing a Rule 12(b)(6) challenge, it is Richie who bears the burden of proof. *Jennings v. AT&T Mobility*, 2009 U.S. Dist. LEXIS 117316, at *6-7 (E.D. Tex. 2009). For all these reasons, Fifth Circuit courts have repeatedly held that motions to dismiss under Rule 12(b)(6) are viewed with disfavor and

are rarely granted. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009); *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).¹

2. Ripeness

Richie argues that the Plaintiffs' Complaint should be dismissed on ripeness grounds, citing numerous decisions (which largely appear to be both unreported and improperly cited) dismissing suits filed before Texas state officials had completed—or at least been given the opportunity to complete—the redistricting process.

Two of the four districts that are subject to Plaintiffs' Complaint—the Congressional House Districts and the Texas State Board of Education Districts—are not subject to any ongoing redistricting process. House Bill 600 in the 82nd Legislature has been enacted as law, and is based on the very population data that Plaintiffs allege in this lawsuit violates various federal and state constitutional provisions and statutes. Similarly, the 82nd Legislature is not enacting any law to replace the current Congressional House Districts, which are also based on the type of population data that Plaintiffs allege in this lawsuit violates various federal and state constitutional provisions and statutes, and which districting also undisputedly dilutes Plaintiffs' vote given that 32 such districts are in existence when the 2010 Census data creates an entitlement to 36 districts. Ripeness is determined at the time a challenge thereto is adjudicated, and not at

¹ Richie misstates the law applicable to Rule 12(b)(1) and (6) motions by citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), in support of his assertion that this Court “must also dismiss the claims if the Plaintiffs are unable to present evidence to support their claims.” The Court in *Scheuer* said no such thing. See *id.* at 236. As noted by the Supreme Court in *Scheuer*, precisely because such Rule 12(b) motions take place “before the reception of any evidence,” “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims,” i.e., at a later stage of the proceedings. *Id.* *Scheuer* goes on to say that, “[i]ndeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.” *Id.* Thus, the *Scheuer* opinion reinforces the proper rule that in reviewing cases under either Rule 12(b)(1) or (6), the Court should limit itself only to the pleadings themselves. See *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 261 (5th Cir. 1999); *Vander Zee v. Reno*, 73 F.3d 1365, 1368 (5th Cir. 1996). Accordingly, Richie's present dismissal Motion is to be determined upon the contents of Plaintiffs' Complaint alone, without any burden upon Plaintiffs to submit additional evidence.

the time a suit is initially filed. *Manley v. Texas*, 2001 U.S. Dist. LEXIS 25427, at *4-6 (E.D. Tex. 2001). Therefore, all of Plaintiffs' claims are plainly ripe with respect to the Texas State Board of Education Districts and the Congressional House Districts.

The remaining two districts—the Texas Senate Districts and Texas House Districts—are, at least for the moment,² subject to the redistricting process. However, Plaintiffs' claims with respect to both such districts—as redistricted—are ripe, because such claims are based on the existing 2010 Census data, which is the only data available for use and, in fact, is being used in the redistricting process.

Plaintiffs' Complaint is directed at the Census data to be utilized in the redistricting process, not at the redistricting process itself. This distinction is crucial because it means that the harm complained of by Plaintiffs need not await for redistricting to be done to “ripen.” The Census data complained of by Plaintiffs has already been made available for redistricting purposes. Under Article III, Section 26 of the Texas Constitution, such Census data must be used for the apportionment of the Texas House of Representatives, and unfailingly has been used for apportioning election districts for the Texas Senate as well. *See Bickerstaff, Redistricting Texas*, at 54 (2011). Richie, as Chairman of the Texas Democratic Party, is authorized under Texas law to hold primary elections only within these districts mapped out using the Census data.

Thus, while this Court may ultimately accept or reject the merits of Plaintiffs' legal arguments, Plaintiffs, today, have legitimate and ripe claims as to (1) the current districts, which were drawn using improper data, (2) the new districts already in place using similar improper data from the 2010 Census, and (3) the current redistricting process using the same improper data that will, by definition, produce unconstitutional

² Both House Bill 150 and Senate Bill 31 have been passed to enrollment.

districts. There are existing flaws in existing Census data. The Texas Legislature is required to use such existing data in its current redistricting efforts, and the new districts based on the existing data will govern Richie's conducting primary elections. Accordingly, because Plaintiffs complain of existing Census-data flaws, which will *necessarily* contaminate an already ongoing process, their claims are ripe.

Finally, as to the ripeness of Plaintiffs' claims regarding the currently-drawn, "old-plan" districts, it is true that other courts have dismissed such claims absent a showing that the Texas Legislature would fail to timely adopt an updated redistricting plan, thereby forcing the next election to be conducted under an obsolete prior plan. *See, e.g., Manley v. Texas*, 2001 U.S. Dist. LEXIS 25427, at *4-6 (E.D. Tex. 2001); *Mayfield v. Texas*, 206 F. Supp. 2d 820 (E.D. Tex. 2001). However, unlike those cases, should Plaintiffs' challenge herein prove successful, it would necessarily initiate a time-consuming effort to both gather and/or tabulate corrected Census data, which process would need be completed before proper Texas redistricting efforts—itsself a time-consuming process—could then begin. *See* Complaint ¶ 54. Under such circumstances, it is reasonably foreseeable that the State would be unable to timely adopt a valid new districting scheme and would attempt to continue its use of its existing plan despite its being made obsolete by population growth and its being based on flawed census data. *See Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo.) (dealing with such a scenario).

Because all facts within the Complaint must be construed in Plaintiffs' favor, dismissal on ripeness grounds is improper as to Plaintiffs' claims regarding the districts for which all redistricting efforts have concluded and the districts currently undergoing redistricting efforts, as well as the obsolete "old-plan" districts.

3. Failure To State A Claim

Richie also urges dismissal of Plaintiffs' attacks on the flawed Census data for failure to state a claim.

First, Richie argues that Plaintiffs' Complaint offers the Court no guidance as to *how* the Census data should be corrected. In the first place, adjustment of Census data is a topic that has hardly gone unexplored in the redistricting context. *See* Texas Legislative Counsel, State And Federal Law Governing Redistricting In Texas, at 112-17 (1991). Moreover, for the purposes of surviving Richie's Rule 12(b)(6) challenge, Plaintiffs Complaint need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Richie cites no authority suggesting that this burden is further extended to encompass spelling out precisely how the complained-of wrong is to be corrected. Rather, in bringing such a Rule 12(b)(6) challenge, it is Richie who bears the burden of proof. *See Jennings v. AT&T Mobility*, 2009 US Dist. LEXIS 117316 *6-7 (E.D. Tex. 2009).

As to Richie's accompanying suggestion that *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010), somehow reflects the Fifth Circuit's disapproval of redistricting cases involving Census data, Richie fails to observe that in *Lopez* the matters complained of were to be resolved by the soon-to-be-released 2010 Census data, whereas Plaintiffs' claims will not. Indeed, the Court in *Lopez* expressly states that, in the event the challenged election districts remain based on improper data, the plaintiffs will have a valid cause of action. *See id.* at 342.

Next, Richie attempts to suggest that prior rulings both by the Supreme Court and within this Circuit have somehow definitively closed the door on the arguments made in

Plaintiffs' Complaint. In fact, the most recent of Richie's own cited authorities, *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000), concludes by stating that the exclusion of aliens for redistricting purposes was a "close question," upon which the Supreme Court has not provided "definitive guidance." Moreover, unlike these cited cases, Richie seeks dismissal in the Rule 12(b)(6) context, where the *likelihood* of Plaintiffs' success on the merits is irrelevant, unless Richie can meet his burden of showing that there is *no* set of facts, under any possible legal theory consistent with Plaintiffs' Complaint, that would permit recovery. *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999); *Indest*, 164 F.3d at 261; *Whiddon v. Chase Home Finance, LLC*, 666 F. Supp.2d 681, 685 (E.D. Tex. 2009) (Rule 12(b)(6) dismissal "is not a procedure for resolving contests about the facts or the merits of a case"). Because Richie has made no showing that *all* legal theories of recovery are foreclosed to Plaintiffs, granting Richie the highly disfavored remedy of dismissal would be improper.³ See *Lormand*, 565 F.3d at 232; *Lowrey*, 117 F.3d at 247.

Finally, in the unlikely event this Court should find merit in any of Richie's Rule 12(b)(6) arguments, Plaintiffs would request, in the alternative, that their Original Complaint not be dismissed, but rather that they be given the opportunity to submit a more definite statement. See *Rubin v. O'Koren*, 621 F.2d 114, 117 (5th Cir. 1980); see also Moore's Federal Practice § 12.36[5] (3d ed. 1999) (citing *Pardee v. Moses*, 605 F.2d 865, 866 (5th Cir. 1979)).

³ In addition, with respect to the cases cited in the Motion to Dismiss, Richie overlooks the distinction between persons who are eligible to be qualified voters (at issue here) and persons who are, in fact, qualified voters (at issue in the cited cases).

CONCLUSION

WHEREFORE, by reason of the arguments set forth above, Plaintiffs hereby request that:

- 1) Richie's FRCP 12(b)(1) Motion To Dismiss be denied in its entirety;
- 2) Richie's FRCP 12(b)(6) Motion To Dismiss be denied in its entirety or, in the alternative, Plaintiffs be allowed to replead any claim determined to be inadequately stated; and
- 3) Plaintiffs be granted all other relief, whether legal or equitable, to which they may be justly entitled.

Respectfully submitted,

HULL HENRICKS LLP
221 West 6th Street, Suite 960
Austin, Texas 78701-3407
512 472-4554 telephone
512 494-0022 facsimile

Michael S. Hull
State Bar No. 10253400
mhull@hjm-llp.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on May 25, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system:

Jose Garza
Law Office of Jose Garza
7414 Robin Rest Dr.
San Antonio, Texas 78209
Counsel for Intervenors Mexican American Legislative Caucus

David J. Schenck
Office of the Attorney General
PO Box 12548
Austin, Texas 78711
Counsel for Defendants State of Texas, Rick Perry, David Dewhurst, Joe Strauss, and Hope Andrade.

Chad W. Dunn
Texas Democratic Party
Brazil & Dunn
4201 FM 1960 West, Suite 530
Houston, Texas 77068
Counsel for Defendant Boyd Richie

/s/ Michael S. Hull
Michael S. Hull