

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

<b>KAAREN TEUBER, et al.</b>	§	
	§	
<b>Plaintiffs,</b>	§	
	§	
<b>v.</b>	§	<b>CIVIL ACTION NO.</b>
	§	<b>5:11-CV-00572-OLG-JES-XR</b>
<b>STATE OF TEXAS, et al.</b>	§	
	§	
<b>Defendants,</b>	§	
	§	
<b>MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC)</b>	§ § § § § §	
	§	
<b>Intervenor.</b>	§	

**INTERVENOR MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC)’S MOTION TO DISMISS AND JOINDER OF SECTION I.B. OF STATE DEFENDANTS’ MOTION TO DISMISS (DKT. #49)**

Intervenor Mexican American Legislative Caucus, Texas House of Representatives (MALC), hereby moves to dismiss this lawsuit because the Court lacks subject matter jurisdiction over Plaintiffs’ claims, as Plaintiffs do not have standing. FED. R. CIV. P. 12(b)(1). MALC also joins Section I.B. of the State Defendants’ Motion to Dismiss (Dkt. #49) in this regard. Also, in support of its own motion, MALC submits the following points and authorities.

**INTRODUCTION**

The ultimate relief Plaintiffs seek in their Second Amended Complaint (Dkt. #42)—an adjustment of the 2010 census population—is beyond the power of the remaining state defendants. The only party that could possibly adjust the census counts would be the Federal Defendants; however, Plaintiffs have voluntarily dismissed the Federal Defendants from this

suit. Accordingly, as set forth below and in Section I.B. of the State Defendants' Motion to Dismiss (Dkt. #49), Plaintiffs' claims in this suit should be dismissed.

### **BACKGROUND**

Plaintiffs filed their Original Complaint on February 10, 2011. (Dkt. #1) In their Original Complaint, Plaintiffs joined three sets of defendants: (1) the State of Texas and various officers in their official capacities (the State Defendants); (2) officers of the United States government in their official capacities (the Federal Defendants); and (3) the chairs of the Texas Democratic and Republican parties. MALC moved to intervene on February 22, 2011. (Dkt. #3) The motion to intervene was granted March 29, 2011. (Dkt. #13) Defendant Boyd Richie filed a Motion to Dismiss on March 24, 2011. (Dkt. #11) MALC filed a brief in support of Defendant Richie's Motion to Dismiss on April 12, 2011. (Dkt. #19) The State Defendants filed a Motion to Dismiss or, in the Alternative, for More Definite Statement on May 10, 2011. (Dkt. #24, 25)

Plaintiffs filed for leave to file their First Amended Complaint on May 27, 2011 (Dkt. #31) and their First Supplemental Complaint on June 2, 2011. (Dkt. #34) On June 22, 2011, the Court granted the motions for leave to amend and supplement their complaint (Dkt. #39) and denied the State Defendants' and Defendant Richie's motions to dismiss the Original Complaint as moot. (Dkt. #40) The same day, Plaintiffs moved for leave to file, and did file, their Second Amended Complaint. (Dkt. #42) The Court held a scheduling conference on June 23, 2011 (Dkt. #44) and entered a scheduling order on June 24, 2011. (Dkt. #45)

Of particular importance to this Motion, on June 29, 2011, Plaintiffs filed a Notice of Voluntary Dismissal, in which they voluntarily dismissed their claims against the Federal Defendants. (Dkt. #47) On July 6, 2011, the State Defendants filed their Motion to Dismiss Plaintiffs' First Amended Complaint and First Supplemental Complaint Pursuant to Federal

Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. #49) On July 8, 2011, this cause was transferred to the Western District of Texas, San Antonio Division. (Dkt. #52) MALC now files its Motion to Dismiss and Joinder of Section I.B. of State Defendants' Motion to Dismiss. (Dkt. #49)

## **ARGUMENT AND AUTHORITIES**

### **I. PLAINTIFFS DO NOT HAVE STANDING.**

A plaintiff invoking the jurisdiction of an Article III federal court bears the burden of establishing standing to do so. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing U.S. CONST. art. III, § 2). “Article III, § 2, of the Constitution restricts the federal ‘judicial Power’ to the resolution of ‘Cases’ and ‘Controversies.’ That case-or-controversy requirement is satisfied only where a plaintiff has standing.” *Sprint Commc’ns Co. v. APCC Servs.*, 554 U.S. 269, 273 (2008) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006)). “[T]o have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly ... trace[able] connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff’s injury will be remedied by the relief plaintiff seeks in bringing suit).” *Id.* at 273-74 (quoting and citing *Lujan*, 504 U.S. at 560-61) (internal quotations omitted).

### **II. ONLY THE U.S. SECRETARY OF COMMERCE CAN ADJUST THE CENSUS COUNTS.**

The authority to conduct the census and adjust census numbers lies with the federal government alone. “The Constitution requires an ‘actual Enumeration’ of the population every 10 years and vests Congress with the authority to conduct that census ‘in such Manner as they shall by Law direct.’” *Wisconsin v. City of New York*, 517 U.S. 1, 5 & n.1 (1996) (citing U.S.

CONST. art. 1, § 2, cl. 3); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 321 (1999) (quoting Census Clause as authority for Congress to direct census).

“Through the Census Act, 13 U.S.C. § 1 *et seq.*, Congress has delegated to the Secretary of the Department of Commerce the responsibility to take ‘a decennial census of [the] population ... in such form and content as he may determine ... .’” *Wisconsin*, 517 U.S. at 5 (citing 13 U.S.C. § 141(a)). Specifically, Section 141 of the Census Act “authoriz[es] the Secretary of Commerce to conduct the census ... .” *State v. Mosbacher*, 783 F. Supp. 308, 314 (S.D. Tex. 1992); *see also Dep't of Commerce*, 525 U.S. at 321 (noting this authority). The Census Bureau and the Director of the Census, in turn, report to the Secretary of Commerce and assist the Secretary in carrying out the census. *Wisconsin*, 517 U.S. at 5 (citing 13 U.S.C. § 2; § 21 (“[The] Director shall perform such duties as may be imposed upon him by law, regulations, or orders of the Secretary”)); *City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859, 864 (9th Cir. 2002) (“The Secretary, in turn, oversees the Bureau of the Census, an agency within the Department of Commerce responsible for conducting the decennial census.”).

The Secretary of Commerce has authority to decide whether to adjust and correct the census enumeration pursuant to “Congress’ direct delegation of its broad authority over the census” to the Secretary. *Wisconsin*, 517 U.S. at 19 (citing U.S. CONST. art. 1, § 2, cl. 3). In 1957, “the Secretary asked Congress to amend the Act to permit the [Census] Bureau to use statistical sampling in gathering some of the census information. In response, Congress enacted § 195 ... .” *Dep't of Commerce*, 525 U.S. at 336 (citation omitted); *City of Los Angeles*, 307 F.3d at 864-65. Section 195 requires the Secretary, “if he considers it feasible, [to] authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of” the Census Act, “[e]xcept for the determination of population for purposes of apportionment of

Representatives in Congress among the several States.” 13 U.S.C. § 195. In 1976, Congress revised Section 141 of the Census Act to authorize the Secretary to “take a decennial census of population ... in such form and content as he may determine, including the use of sampling procedures and special surveys.” *Dep’t of Commerce*, 525 U.S. at 337-38 (citing 13 U.S.C. § 141(a)). The more specific language in Section 195 informs the “broad grant of authority given in § 141(a)” for the Secretary to conduct and adjust the census counts. *Id.* at 338.

Thus, the ultimate decision as to adjustment of census numbers based on statistical sampling rests with the Secretary himself, although the Secretary receives recommendations from various census officials, statisticians, and demographers. *See Wisconsin*, 517 U.S. at 10, 23-24 (explaining Secretary gathers such recommendations before issuing adjustment decision); *see generally City of Los Angeles*, 307 F. 3d at 866-67, 868, 871, 877 (recognizing Secretary holds discretion and authority over adjustment decision, including authority to delegate such decision to Director of Census Bureau). Because the Secretary of the U.S. Department of Commerce controls any adjustment of census numbers, Plaintiffs here cannot trace any injury to the State Defendants and cannot demonstrate that the State Defendants are able to do anything to redress any such alleged injury.<sup>1</sup>

Accordingly, Plaintiffs lack standing and this Court does not have subject matter jurisdiction. MALC also joins Section I.B. of the State Defendants’ Motion to Dismiss in this respect. *See State Defs.’ Mot. to Dismiss § I.B.* (Dkt. #49) (“Plaintiffs cannot establish that their alleged injuries are traceable to the State Defendants. ... Any injury caused by the Census itself is not traceable to the State Defendants because the federal government is responsible for any flaws in the Census. Moreover, Plaintiffs’ claims are not redressable because the ultimate relief

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<sup>1</sup> Adjustment of census counts, which the Plaintiffs seek in this cause, must be distinguished from the redrawing of legislative districts, which is the subject matter of the pending consolidated cases in which MALC is a plaintiff (*Perez, et al. v. State of Texas*, Civil Action No. 5:11-CV-0360-OLG-JES-XR).

they seek—‘an adjustment of the 2010 census population,’ First Am. Compl. ¶ 54—is beyond the power of the State Defendants to provide.”) Therefore, MALC moves for dismissal of Plaintiffs’ First Amended Complaint and First Supplemental Complaint (Dkt. #1, 35), and Plaintiffs’ Second Amended Complaint, Request for Injunctive Relief and Designation of a Three-Judge Court (Dkt. 42) on the basis of Plaintiffs’ lack of standing and this Court’s resulting lack of subject matter jurisdiction.

### CONCLUSION AND PRAYER

Plaintiffs do not have standing because the Federal Defendants would be the only party that could possibly adjust the census counts so as to provide the Plaintiffs the relief they seek, and Plaintiffs have voluntarily dismissed the Federal Defendants from this lawsuit. The State Defendants cannot adjust the census counts as the Plaintiffs request. For the foregoing reasons, MALC respectfully requests that this Court dismiss Plaintiffs’ First Amended Complaint and First Supplemental Complaint (Dkt. #1, 35), and Plaintiffs’ Second Amended Complaint, Request for Injunctive Relief and Designation of a Three-Judge Court (Dkt. #42).

DATED: July 19, 2011

Respectfully Submitted,

/s/ Jose Garza

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**ATTORNEYS FOR MEXICAN  
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CAUSE NO. 5:11-CV-572-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 19, 2011, to counsel of record in each of the cases referenced above.

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/s/ Jose Garza