

**FILED**

DEC 18 2013

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY  DEPUTY CLERK

MEXICAN AMERICAN LEGISLATIVE )  
CAUCUS, TEXAS HOUSE OF )  
REPRESENTATIVES (MALC) )

Plaintiff )

v. )

CIVIL ACTION NO.  
SA-13-CA-261-OG

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 )  
of the State of Texas, and JOE STRAUS, )  
in his official capacity as Speaker of the )  
Texas House of Representatives )

Defendants )

**ORDER**

The Court has determined that it is necessary to re-examine *sua sponte* whether subject matter jurisdiction exists in this case.

MALC filed this lawsuit in Hidalgo County, Texas on April 5, 2011. The original petition has never been amended. In its pleading, MALC asserts discrimination and equal protection violations under the Texas Constitution, Article I, §§ 3 and 3a and Article VI, § 2(c), and Section 106.001(a)(6) of the Texas Civil Practice and Remedies Code. MALC seeks injunctive relief to force the defendants to comply “with the Texas Constitution and Texas statutes,” declaratory relief “as authorized by the Texas Declaratory Judgment Act, § 37.003 of the Texas Civil Practice and Remedies Code,” and attorneys fees and costs pursuant to the Texas Civil Practice and Remedies Code. (Dkt. # 1-1).

Defendants removed the lawsuit to the U.S. District Court, Southern District of Texas, on May 13, 2011 and the case was assigned to the Honorable Randy Crane. (Dkt. # 1). On May 27, 2011, MALC filed a motion to remand stating that the Court lacks subject matter jurisdiction because only state law claims have been asserted. (Dkt. # 3). Defendants responded by claiming that MALC's petition raises a federal question or asserts claims completely preempted by federal law. (Dkt. # 6). Judge Crane denied Plaintiff's motion to remand and transferred the case to the undersigned judge. (Dkt. # 19).

In the order denying remand, Judge Crane determined that "MALC's Original Petition on which this case was removed alleges only state constitutional and statutory violations and seeks relief only under state law," and "MALC has pleaded no federal question on the face of its petition." (Dkt. # 19, p. 3). Judge Crane noted that MALC could have invoked federal law but the plaintiff is the master of its pleadings and may rely exclusively on state law, even where federal remedies might also exist. (Dkt. # 19, p. 6). Because MALC chose to rely on the protections afforded by the Texas Constitution, rather than the United States Constitution, its pleading "presents only questions of state constitutional interpretation." (Dkt. # 19, p. 7). In sum, Judge Crane determined that "federal law does not create or preempt" MALC's claim as pleaded, and rejected Defendants' assertion that MALC's pleading "presents a federal question." (Dkt. # 19, p. 7).

The jurisdictional analysis could have ended there, but Judge Crane continued:

Still, the Court is persuaded by Defendants' alternate argument that MALC's state law challenge to the use of "inaccurate" U.S. census data to formulate the State's redistricting plans necessarily requires the resolution of substantial and disputed issues of federal law. (Docs 1, 6). *This challenge specifically implicates the conduct of federal actors, and its resolution depends upon a showing that federal census procedures in fact resulted in an undervaluation of the Latino population in certain regions of Texas. See (Doc. 1-1 at ¶¶ 9-23)*(alleging, among other things, that manner in which Census Bureau conducted census in

Hidalgo County and other border area counties resulted in undercount). Also, whether an undercount occurred is actually disputed by the parties and concerns the substantial federal interest in conducting a decennial census. *See* U.S. CONST. Art. I, § 2, cl. 3 (directing Congress to conduct an “actual Enumeration” every ten years after initial census); 13 U.S.C. § 141. Finally, although legislative redistricting is primarily a matter left to the state legislature and timely action by the state judiciary, this rule of deferral does not extend to *contests to the inherently federal procedures used to arrive at the data on which redistricting is based*. Notably, MALC has provided no argument for why its challenge to the use of the 2010 U.S. census data does not present a federal question. *See* (Docs. 5, 8). The Court finds that it does and that removal was proper on this basis.

(Dkt. # 19, p. 8)(emphasis added). Thus, MALC’s factual allegations regarding flaws in U.S. census procedures and inaccuracies in U.S. census data were the sole basis for Judge Crane’s finding of subject matter jurisdiction.

At approximately the same time that the parties were briefing the jurisdictional issues for Judge Crane, both the State defendants and MALC were filing motions to dismiss in another case styled *Teuber v. State of Texas*, which was filed in the Eastern District (Civil Action No. 11-CA-59) and then transferred to the Western District (Civil Action No. 11-CA-572). In the *Teuber* case, the same State defendants were sued and MALC intervened. Similar allegations regarding flaws in U.S. census procedures and inaccuracies in U.S. census data (“census claims”) were being asserted, and both the State defendants and MALC filed motions stating that such claims had to be dismissed for lack of subject matter jurisdiction. (5:11-CA-572, Dkt. # 24, 61).<sup>1</sup> In the State defendants’ motion, they argued that the *Teuber* plaintiffs’ census claims failed to meet the traceability element of

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<sup>1</sup>The *Teuber* plaintiffs alleged that the procedures used by the U.S. Census Bureau were flawed and resulted in an overcount of the Latino population (5:11-CA-572, Dkt. # 42) while *MALC* alleged that the procedures used by the U.S. Census Bureau were flawed and resulted in an undercount of the Latino population (Dkt. # 1-1). Thus, while they did not agree on whether there was an undercount or overcount, they both alleged that the census procedures were flawed and the census data was inaccurate as a result.

Article III standing as follows:

To meet the traceability element of standing, a plaintiff must establish “a ‘fairly traceable’ causal link between [its] injury and the defendant’s conduct.” *Cadle Co. v. Neubauer*, 562 F.3d 369 (5<sup>th</sup> Cir. 2009)(quoting *Lujan*, 504 U.S. at 560-61). To the extent Plaintiffs’ claims are based on the inclusion of undocumented immigrants in the 2010 United State Census, Plaintiffs cannot establish that their alleged injuries are traceable to the State Defendants. . . . The State of Texas and its officers have no power to control the United States government’s performance of its constitutional duty. Indeed, Plaintiffs do not appear to allege that the State Defendants are somehow responsible for the alleged defects in the U.S. Census. Thus to the extent Plaintiffs’ claims are based on the conduct of the 2010 Census, any alleged injury is not traceable to the State Defendants.

(5:11-CA-572, Dkt. # 24, ¶1C) (reference to record omitted). MALC joined in the State’s argument regarding traceability (5:11-CA-572, Dkt. # 61, p. 5) and further asserted lack of redressability:

[A]n 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. . . . A plaintiff invoking the jurisdiction of an Article III federal court bears the burden of establishing standing to do so. *Lujan v. Defendants 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 Communications 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). . . . The authority to conduct the census and adjust census numbers lies with the federal government alone. . . . “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 ... .’” . . . 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. . . . Thus, the ultimate decision as to adjustment of census numbers ... rests with the Secretary himself. . . . Accordingly, Plaintiffs lack standing and this Court does not have subject matter jurisdiction.

(5:11-CA-572, Dkt. # 61, pp. 1, 3-5)(citations omitted).

The parties' legal arguments for why subject matter jurisdiction was lacking in the *Teuber* case are even more compelling in this case. In the *Teuber* case, the plaintiffs originally named the U.S. Secretary of Commerce and the Director of the U.S. Census Bureau as defendants and filed suit in federal court asserting both state and federal claims. They voluntarily dismissed the federal defendants early in the proceedings, leaving only the State defendants. The State defendants and MALC asserted that the dismissal of the federal defendants necessitated the dismissal of any claims based on flawed census procedures and census data. This case, by contrast, was filed in state court and while MALC included similar factual allegations regarding flawed census procedures and data, MALC asserted only state claims and sued only the State defendants. MALC did not name any federal actors as defendants and MALC never sought leave to join them at any juncture of the proceedings. Thus, while the Court's jurisdiction in *Teuber* was not based solely on the census claims, the census allegations in this case are *sole* reason that Judge Crane allowed this case to remain in federal court. There is no other basis for subject matter jurisdiction. For the reasons explained by both the State defendants and MALC in their briefs filed in the *Teuber* case, MALC does not have standing to sue the State defendants for alleged flaws in census procedures and data. Thus, subject matter jurisdiction is lacking.

It is unfortunate that Judge Crane did not have the benefit of the parties' briefs on Article III standing at the time he entered the order denying remand in this case. Nevertheless, the Court has a continuing obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party.<sup>2</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235 (2006)

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<sup>2</sup>While subject matter jurisdiction cannot be waived, MALC has never conceded that subject matter jurisdiction exists. When the State requested a three judge panel, MALC explained that a three judge panel is not authorized when only state claims have been asserted. (Dkt. # 23). When the State requested

(“The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment”). MALC could have chosen to pursue federal causes of action and name federal actors as defendants, but it did not. To the extent that MALC’s pleading includes factual allegations regarding flawed U.S. census procedures and data, MALC lacks standing to assert a claim based on flawed census procedures and data because it cannot meet the traceability and redressability standards for constitutional standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854 (2006); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). MALC’s injuries, if any, resulting from flawed census procedures and data are not traceable to the State defendants and any action taken against the State defendants will not redress injuries allegedly resulting from flawed census procedures and data. Because MALC lacks Article III standing to pursue such claims against the State defendants, the Court did not have jurisdiction over this case at its inception or at the time of removal, and it still lacks jurisdiction over this matter.

This case was removed under 28 U.S.C. § 1441(a) on the premise that the Court had original jurisdiction and it does not; thus, removal was improper and the case must be remanded to the state court where it originated. *Int’l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 88-89, 111 S.Ct. 1700 (1991) (remand, rather than dismissal, is appropriate under such circumstances); 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded); 28 U.S.C. § 1447(d) (the case is remanded “to the State court from which it was removed” and “is not reviewable on appeal or

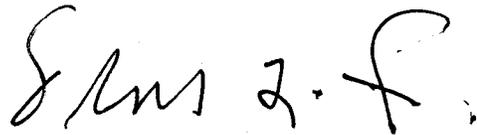
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consolidation, MALC objected and explained that the legal issues were entirely different because this case involves only state claims. (Id.).

otherwise").<sup>3</sup>

It is therefore ORDERED that the Court lacks subject matter jurisdiction over this case; the case was improperly removed under 28 U.S.C. § 1441(a); and the case must be REMANDED to the 139<sup>th</sup> Judicial District Court of Hidalgo County, Texas pursuant to 28 U.S.C. § 1447(c). Any costs and fees incurred in the removal are taxed against the party incurring same. The Clerk of the Court may close this case upon remand.

SIGNED this 18 day of December, 2013.



ORLANDO L. GARCIA  
UNITED STATES DISTRICT JUDGE

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<sup>3</sup>The Court does not have authority to remand a case to a “stranger” court; it must send the case back to the State court from which it was removed. *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263, 270 (3rd Cir. 2002).