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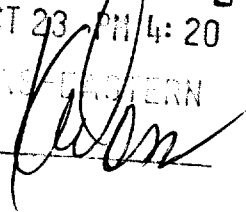
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OCT 23 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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TEXAS - EASTERN

BY 

WALTER SESSION, *et al*,
Plaintiffs

V.

No. 2:03-CV-00354

RICK PERRY, *et. al*

Defendants

**PLAINTIFFS' APPLICATION FOR PRELIMINARY
INJUNCTION, AND BRIEF**

TO THE HONORABLE THREE-JUDGE PANEL OF SAID COURT:

COME NOW Walter Session, Morris Byers and Frenchie Henderson, Plaintiffs in the above captioned and numbered cause and, pursuant to the Article I, Section 4, Clause 1 of the United States Constitution; Title 28 U.S.C. Sections 2201, 2202 and 2284; Title 42 U.S.C. Section 1983 and 1988; and Rules 57 and 65 of the Federal Rules of Civil Procedure; files this their Application for a Preliminary Injunction, and Brief, and in this connection would respectfully show unto the Court as follows:

I.

BACKGROUND

Due to the increase in population reflected by the 2000 federal decennial census, Texas became entitled to an increase of 2 additional congressional seats after the federal reapportionment. On November 14, 2001, a federal three-judge panel of this Court in Balderas v. Texas, No. 6:01CV158 (E.D. Tex.), based upon the continuing "failure of the State [of Texas] to produce a congressional redistricting plan", reluctantly accepted the

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“unwelcome obligation of performing in the legislature’s stead.” Id., Memo. Op. at page 1.¹ The Balderas court, after reviewing the evidence and the parties’ submissions, ultimately fashioned and implemented new Congressional districts based on the 2000 census. Id., Memo Op., pages 4-14.

On October 10th and 12th, 2003, respectively, and near the end of the 3rd Called Special Session of the 78th Texas Legislature, the Texas House of Representatives and Texas Senate passed House Bill 3 (“HB3”), which adopted “Plan 1374C”, to provide new congressional districts for the State of Texas. On October 13, 2003, Defendant Governor Perry signed HB3 into law. As enacted, Plan 1374C separates Plaintiffs from their rural community of interest, submerges them within a congressional district containing 320, 639 suburban voters in Dallas county, and by design effectively terminates Plaintiffs’ political relationship with their present congressman, Jim Turner. The Plaintiffs allege the identified legislative revision of Texas congressional districts, for a second time in less than two years, violates Article I, Section 4, Clause 1 of the United States Constitution. In this connection, Plaintiffs allege the earlier revision of congressional districts by the three-judge court in Balderas, which were fashioned in accordance with “traditional redistricting principles” and law of the State of Texas at the time the Balderas judgment was entered, constituted an exercise of constitutional power under Article I, Section 4, Clause 1 of the United States Constitution which was functionally and legally equivalent to revision of congressional districts by the Texas State Legislature under Article I, Section 4, Clause 1; and, that the revision of congressional districts by the Balderas judgment operated to exhaust all federal

¹ Available online at: <http://gis1.tlc.state.tx.us/static/crtadopt.htm>

constitutional power vested in the Texas Legislature to enact, modify or alter, congressional districts in Texas before the 2010 federal decennial census and federal apportionment.

The ongoing dispute made the basis of Plaintiffs' claims arises in large part from the fact that, while the Balderas court provided a constitutional remedy for the failure of the Texas Legislature to timely enact congressional districts based on the 2000 federal apportionment, it did not expressly state in its final judgment whether the congressional districts it devised would continue in force or remain in effect until after the next federal apportionment based on the 2010 federal decennial census. While this omission has provided the Defendants with (at best) an arguable basis to contend the 78th Texas Legislature retains some sort of federal constitutional power (or "duty") to presently devise congressional districts notwithstanding the Balderas judgment, the Plaintiffs say that under applicable Federal and State law no such power remains.

II.

RELIEF REQUESTED AND CONSIDERATIONS

GOVERNING ISSUANCE OF PRELIMINARY INJUNCTION

In the present application, in accordance with the relief sought by Plaintiffs in their Original Complaint, the Plaintiffs seek a preliminary injunction prohibiting the Defendants, their agents, successors, assigns, or anyone acting in concert with them, from engaging in any actions intended for the purpose, or likely to cause, alteration or modification of the existing congressional districts prior to disposition of the merits of Plaintiffs complaint. The considerations governing the issuance of a preliminary injunction under the decisional law of the United States Court of Appeals for the Fifth Circuit, both generally, and in the context of voting rights claims, provide that the Plaintiffs must demonstrate:

- 1) a substantial likelihood of success on the merits;
- 2) a substantial threat that the Plaintiffs will suffer irreparable injury if the injunction is not granted;
- 3) that the threatened injury to Plaintiffs outweighs the threatened harm the injunction may do to the Defendants; and
- 4) that granting the preliminary injunction will not disserve the public interest.

See Chisom v. Roemer, 853 F.3d 1186, 1188 (5th Cir. 1988). The Plaintiffs would respectfully discuss these considerations separately below.

III.

LIKELIHOOD OF SUCCESS ON THE MERITS

A) Effect of the Final Judgment in Balderas.

Title 2, U.S.C. Section 2a(c)(2), provides that “if there is an increase in the number of [Congressional] Representatives [to which a State becomes entitled after federal apportionment], such additional Representative or Representatives shall be elected from the State at large” until the State “is redistricted in the manner provided *by the law thereof* after any apportionment.” More specifically, Title 2, U.S.C. Section 2c, provides without exception that election for Congressional Representatives (in each State entitled to more than one Representative) shall be by single-member districts “as established by law”.

When enacting Title 2, U.S.C. Sections 2a(c)(2) and 2c, the United States Congress legitimately exercised its constitutional authority retained directly under U.S. Const. Article

I, Section 4, cl.1, to prescribe laws regulating the manner of holding congressional elections.² Under Section 2c, Congress intended for courts, both State and federal (and not merely State legislatures), to be authorized to devise congressional districts when a State legislature has failed or refused to do so.³ Federal law applicable to congressional redistricting⁴ requires that congressional districts be drawn in the manner provided by the law of the forum State, whether drawn by a State legislature or by a federal court.⁵ In this respect, federal redistricting law merely recognizes congressional intent, expressed since the 1st Congress, to permit State law, in certain circumstances, to govern application of federal law in the absence of any conflict between the two. See *e.g.*, Title 42 U.S.C. Section 1988(a)(providing that, where federal law is deficient, enforcement and remedies under civil rights law shall be in conformity with law of the forum State as it may be modified or changed); *see also* C. Wright, Federal Practice, 255-257 (2d ed. 1970)(discussing the Judiciary Act of 1789, which adopted for application in federal court proceedings the judicial procedures of the forum State; and the Conformity Act of 1872, which authorized application in federal courts the judicial procedures of each State in which a case is pending, as they might from time to time thereafter be altered.).

² Branch v. Smith, 538 U.S. ___, 123 S.Ct. 1429, 1438 (2003)(majority opinion)(observing that Congress enacted Section 2a under power reserved to it by U.S. Const. Article I, Section 4, cl.1); *id.*, 123 S.Ct. at 1445 (Opinion per Scalia, J., joined by Rehnquist, C.J., Kennedy and Ginsburg, JJ.)(“the District Court appropriately followed the ‘Regulations’ Congress prescribed in § 2c — ‘Regulations’ that Article I, § 4, cl. 1, of the Constitution expressly permits Congress to make.”).

³ Branch v. Smith, *supra*, 123 S.Ct. at 1441 (majority opinion)(“Section 2c is as readily enforced by courts as it is by state legislatures, and it is just as binding on courts—federal or state---as it is on legislatures.”).

⁴ See Article I, Section 4, Clause 1 of the United States Constitution (which provides for congressional districting by the States “under the law thereof”); Title 2, U.S.C. Section 2a(c)(2)(which authorizes judicial congressional districting in accordance with the policies of each State “in the manner provided by the law thereof”); Title 2, U.S.C. Section 2c (single-member congressional districts shall be “established by law”).

⁵ Branch v. Smith, *supra*, 123 S.Ct. at 1442 (Opinion per Scalia, J., joined by Rehnquist, C.J., Kennedy and Ginsburg, JJ.)(“when a court, state or federal, redistricts... it necessarily does so in the manner provided by *state law*” and “must follow the policies and preferences *of the State*, as expressed in statutory and constitutional provisions” thereof.)(italics added).

With this understanding that: 1) Section 2c is “just as binding” on federal courts as it is on State legislatures; 2) when a federal court devises congressional districts it necessarily does so in the manner provided by State law; and, 3) Congress properly enacted Section 2c under the power reserved to it by U.S. Const. Article I, Section 4, cl.1; it thus becomes clear that congressional districts which are drawn by a federal district court are functionally equivalent, for purposes of Article I, Section 4, Clause 1, to congressional districts drawn by the State Legislatures through the exercise of their constitutionally delegated power under Article I, Section 4, cl.1.

In Balderas v. Texas, supra, the three-judge district court exercised its authority under Sections 2a(c)(2) and 2c, and provided for election of Representatives to Congress from Texas by single-member districts. Accordingly, whatever else may be said about the District Court’s intentions in Balderas, that Court was required to follow, and Plaintiffs say it did properly follow, the “policies and preferences” of the State of Texas as they existed on November 14, 2001, while “performing in the Legislature’s stead”, and when entering its final judgment. Consequently, resolution of the question of whether Article I, Section 4, Clause 1 of the United States Constitution vests the 78th Texas Legislature with “continuing authority” to revise Texas congressional districts after Balderas and before the next decennial census, ultimately depends upon an examination of “the policies and preferences of the State [of Texas], as expressed in [its] statutory and constitutional provisions,” White v. Weiser, 412 U.S. 783, 795 (1973), and the “traditional districting principles” of the State of Texas, as they existed prior to entry of the Balderas judgment. Branch v. Smith, supra, 123 S.Ct. at 1444 (Opinion per Scalia, J., joined by Rehnquist, C.J., Kennedy and Ginsburg, JJ.), *citing* Abrams v. Johnson, 521 U.S. 74, 86 (1997).

B) Texas Constitutional Law and Policy

No Texas Constitution has ever explicitly prescribed either the standards or procedures for drawing congressional districts. Bickerstaff, Reapportionment by State Legislatures: A Guide for the 1980's, 34 SW.L.J. 607, 622 (1980). The Texas Legislature, however, has enacted congressional districts for the State of Texas throughout its history; and over the years, Texas constitutions have explicitly and consistently provided parallel standards and procedures for enactment of State Senate and Representative districts.

Isolation of Texas' "policies and preferences" when enacting congressional districts in the past, as well as its "policies and preferences" for State legislative redistricting, provides the clearest evidence of whether a practice of "interdecennial" redistricting, generally, existed under Texas law when the Balderas judgment was entered. Such a State custom, practice or policy would necessarily have to be shown by the Defendants in order for this Court to conclude that the Balderas court implicitly relied upon it, and when relying on it, intended to rule that the Texas Legislature should thereafter retain authority to revise congressional districts before the next federal decennial census in 2010.

Texas constitutional provisions adopted since 1876 disclose not only that Texas has never either required or authorized State legislative redistricting more frequently than once every 10 years; but also that Texas law and policy, as expressed historically in its successive constitutions, has in fact *affirmatively prohibited* revision of its State legislative districts more than once after each federal decennial census. Article III, Section 28 of the Texas Constitution of 1876, like other State constitutional provisions adopted in the middle and latter part of the 19th century, expressly prohibited enactment of State legislative districts

more than once after each federal decennial census. Article I, Section 28 of the Texas Constitution of 1876 provided in relevant part that:

“The State Legislature shall, at its first session after the publication of each United States decennial census, apportion the State into senatorial and representative districts...and *until the next decennial, when the first apportionment shall be made by the Legislature, the State shall be, and it is hereby divided into senatorial and representative districts* as provided by an ordinance of the convention on that subject.”

8 Gammel’s Laws of Texas, at 788 (1874-1879)(italics added).

Reference to the constitutions of several other States reveals that Tex.Const. Article I, Section 28, as ratified by the People of Texas in 1876, was hardly unique in limiting the constitutional authority of its Legislature to redistrict to only once per decennial. Under similar State constitutional provisions, the Courts of last resort in numerous other States have uniformly held that, while their respective legislatures remain under a “continuing duty” to act after they have failed to timely enact new legislative districts, “*once a valid apportionment law is enacted no future act may be passed by the Legislature until after the next regular apportionment period by the constitution.*”⁶ Applying this analysis, for example,

⁶ Harris v. Shanahan, 387 P.2d 771, 779-80 (Kan. 1963)(Kan.Const.Article X, Section 2)(italics added), *citing* 18 Am. Jur., Elections, § 14, p. 190 (1958); Lanning v. Carpenter, 20 N.Y. 447, 451 (N.Y.1859)(N.Y.Const. of 1846, Article III, Section 5)(“the apportionment and districts so to be made shall remain unaltered until another enumeration shall be taken”); Denny v. Balsler, 42 N.E. 929, 931-33 (Ind. 1896)(Ind.Const. of 1881, Article IV, Sections 4 and 5)(after enumeration, “the apportionment of members of the legislature shall be made at the next ensuing session of the general assembly, and only then”); Harmison v. Ballot Commissioners, 31 S.E. 394, 395 (W.Va. 1898)(W.Va.Const. of 1872, Article VI, Sections 7 and 10)(“We plainly see that both sections contemplate one apportionment and arrangement of districts after each census, not a changing one every session of the legislature.”); People v. Hutchinson, 50 N.E. 599, 601-602 (Ill. 1898)(Ill.Const. of 1870, Article IV, Section 6)(“provisions giving specific directions to make the apportionment at a particular time...manifest an intention to impose a negative upon the exercise of the power at any other time.”); Noecker v. Woods, 102 A. 507, 508-510 (Pa. 1917)(Pa.Const. of 1874, Section 14)(providing for apportionment of judicial districts “at the next succeeding session after each decennial census and not oftener”, construed to require that “districts of the state cannot be changed by the Legislature, session after session, but only at intervals of ten years”); Opinion of the Judges, 246 N.W. 295, 296 (S.D. 1933)(S.D.Const.Article 3, Section 5)(providing that Legislature shall enact legislative districts at “its first regular session” after each federal decennial census “but at no other time”); Herbert v. Bricker, 41 N.E. 2d 377, 383 (Ohio 1942)(Ohio Const. Of 1851, Article XI, Section 10)(referring to text of constitutional provision that states “no change shall ever be made...except as above provided”, and construing provision to mean “districts continue unchanged from decennium to (footnote cont.’d)

the Supreme Court of California has ruled its State constitution limits *congressional* redistricting to a period “immediately after each decennial census and not again thereafter until the next census”.⁷

At least three Texas Attorney General opinions have observed that, as in these other States, once the State of Texas has validly been redistricted, no residual legal authority exists to authorize revision of districts until after the next federal decennial census. See, Op.Tex.Att’y Gen., No. 0-6488 (1945)(Section 28 “means the redistricting of the State is a continuing duty of the Legislature until such time as the State has become redistricted.”); Op.Tex.Att’y Gen., No. 0-4899 (1943)(“*since the Legislature did not apportion the State into senatorial districts at the Regular Session of the Thirty-seventh Legislature it is still authorized and in duty bound to do so at this time.*”)(italics added), *quoting* Tex.Att’y Gen.Op., 1920-1922 Tex.Att’y Gen. Biennial Report (July 18, 1921)(favorably citing rule that “*when a valid apportionment has been made, no new apportionment can be made until the expiration of the prescribed period.*”)(italics added).

Although Article I, Section 28 of the Texas Constitution of 1876 was amended in 1948 in the course of providing for the Texas Legislative Redistricting Board; and, as amended, no longer explicitly contains the requirement that once a valid redistricting statute has been enacted it must remain in force “until the next decennial census”; no intention to

decennium except insofar as the Constitution itself prescribes a change.”); Jones v. Freeman, 146 P.2d 564 (Okla. 1944)(Okla.Const.Article 5, Sections 9(a), 10(b), and 10(c))(“Once a valid law is enacted no further act may be passed by the Legislature until after the next federal decennial census.”); Opinion of the Judges, 47 So.2d 714 (Ala.1950)(Ala.Const. Sections 198 and 200)(“only one apportionment is contemplated during the ten-year period that a given census enumeration is in effect”); Cahill v. Leopold, 103 A.2d 818, 827(Conn. 1954)(Conn.Const.Amend. II of 1828, and Amend. XXXI of 1901)(both amendments providing that “districts shall not be altered...except at any session of the General Assembly next after the completion of a census of the United States”).

⁷Legislature v. Deukmejian, 669 P.2d 17, 22 (Cal. 1983)(Cal.Const. of 1879, Article IV, Section 6).

eliminate that frequency restriction, on the part of either the Texas Legislature or the electorate that approved amended Section 28, is apparent. Introduced during the Regular Session of the 50th Texas Legislature, the preamble to S.J.R. 2 simply expressed an intent to:

“[P]ropos[e] an amendment to Section 28 of Article III of the Constitution of the State of Texas, so as to provide for a Board for apportioning the state into senatorial districts and representatives districts in the event the Legislature fails to make such apportionment; providing for the issuance of the necessary proclamation by the Governor; and making an appropriation.”⁸

S.J.R. 2 was presented to Texas voters on Tuesday, November 2, 1948, was adopted by an overwhelming vote of 528, 158 “for”, and 153, 704 “against”, and became effective on January 1, 1951. As provided by Section 2 of S.J.R. 2, two clauses were printed on the ballot for voter consideration: one clause indicating a vote “for” the amendment, and another clause indicating “against”. Both clauses on the ballot were otherwise identical, and directed voters to “mark out one of such clauses on the ballot, [and] leav[e] the clause expressing his vote”, either “for” or “against”, in relation to:

“the amendment to Section 28, Article III of the Constitution of Texas providing for a Board for apportionment of the state into senatorial districts and representatives districts in the event the Legislature fails to make such apportionment.”

The total absence of any mention of an intent to repeal the decennial redistricting restriction under former Section 28, either in the preamble or caption of S.J.R. 2, in the “bill file” for S.J.R. 2, on the ballot, or elsewhere, weighs heavily against any suggestion that the People of Texas voted informatively and intentionally on November 2, 1948, to repeal that restriction. While the publication of official analyses of Senate Joint Resolutions, and

⁸ The “Bill file” for S.J.R. 2, consisting of eight legal sized pages, is available for review at the Texas State Library and Archives Commission, at Austin, Texas.

information disseminated by local newspapers or “voter information entities”, have been considered probative evidence of voter intent when interpreting constitutional amendments under Texas law, Studer v. State, 799 S.W.2d 263, 268 (Tex.Crim.App.1990); as already noted in this memorandum, *ante* at page 10 n. 8, the “bill file” for S.J.R. 2 contains only eight pages of information, none of which suggest any legislative intent to repeal former Section 28’s redistricting frequency restriction.

Similarly, examination of information disseminated by local Texas newspapers immediately prior to voter approval of amended Section 28 on November 2, 1948, reinforces the conclusion that the amendment to Section 28 was merely intended to compel timely decennial adjustment of electoral districts to recognize shifts in population and growth.⁹ There is also some indication, however, that voters were informed the amendment was intended only to “add to” the existing mandates and restrictions in former Section 28.¹⁰

Finally, case law that has developed in this area uniformly holds it is only in the “absence of restrictive *or* mandatory provisions in the Constitution as to the time when and how often the legislature may make a representative apportionment, [that] the legislature may, in its discretion, make apportionments as often as it wills.” American Jurisprudence, *supra*, at 190 (italics added). In this connection, because present Section 28, as amended, retains a “mandatory” provision (“The Legislature *shall* [apportion] at its first regular session

⁹ Editor, *Chance to Equalize Representation*, Fort Worth Star-Telegram, October 17, 1948, at 10 (editorial endorsement of proposed amendment “[b]ecause succeeding Texas legislatures for the last 27 years have ignored a plain provision of the State Constitution.”) (available on microfilm at Fort Worth Central Public Library).

¹⁰ Kinch, *Texas Constitutional Amendments Should Not Be Overlooked by Voters*, Fort Worth Star-Telegram, October 28, 1948, at 33 (evening edition)(stating that S.J.R. 2 “would amend Section 28...*by adding to the requirement for redistricting.*”)(italics added); Mayer, *Automatic Redistricting Goes Before Texas Voters Nov. 2*, Austin Statesman, October 19, 1948 (observing “the [Texas] Constitution presently requires the Legislature to redistrict once every 10 years...”, but that after adoption of the proposed amendment “[i]f the Legislature fails to redistrict in 1951, (and 1961, 1971, etc.) a special board will...redistrict”)(available on microfilm at the Dallas Central Public Library).

after the publication of each United States decennial census”), it continues to manifest, independent of former Section 28, “an intention to impose a negative upon the exercise of the power at any other time.” People v. Hutchinson, supra, 50 N.E. at 602.

IV.

IRREPARABLE INJURY TO PLAINTIFFS

The Fifth Circuit Court of Appeals has adopted the reasoning of legal commentators who suggest that it is “only when the threatened harm [to Plaintiffs] would impair the court’s ability to grant an effective remedy is there really a need for preliminary relief.” Chisom v. Roemer, supra, 853 F.2d at 1189, *quoting* Wright & Miller, Federal Civil Procedure, Section 2948 ay 431-34 (1973)(ellipses added). In this connection, the Plaintiffs allege that as taxpayers and residents of the State of Texas, and in the absence of a preliminary injunction as requested by Plaintiffs, the Plaintiffs will be irreparably harmed by the unnecessary expenditure of hundreds of thousands if not millions of tax dollars, incurred in preparation for an election under the invalid congressional districts enacted by Defendants, including but not limited to the costs of the printing and dissemination of invalid congressional district maps, ballots, election information and materials, all expended to finance the Defendants’ unlawful and relentless pursuit to implement new, politically partisan, congressional districts before the 2010 federal census and federal apportionment.

Additionally, the Plaintiffs contend that in the absence of a preliminary injunction, it is apparent that widespread confusion among both voters and prospective congressional candidates will result. Under Texas statutory law, congressional candidates must be nominated by primary election, Tex.Elec.Code, Section 172.001. Presently, the period to file an application for a place on the primary ballot for election to the United State House of

Representatives begins on December 3, 2003. *Id.*, Section 172.023(a). Under Article III, Section 39 of the Texas Constitution, the statutory revision of congressional districts by Defendants during the Third Called Special Session of the Texas Legislature may not legally “take effect or go into force until ninety days after adjournment of the session at which it was enacted”. The Third Called Special Session of the 78th Texas Legislature, during which HB3 was enacted, adjourned *sine die* on October 12, 2003. Accordingly, HB3 will not become effective earlier than Saturday, January 10, 2004 (39 days after the existing filing period has commenced on December 3, 2003, and 8 days after the existing 30 day filing period has ended). The result of all this, and particularly in light of the enactment of H.B. 1, which modified the filing period for congressional races in Texas, is that during the next election cycle congressional candidates will be confronted with two different filing periods under two different congressional district plans: one under the Balderas districts from December 3, 2003, until January 2, 2003; and another under HB3 *beginning* 90 days after the Third Called Special Session adjourns (January 10, 2004), and ending six days later at 6:00 p.m. on January 16, 2004. *See* Texas Elections Code, Section 172.023(a), *as amended by* H.B.1, Section 6, 78th Leg., 3rd Called Session.

The Plaintiffs have no adequate remedy at law to recover the public funds to be unlawfully expended by Defendants as described above. The Plaintiffs say such public funds, which will be irretrievably lost, would otherwise be expended to advance lawful, legitimate, necessary and proper State objectives to the benefit of Plaintiffs and others similarly situated. The Plaintiffs reasonably anticipate the Defendants will carelessly and with deliberate indifference continue to waste public funds, having wasted an estimated 5.1 million dollars

thus far, to advance their unlawful partisan purposes (as alleged more specifically in Plaintiffs' Original Complaint), unless restrained and enjoined by this Court from doing so.

Nor do the Plaintiffs have an adequate remedy at law to prevent the unlawful disruption of the constitutionally mandated congressional election process under the valid congressional district lines fashioned by the Balderas court, or the attendant confusion among voters and prospective congressional candidates. The Plaintiffs say the actions of Defendants Perry, Craddick, Dewhurst, and Connor, unless prohibited by the preliminary injunction requested, will result in widespread confusion among both voters and prospective congressional candidates, and will thereby directly and irreparably prejudice both the Plaintiffs' constitutionally protected reasonable expectations of (and legitimate interests in) repose, stability and continuity in the organization of the federal electoral system, not to mention the Plaintiffs' constitutionally protected interests in effective representation in the United States Congress without distraction or interference caused by the Defendants.

V.

BALANCE OF THREATENED HARM OR INJURY

TO PLAINTIFFS AND DEFENDANTS

The Plaintiffs allege, and the Defendants cannot dispute, that no legitimate governmental objective exists to justify the actions of the Defendants, as a revision of the current congressional districts by the Texas Legislature is not supported by any meaningful shift in population or intervening change in law since entry of the final judgment in Balderas that could warrant implementation of new or different congressional district lines.

VI.

PUBLIC INTERESTS

The fourth “public interest” component of the tetrad test for issuance of a preliminary injunction “primarily addresses impact on non-parties rather than parties.” Bernhardt v. Los Angeles County, 339 F.3d 920, 93-932 (9th Cir. 2003), *quoting* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). The Defendants, in legislative debate and in the public media, have asserted they are seeking to merely advance the political preferences and interests of the People of the State of Texas *at large* when enacting new congressional districts. The Plaintiffs submit that: 1) the relevant “public interest” to be considered *is not* the interests of the State of Texas *at large*, but rather the public interests of the People of the United States who reside, respectively, in the single member districts within the State of Texas established by the final judgment in Balderas; and that 2) in relation to the relevant public interests of the communities appropriately so defined, these relevant “public interests” actually weigh in favor of the preliminary injunction the Plaintiffs request.

Assuming *arguendo* that a majority of the members of the Texas Legislature actually do represent the will of a majority of the People of the State of Texas; the Plaintiffs say that Article I, Section 4, Clause 1 of the Constitution of the United States *does not* recognize the public interest of the People of the State of Texas “at large” to be the relevant “public interest” intended to be represented in the United States Congress. To the contrary, as explained by James Madison at the Constitutional Convention on August 9, 1787, while in debate on what later was adopted as U.S.Const. art. I, Sec.4, Clause 1:

“The necessity of the General Assembly [U.S. Congress] supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the People and not the Legislatures of the States, supposes that the result will be influenced by the mode. This view of the question seems to decide that the Legislatures of the States ought not to have the uncontroled right of regulating the times, places and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce; should assemble at this place or that place; should be divided into districts or all meet at one place; should all vote for representatives or all in a district vote for a number allotted to the district; these and many other points would depend on the Legislatures, and might materially affect the appointments. *Whenever the Legislature had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed...*It seemed as improper in principle...to give to the Legislatures this great authority over the election of the Representatives of the People in the General Legislature, as it would be to give to the latter a like power over election of their Representatives in the State Legislatures.”

2 The Records of the Federal Constitution of 1787, at 241 (M. Farrand ed. 1911)(italics added).

Apart from the disservice inhering in the unnecessary expenditure of public funds to implement an invalid congressional redistricting statute, another relevant public interest will be disserved by denial of the preliminary injunction sought by Plaintiffs. As eloquently stated by Republican Congressman Edward Derwinski of Illinios when offering a legislative amendment later enacted as 13 U.S.C. Section 141(e)(2)(providing that “[i]nformation obtained in any mid-decade census shall not be used ... in prescribing congressional districts.”):

“It is bad politics, resulting in bad government, to promote the continual shifting and drifting of congressional district lines. I urge adoption of the amendment and, with that adoption, the passage of this mid-decade census legislation...We feel—and I think all Members of the House will share this view—that where we would have redistricting more than once every 10 years, we create political complications for the citizenry, we produce tugs-of-war that are not conducive to good government, and we produce an instability in the House of Representatives.”

122 Cong.Rec. 9796 (April 7, 1976).

It is undisputed that over 90% of the several thousand members of the general public that appeared before House and Senate committee hearings during the 78th Texas Legislature emphatically expressed their opposition to revision of their respective congressional districts in any manner. The Plaintiffs submit that the 78th Texas Legislatures' consideration of the relevant public interests of the People of the United States who reside, respectively, in the single member districts within the State of Texas as established by the final judgment in Balderas, is so attenuated that any claim by Defendants that a relevant "public interest" would be disserved by granting Plaintiffs application for preliminary injunction should "be accorded only limited", if any, "solicitude" by this Court. Graves v. Barnes, 446 F.Supp. 560, 564 (E.D.Tex.1972).

VII.

BOND REQUIREMENT

Although Fed.R.Civ.P. 65(c) generally requires the grant of a temporary restraining order or preliminary injunction be conditioned upon the giving of security by the applicant, the amount of security required, if any, is a matter for the discretion of the District Court. Corrigan Dispatch Co. v. Casa Guzman, S.A., 569 F.2d 300, 303 (5th Cir. 1978)(per curium). The Plaintiffs respectfully submit that where, as here, the equitable relief sought is for the purpose of enforcing a fundamental constitutional right; and imposition of any bond requirement would, as in the present case, impose an undue hardship on Plaintiffs and egregiously interfere with remedial federal legislation enacted to protect such rights; no bond requirement should be required. Crowley v. Local No. 82, Furniture & Piano, 679 F.2d 978, 1000 (1st Cir.1982)(following line of decisions wherein "no bond is required in suits to enforce important federal rights or 'public interests'.")(citing authorities), *rev.'d on other*

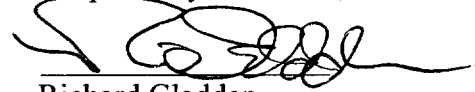
grounds, 467 U.S. 526 (1984); *cf.*, Terrazas v. Slagle, 821 F.Supp. 1154, 1162 (W.D.Tex.1992)(requiring only \$500.00 bond as condition of preliminary injunction in congressional redistricting case).

PRAYER

Based on the evidence and claims presented by Plaintiffs, the Plaintiffs respectfully move the Court to issue a preliminary injunction, without bond, to expire not earlier than disposition of Plaintiffs' claims on the merits contained in their Original Complaint, that will prohibit the Defendants, their agents, successors, assigns, or anyone acting in concert with them, from engaging in any actions, and from taking any steps, intended for the purpose, or likely to cause, the election of congressional representatives from congressional districts other than those presently in effect in the State of Texas as the result of the final judgment issued by the three-judge federal district court in Balderas v. Texas, No. 6:01CV158 (E.D. Tex.)(November 14, 2001).

John S. Ament III
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P.O. Box 751
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903/586-3561
Of Counsel for Plaintiffs

Respectfully submitted,



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Counsel-in-Charge for Plaintiffs

THE STATE OF TEXAS

COUNTY OF DENTON

AFFIDAVIT


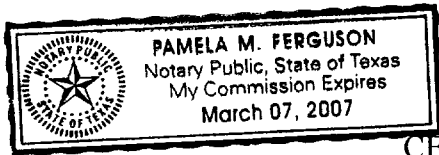
On this day personally appeared before me, the undersigned authority, Richard Gladden, who, having duly been sworn, did depose and state upon his oath as follows:

“My name is Richard Gladden. I have read the foregoing document entitled ‘Plaintiffs’ Application for Preliminary Injunction, and Brief’. I am personally familiar with the facts stated in said document, and I hereby state upon my oath that all facts stated in the said document are true and correct.”



Richard Gladden

SIGNED AND SWORN TO BEFORE ME, the undersigned authority, on this 22nd day of October, 2003.



Notary Public in and for the
State of Texas

CERTIFICATE OF CONFERENCE
&
CERTIFICATE OF SERVICE

I, Richard Gladden, hereby certify that on October 22, 2003, I conferred by telephone with Mr. Ed Burbach, a Deputy Texas Attorney General with the Office of the Attorney of Record for Defendants, Greg Abbott, and that after conferring with Mr. Burbach, I was informed that the Defendants do oppose this Application for Preliminary Injunction. I further certify that I have delivered a true and correct copy of the foregoing document, along with a copy of Plaintiffs’ proposed order, on Defendants Rick Perry, Tom Craddick, David Dewhurst and Geoffrey S. Connor, by service on their Attorney of Record, the Attorney General of the State of Texas, Greg Abbott, by both facsimile transmission (to 512/474-2697) and by U.S. mail, certified receipt requested (to P.O. Box 12548, Austin, Texas 78711-2548), on this 22nd day of October, 2003.



Richard Gladden

COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION; *et al*

Plaintiffs

V.

No. 2:03-CV-00354 - TJW

1) RICK PERRY, in his Official Capacity
as Governor of the State of Texas; *et al*

Defendants

**ORDER GRANTING PRELIMINARY
INJUNCTION**

On this day came on to be considered in the above captioned and numbered cause the Application of Plaintiffs for a Preliminary Injunction. The Court, sitting as a three-judge court pursuant to 28 U.S.C. 2284, after carefully considering the Plaintiffs' Application, the claims and evidence presented by at a hearing on said pleading, and the argument of counsel for the Plaintiffs and the Defendants; is of the opinion that the Plaintiffs are entitled to the relief they have requested in their Application. Specifically, the Court finds 1) that Plaintiffs have presented a substantial likelihood of success on the merits of their claims; 2) that a substantial threat exists that the Plaintiffs will suffer irreparable injury if a preliminary injunction is not granted; 3) that the threatened injury to Plaintiffs outweighs the threatened harm the injunction may do to the Defendants; and 4) that granting the preliminary injunction will not disserve the public interest.

Accordingly, it is hereby ORDERED that the Defendants, Rick Perry, Tom Craddick, David Dewhurst and Geoffrey S. Connor, in their official capacities, along with their agents,

successors, assigns, are hereby preliminarily enjoined and prohibited from engaging in any actions and from taking any steps intended for the purpose, or likely to cause, revision of the congressional districts presently in effect in the State of Texas as the result of the final judgment issued by the three-judge federal district court in Balderas v. Texas, No. 6:01CV158 (E.D. Tex.)(November 14, 2001).

It is further ORDERED that no security shall be required from Plaintiffs to effectuate this Order.

This Order shall remain in force until the final hearing, determination and disposition of the merits of Plaintiffs' claims as alleged in Plaintiffs' Original Complaint, unless withdrawn or vacated by further Order of this Court.

IT IS SO ORDERED.

SIGNED this ____ day of _____, 2003.

United States Circuit Judge

United States District Judge

United States District Judge