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COUNTY OF KERN, *ET AL.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR LUNA, *et al.*,
Plaintiffs,

vs.

COUNTY OF KERN, *et al.*,
Defendants.

Case #1:16-cv-00568-DAD-JLT

**DEFENDANTS' ANSWER TO
COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF
[DKT. #1]**

JUDGE: Hon. Dale A. Drozd
COURTROOM: 5

Defendants KERN COUNTY, the KERN COUNTY BOARD OF SUPERVISORS, MICK GLEASON, ZACK SCRIVNER, MIKE MAGGARD, DAVID COUCH, LETICIA PEREZ, JOHN NILON and MARY B. BEDARD (jointly “Defendants”), by and through their undersigned attorneys, hereby assert defenses to the complaint of Plaintiffs OSCAR LUNA, ALICIA PUENTES, DOROTHY VELASQUEZ, AND GARY RODRIGUEZ (jointly “Plaintiffs”), dated April 22, 2016, and answer each numbered paragraph as follows. Except as expressly admitted all allegations in the Complaint are denied.

ANSWER TO “INTRODUCTION”

1. The allegations set forth in Paragraph 1 of Plaintiffs’ Complaint constitute characterizations of Plaintiffs’ action and claims for relief to which no response is required. To the extent that an answer is required, Defendants deny each and every allegation, especially but not limited to, the allegations that: Kern County’s 2011 supervisorial redistricting plan “unlawfully discriminates” against Latinos in violation of the federal Voting Rights Act; that the right to vote of Latino citizens in Kern County has been “abridged on the basis of race and national origin”; and that the County’s redistricting plan “denies Latino voters an equal opportunity to elect candidates of their choice.”

2. Defendants admit: that Latinos constitute nearly half the total population of Kern County (approximately 49%); that Latinos comprise more than half the citizen voting age population in District 5; that Latinos do not comprise more than half the citizen voting age population in any other supervisorial district; and that Latinos do not constitute a majority of citizen voting age population in either of the supervisorial districts in the northern part of Kern County. Defendants deny the implicit allegation contained in the second sentence of Paragraph 2, that the Latino population is sufficiently numerous and geographically compact to make it possible to draw an equipopulous districting plan, which respects traditional redistricting criteria, that contains a second majority Latino CVAP district in the northern part of Kern County. As for the allegation that Latinos in the northern part of Kern County are “politically cohesive,” Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of that allegation, and

1 therefore deny it. Except as expressly admitted herein, all allegations in Paragraph 2 are
2 denied.

3 3. The allegations set forth in Paragraph 3 of Plaintiffs' Complaint constitute
4 characterizations of Plaintiffs' action and claims for relief to which no response is required.
5 To the extent that an answer is required, Defendants deny each and every allegation.

6 **ANSWER TO "JURISDICTION AND VENUE"**

7 4. Defendants admit that Plaintiffs' claims present a question of federal law
8 within the meaning of 28 U.S.C. § 1331 and 1343, and that jurisdiction in this Court is
9 therefore appropriate. Regarding the second sentence of Paragraph 4, the allegations set
10 forth therein constitute characterizations of Plaintiffs' action and claims for relief to which
11 no response is required, but Defendants admit that 52 U.S.C. § 10310(e) provides that "In
12 any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth
13 amendment the court, in its discretion, may allow the prevailing party, other than the United
14 States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation
15 expenses as part of the costs" and that the award of certain litigation costs to a prevailing
16 party are authorized by 28 U.S.C. § 1920, in the sound discretion of the Court. Except as
17 expressly admitted herein, all allegations in Paragraph 4 are denied.

18 5. Defendants admit that venue is proper in this Court.

19 **ANSWER TO "PARTIES"**

20 **Answer to "Plaintiffs"**

21 6. Defendants are without knowledge or information sufficient to form a belief
22 as to the truth or falsity of the allegations in Paragraph 6, and therefore deny those
23 allegations.

24 7. Defendants are without knowledge or information sufficient to form a belief
25 as to the truth or falsity of the allegations in Paragraph 7, and therefore deny those
26 allegations.

27 8. Defendants are without knowledge or information sufficient to form a belief
28 as to the truth or falsity of the allegations in Paragraph 8, and therefore deny those

1 allegations.

2 9. Defendants are without knowledge or information sufficient to form a belief
3 as to the truth or falsity of the allegations in Paragraph 9, and therefore deny those
4 allegations.

5 10. Defendants are without knowledge or information sufficient to form a belief
6 as to the truth or falsity of the allegations in Paragraph 10, and therefore deny those
7 allegations.

8 **Answer to “Defendants”**

9 11. Defendants admit the allegations of Paragraph 11.

10 12. Defendants admit the allegations of Paragraph 12.

11 13. Defendants admit the allegations of Paragraph 13.

12 14. Defendants admit the allegations of Paragraph 14.

13 15. Defendants admit the allegations of Paragraph 15.

14 **ANSWER TO “FACTUAL ALLEGATIONS”**

15 **Answer to “Demographics and Population of Kern County”**

16 16. Defendants admit that, according to the 2010 Census, Kern County did have a
17 population of 839,631, and that based on 2010 Census data, the percentages of Latinos,
18 Asians, and African Americans identified by that Paragraph are approximately accurate.
19 Defendants further admit that the 2000 Census indicated that Kern County had a total
20 population of 661,645 persons, of whom 254,036 (*i.e.*, approximately 38.4%) were of
21 Hispanic/Latino origin. Except as expressly admitted herein, all allegations in Paragraph 16
22 are denied.

23 17. Defendants admit that, according to the U.S. Census Bureau’s American
24 Community Survey (“ACS”) 1-year estimate for 2010, Kern County had a total citizen
25 voting age population of 476,399, of whom 161,300 (*i.e.*, approximately 33.9%) were
26 identified as being of Hispanic/Latino origin. However, Defendants allege that these figures
27 are merely estimates and are unreliable for purposes of redistricting. The American
28 Community Survey is not a full count of the population, like the decennial Census, but is

1 merely a sample of the population. Accordingly, ACS data come with substantial margins
2 of error, and the one-year ACS estimates have the largest margins of error. As for
3 Plaintiffs' allegation regarding Latinos comprised 25% of the citizen voting age population
4 "ten years earlier," Defendants are without knowledge or information sufficient to form a
5 belief as to the truth or falsity of the allegation, and therefore deny it. Except as expressly
6 admitted herein, all allegations in Paragraph 17 are denied.

7 18. Defendants admit that Kern County is divided into five supervisorial districts.
8 Defendants deny that Kern County's Latino residents are severely underrepresented on the
9 Board of Supervisors. Defendants admit that Leticia Perez currently represents District 5
10 and that she is Latina. Defendants also admit that prior representatives of District 5 in the
11 last two decades include Pete Parra and Michael Rubio, who are Latino. However,
12 Defendants allege that that Steve Perez was reelected to the Board of Supervisors from
13 District 2 in 1998, having initially been elected from that District in 1994, and that Mr.
14 Perez was Latino. Except as expressly admitted herein, all allegations in Paragraph 17 are
15 denied.

16 **Answer to "The 2011 Redistricting Plan"**

17 19. The allegations set forth in Paragraph 19 constitute conclusions of law to
18 which no response is required. However, Defendants admit that California Elections Code
19 § 21500 may require the County to readjust its supervisorial districts after the federal
20 decennial Census, in the year following the Census's release. Except as expressly admitted
21 herein, all allegations in Paragraph 19 are denied.

22 20. Defendants admit that the Board of Supervisors held three formal, duly-
23 noticed "public hearings" on supervisorial redistricting in 2011, in July and August.
24 However, Defendants also allege that during May and June of that year the County
25 Administrative Office conducted 20 public workshops in 17 communities to gather public
26 input on redistricting. Attendance at the public workshops totaled approximately 110
27 persons.

28 21. Defendants deny that MALDEF's National Redistricting Coordinator, Steven

Ochoa, is a “community member” in Kern County or that the map submitted to the Board of Supervisors by Mr. Ochoa in 2011 was either equipopulous or geographically compact. Defendants allege that at the time of the 2010 Census, Kern County was home to 29,524 inmates of state and federal prisons, who are not eligible to vote, and that following the advice of the California Attorney General, *see* 74 Ops. Cal. Att’y Gen. 162 (1991), Kern County excluded those prisoners from the total population base for evaluating equal population. The map submitted by MALDEF’s National Redistricting Coordinator, however, failed to exclude these prisoners from its population base, and once those prisoners are excluded, the total deviation of the MALDEF map exceeds 10%, making it presumptively unconstitutional. With respect to the allegation of “geographical compactness,” Defendants further allege that MALDEF’s proposed District 3 takes in the rural northwestern quadrant of the County, including Shafter, Delano, Wasco and McFarland, but then—lacking sufficient population even under MALDEF’s unadjusted numbers—it appends a “tail” to the District that meanders south and east, skirting around northwest Bakersfield to pick up additional, more urban territory in northeast Bakersfield. Defendants deny that Latino eligible voters are sufficiently numerous and geographically compact to comprise a majority in two supervisorial districts in an equipopulous, geographically compact supervisorial district plan in Kern County. Except as expressly admitted herein, all allegations in Paragraph 21 are denied.

22. Defendants admit that the Latino population grew in Kern County during the two decades prior to the filing of the Complaint, though Plaintiffs’ characterization of that growth as “dramatic” is merely rhetoric and a matter of opinion, and therefore does not require a response. To the extent a response is required, Defendants deny that the growth was “dramatic.” Defendants deny that there is “demonstrable ability to add a second Latino CVAP majority district”—at least one that complies with the requirement that the Latino community be geographically compact and comply with traditional districting criteria, including the requirement of equal population. Defendants admit that in the plan adopted by the Board of Supervisors in 2011, District 5 was the only district in which Latinos

1 comprised a majority of the citizen voting age population. Defendants deny that the Board
2 of Supervisors' adopted plan "fractured a large and geographically compact Latino
3 community of eligible voters between District 1 and 4," or that the Latino population
4 alleged to have been so "fractured" was sufficiently numerous as to constitute a majority of
5 the citizen voting age population in a single, equipopulous supervisorial district, as required
6 by *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Bartlett v. Strickland*, 556 U.S. 1 (2009).
7 Except as expressly admitted herein, all allegations in Paragraph 21 are denied.

8 23. Defendants admit the allegations of Paragraph 23.

9 24. The allegations set forth in Paragraph 24 constitute conclusions of law to
10 which no response is required. However, to the extent that an answer is required,
11 Defendants deny each and every allegation contained within that Paragraph.

12 **Answer to "Racially Polarized Voting in Kern County"**

13 25. Defendants deny the allegations of the first sentence of Paragraph 25. The
14 second sentence of Paragraph 25 is a conclusion of law, which requires no answer; to the
15 extent that an answer is required, Defendants deny each and every allegation, and
16 Defendants specifically deny that Plaintiffs have correctly described what constitutes
17 "racially polarized voting" within the meaning of applicable case law under Section 2. With
18 respect to the allegations of the third sentence, Defendants deny that polarized voting
19 occurs in Kern County elections, and further denies that a mere "difference in the
20 candidates that are preferred by Latino voters and the candidates that are preferred by non-
21 Latino voters" sufficiently establishes legally significant "polarized voting" within the
22 meaning of applicable case law under Section 2.

23 26. Defendants deny that political cohesion, within the meaning of applicable
24 case law under Section 2, is per se "manifested by the higher rates at which Latino voters
25 express their preference for Latino candidates in racially contested elections." Defendants
26 are without knowledge or information sufficient to form a belief as to the truth or falsity of
27 the allegation that Latino voters in Kern County are politically cohesive, and therefore deny
28 the allegation. Except as expressly admitted herein, all allegations in Paragraph 26 are

1 denied.

2 27. Defendants are without knowledge or information sufficient to form a belief
3 as to the truth or falsity of the allegations in Paragraph 27, especially insofar as Plaintiffs
4 have not specified the candidates or elections of which they speak, and therefore deny the
5 allegations.

6 28. Defendants are without knowledge or information sufficient to form a belief
7 as to the truth or falsity of the allegations in Paragraph 28, especially insofar as Plaintiffs
8 have not specified the candidates or elections of which they speak, and therefore deny the
9 allegations.

10 29. Defendants are without knowledge or information sufficient to form a belief
11 as to the truth or falsity of the allegations in Paragraph 29, especially insofar as Plaintiffs
12 have not specified the candidates or elections of which they speak, and therefore deny the
13 allegations. Defendants affirmatively allege, on information and belief, that Latino voters
14 have elected candidates of their choice in which Latinos do not constitute a majority of the
15 CVAP. Insofar as Paragraph 29 contains an implicit allegation that District 5 was a Latino
16 majority CVAP district when Pete Parra was elected in 1996 and 2000 and when Michael
17 Rubio was elected in 2004 and 2008, Defendants are without knowledge or information
18 sufficient to form a belief as to the truth or falsity of that implicit allegation, and therefore
19 deny it as well. Except as expressly admitted herein, all allegations in Paragraph 29 are
20 denied.

21 30. Defendants admit that: Pete Parra was elected to the Board of Supervisors
22 from District 5 in 1996 and 2000; Michael Rubio was elected to the Board of Supervisors
23 from District 5 in 2004 and 2008; that Leticia Perez was elected to the Board of
24 Supervisors in 2012 and 2016; that Parra, Rubio and Perez are Latino/a; that District 5 was
25 a majority Latino citizen voting age population district as adopted by the Board of
26 Supervisors in 2011; and that none of the other 2011 supervisorial districts are majority
27 Latino citizen voting age population. Insofar as Paragraph 29 contains an implicit allegation
28 that District 5 was a Latino majority CVAP district when Pete Parra was elected in 1996

1 and 2000 and when Michael Rubio was elected in 2004 and 2008, Defendants are without
2 knowledge or information sufficient to form a belief as to the truth or falsity of that implicit
3 allegation, and therefore deny it as well. Except as expressly admitted herein, all allegations
4 in Paragraph 30 are denied.

5 **Answer to “History and Effects of Discrimination in Kern County”**

6 31. Defendants deny the allegations of Paragraph 31.

7 32. Defendants deny that there is currently, or has in recent history been, any
8 official voting-related discrimination against Latinos in Kern County. Inasmuch as
9 Plaintiffs do not provide any specific factual support for this allegation or indicate what
10 time period their allegations that “historically” there has been such discrimination is meant
11 to include, Defendants are without knowledge or information sufficient to form a belief as
12 to the truth or falsity of that allegation, and therefore deny it as well. Defendants further
13 deny that any “historical” official voting-related discrimination presently manifests itself in
14 a lack of equal opportunity by Latino voters in Kern County to elect representatives of their
15 choice. Except as expressly admitted herein, all allegations in Paragraph 32 are denied.

16 33. Inasmuch as Plaintiffs do not provide any specific factual support for the
17 allegations in the first sentence of Paragraph 33, Defendants are without knowledge or
18 information sufficient to form a belief as to the truth or falsity of those allegations, and
19 therefore deny them. Defendants further deny that Latino voters in Kern County lack the
20 ability to participate effectively in the political process. Except as expressly admitted
21 herein, all allegations in Paragraph 33 are denied.

22 34. Defendants deny that “[n]o Latino candidate has won a supervisorial contest
23 outside of the only Latino CVAP majority district – District 5 – in the past two decades.”
24 Defendants allege that Steve Perez was reelected to the Board of Supervisors from District
25 2 in 1998, having initially been elected from that District in 1994. Defendants further allege
26 that Mr. Perez “won” the primary for District 2 in 2010 (seeking to reclaim the seat he had
27 voluntarily vacated in 2002), by placing in the top two vote-getters at that 2010 primary and
28 advancing to the general election (where he was narrowly defeated by Zack Scrivner, 50%

1 to 49.39%). Insofar as Paragraph 34 contains an implicit allegation that District 5 was a
2 Latino majority CVAP district when Pete Parra was elected in 1996 and 2000 and when
3 Michael Rubio was elected in 2004 and 2008, Defendants are without knowledge or
4 information sufficient to form a belief as to the truth or falsity of that implicit allegation,
5 and therefore deny it. Defendants are without knowledge or information sufficient to form a
6 belief as to the truth or falsity of that implicit allegation, and therefore deny it as well.
7 Except as expressly admitted herein, all allegations in Paragraph 34 are denied.

8 35. Defendants deny that there is currently, or has in recent history been, a lack of
9 responsiveness on the part of County Supervisors to the particularized needs of the Latino
10 residents of Kern County. Inasmuch as Plaintiffs do not provide any specific factual
11 support for this allegation or indicate what time period their allegations that “historically”
12 there has been a lack of responsiveness is intended to include, Defendants are without
13 knowledge or information sufficient to form a belief as to the truth or falsity of that
14 allegation, and therefore deny it as well. Defendants further deny that any “historical” lack
15 of responsiveness presently manifests itself in a lack of equal opportunity by Latino voters
16 in Kern County to elect representatives of their choice. Except as expressly admitted herein,
17 all allegations in Paragraph 35 are denied.

18 36. Defendants deny that the policies underlying the redistricting plan adopted in
19 2011 are tenuous, or that the map failed to “fairly reflect[] the Latino population growth
20 during the prior decade.” Except as expressly admitted herein, all allegations in Paragraph
21 36 are denied.

22 **ANSWER TO “FIRST CAUSE OF ACTION**

23 **“VIOLATION OF SECTION 2 [OF] THE VOTING RIGHTS ACT OF 1965”**

24 37. Defendants incorporate and reassert their responses to all the preceding
25 Paragraphs as if fully set forth herein.

26 38. Defendants admit that Section 2 of the federal Voting Rights Act, now
27 codified at 52 U.S.C. § 10301, is applicable to Kern County.

28 39. Defendants deny the allegations of Paragraph 39.

1 40. Defendants deny the allegations of Paragraph 40.

2 41. The allegations set forth in Paragraph 41 constitute conclusions of law to
3 which no response is required. However, to the extent that an answer is required,
4 Defendants deny each and every allegation contained within that Paragraph.

5 **ANSWER TO “PRAYER FOR RELIEF”**

6 42. The remainder of the Complaint, including the WHEREFORE clause and the
7 five numbered paragraphs that follow it, contain Plaintiffs’ requests for relief to which no
8 responsive pleading is required. To the extent that any response to those portions of the
9 Complaint is deemed to be required, Defendants deny all of the allegations set forth therein
10 and deny that the Plaintiffs are entitled to any of the relief requested, or to any other forms
11 of relief whatsoever.

12 **DEFENDANTS’ AFFIRMATIVE DEFENSES**

13 For Defendants’ separate and additional affirmative defenses to the cause of action
14 alleged in the Complaint, and without admitting that Defendants have the burden of proof
15 on any of these defenses, Defendants allege as follows:

16 **First Affirmative Defense**

17 **(Failure to State a Cause of Action)**

18 1. The Complaint fails to allege facts sufficient to state a claim for relief.

19 **Second Affirmative Defense**

20 **(Undue Vagueness of Allegations)**

21 2. The Complaint lacks sufficient factual basis to state a claim under the
22 pleading standards required by Federal Rule of Civil Procedure 8. *See Ashcroft v. Iqbal*,
23 556 U.S. 662 (2009) (“*Iqbal*”); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007)
24 (“*Twombly*”); *Lopez v. Merced County*, 2007 U.S. Dist. LEXIS 44426, *9-*10 (E.D. Cal.
25 June 8, 2007) (dismissing claims under the federal Voting Rights Act for lack of sufficient
26 specificity); *Broward Citizens for Fair Dists v. Broward County*, 2012 U.S. Dist. LEXIS
27 46828 (S.D. Fla. Apr. 3, 2012) (same); *NAACP v. Snyder*, 879 F. Supp. 2d 662 (E.D. Mich.
28 2012) (same).

Third Affirmative Defense

(Laches)

3. The facts regarding the redistricting plan challenged herein were known or should have been known to Plaintiffs in 2011, yet Plaintiffs have waited until 2016 to bring their claim. The two challenged districts in “northern Kern County”—Districts 1 and 4—had elections in 2012 and, just recently, in June 2016. Plaintiffs made no effort to challenge the conduct of either of those elections, and, in fact, have only sought to enjoin the use of the existing map in connection with “future elections.” *See* Prayer for Relief, ¶ 2. At this point, there is only one election cycle left (2020) in which Districts 1 and 4 will be used prior to the next redistricting following the release of new Census data in 2021.

4. Plaintiffs’ delay in bringing this suit threatens to prejudice the County and the public interest, potentially causing significant voter confusion and unwarranted expense and disruption to the administration of elections by requiring reprecincting, the reassignment of voters, etc., for a single election in 2020, when new Census data will be released the following year that will require rebalancing of the supervisorial lines again anyway.

Fourth Affirmative Defense

(Lack of Ripeness)

5. Insofar as Plaintiffs seek to base their claim on demographic data that were unavailable at the time the 2011 districting plan was adopted by the County Board of Supervisors, that claim is not ripe as the Board has no legal obligation to redistrict until after the 2021 Census.

Fifth Affirmative Defense

(Prior Election of Latino-Preferred Candidates)

6. The Act authorizes consideration of the election of minority candidates who are the chosen candidates of the plaintiff minority group in determining a violation of the Act. Contrary to the allegations of the Complaint, at least one Latino has previously been elected to the Board of Supervisors of Kern County in the last two decades outside of

1 District 5—Steve Perez, in District 2. Latinos have also been elected to other overlapping
2 jurisdictions in Kern County as well. And Defendants are informed and believe, and on that
3 basis allege, that Latino voters have supported other non-Latino candidates in the County as
4 well, who were elected.

5 **Sixth Affirmative Defense**

6 **(Unconstitutionality)**

7 7. No supervisorial map can be drawn in Kern County that would have two
8 majority Latino citizen voting age population districts, without subordinating traditional
9 districting considerations to racial ones in violation of Equal Protection.

10 **Seventh Affirmative Defense**

11 **(Good Faith)**

12 8. Defendants have acted at all times in good faith and in accordance with the
13 laws of the State of California and the United States of America and without intent to
14 deprive Plaintiffs of their rights or to cause other injury.

15 9. Defendants have acted at all times in good faith and with the reasonable
16 belief that their actions were valid.

17 10. Defendants reasonably and in good faith determined that the mandate of
18 Section 2 was better met by maintaining the core of the existing District 5, which had
19 historically been an effective opportunity-to-elect district for Latinos in northwest
20 Bakersfield, rather than by dividing that district in an effort to create two new districts with
21 bare Latino majorities. That determination is entitled to deference by the courts.

22 **Eighth Affirmative Defense**

23 **(Compliance with Section 2)**

24 11. The only way to create two majority-Latino supervisorial districts in 2011
25 was by dividing the Latino community in northwest Bakersfield, which had historically
26 been successful in electing the candidates of its choice, and pairing portions of that divided
27 community with rural Latinos outside of Bakersfield. Dismantling an historically-effective
28 majority minority district to create two bare-majority Latino citizen voting age population

1 districts, by combining disparate Latino communities, would itself have been a violation of
2 Section 2.

3 **Ninth Affirmative Defense**

4 **(Reservation of Rights)**

5 12. Because the Complaint is couched in conclusory terms, Defendants cannot
6 fully anticipate all affirmative defenses that may be applicable to the claims asserted
7 therein. Accordingly, Defendants hereby reserve the right to assert additional affirmative
8 defenses to the Complaint, whether under law, equity, or otherwise, if and to the extent that
9 such affirmative defenses are discovered and apply.

10 **PRAAYER**

11 WHEREFORE, Defendant prays for judgment that:

- 12 1. That Plaintiffs take nothing by their Complaint;
13 2. For entry of Judgment against Plaintiffs and in favor of Defendants; and
14 3. That Defendants be awarded their costs of suit; and
15 4. That the Court order other and further relief to Defendants as deemed just and
16 proper.

17 Dated: September 20, 2016

NIELSEN MERKSAMER
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19 Marguerite Mary Leoni
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