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

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

ADVISORY REGARDING POTENTIAL APPLICABILITY OF *ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA* AND *ALABAMA DEMOCRATIC CONFERENCE V. ALABAMA*

Defendants Rick Perry, in his official capacity as Governor, Nandita Berry, in her official capacity as Secretary of State, and the State of Texas (collectively, the "State Defendants") file this Advisory in response to the Court's Order of November 18, 2014, addressing the potential applicability of *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama* (collectively, the "Alabama cases"), both pending before the U.S. Supreme Court. Although the legal issues presented in the Alabama cases overlap to some degree with the claims against Texas's 2011 redistricting plans, factual distinctions between the cases suggest that delaying a ruling on the 2011 plans in light of the Alabama cases is not necessary.

In the Alabama cases, the plaintiffs asserted numerous claims against state House and Senate plans adopted by the Alabama Legislature in 2012, including claims under the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act. But the Supreme Court noted probable jurisdiction on a narrow set of questions: whether Alabama's plans "unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts," Brief for Appellants at i, *Ala. Legislative Black Caucus v. Alabama*, No. 13-895 (U.S. Aug. 13, 2014); and whether Alabama's alleged "unconstitutional racial quota and racial gerrymandering" was justified by its stated interest of complying with Section 5 of the Voting Rights Act, Brief for Appellants at i, *Ala. Democratic Conference v. Alabama*, No. 13-1138 (U.S. Aug. 13, 2014).[1] The Alabama cases thus present a *Shaw* claim based on Alabama's alleged impermissible focus on race in seeking to maintain Black population percentages near or above benchmark levels in majority-Black districts. *See, e.g.*, Brief for Appellants at 15, *Ala. Legislative Black Caucus* ("[T]he achievement of the district-specific racial ratios was by definition the predominant purpose of the plan, the circumstance that establishes a *Shaw* claim.").[2]

[1] In *Alabama Democratic Conference*, the Court also noted probable jurisdiction to consider whether the plaintiffs there have standing to bring their claims. Brief for Appellants at i, *Ala. Democratic Conference*.

[2] *See Shaw v. Reno*, 509 U.S. 630, 649 (1993) (holding that a plaintiff can challenge a reapportionment statute "by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification").

Whether any plaintiff in this case asserts a discrete *Shaw* claim remains unclear, even after the filing of post-trial briefs. DOJ has expressly disavowed any *Shaw* claim.[3] *Shaw* is not cited or discussed in the Perez Plaintiffs' post-trial brief,[4] the MALC Plaintiffs' post-trial brief,[5] the NAACP and African-American Congresspersons' post-trial brief,[6] or the joint post-trial brief of the LULAC, Quesada, and Rodriguez Plaintiffs.[7] The Task Force Plaintiffs cite *Shaw* as authority for a "distinct claim[] of intentional discrimination [that] challenges the use of race as a basis for separating voters into districts"[8] and allege that the State relied on race to draw CD 6, CD 23, CD 26, HD 78, and HD 117,[9] but they do not clearly make an actual *Shaw* claim. They do not argue, for example, that race predominated in the creation of any particular district,[10] and their allegations regarding the use of race are presented as

[3] *See* Closing Argument of United States, Tr. 139:14-15, July 29, 2014 ("[O]ur claim is not a *Shaw* claim."); Closing Argument of United States, Tr. 2067:14-16, Aug. 26, 2014 ("[W]e want to make it clear that the United States does not have a *Shaw* claim.").
[4] Perez Plaintiffs' Trial Brief (Oct. 21, 2014), ECF No. 1263.
[5] Plaintiff MALC's Post Trial Brief on Interplay Between Article 3, § 26 of the Texas Constitution and the Federal Voting Rights Requirements of the 14th Amendment and Section 2 of the Voting Rights Act (Oct. 30, 2014), ECF No. 1273.
[6] Post Trial Brief of the NAACP and African American Congresspersons—2011 Congress and House (Oct. 30, 2014), ECF No. 1280.
[7] Joint Post-Trial Brief for LULAC, Quesada, and Rodriguez Plaintiffs on the 2011 Congressional Redistricting Plan (Oct. 30, 2014), ECF No. 1277.
[8] Post-Trial Brief of Plaintiffs Texas Latino Redistricting Task Force, et al. at 23 (Oct. 30, 2014), ECF No. 1282.
[9] *See id.* at 46-47, 67.
[10] *Compare Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."), *with* Task Force Plaintiffs' Post-Trial Brief at 67 (alleging that "[t]he State assigned Latino voters into and out of CD 23 because of their race" and "into and out of CDs 6 and 26 on the basis of their race"), *and id.* at 97-98 (discussing the use of racial shading in CD 26, alleging that Downton "used racial

evidence of intentional vote-dilution, not an unconstitutional racial classification per se.[11]

Assuming that the Task Force Plaintiffs have articulated *Shaw* claims, there are significant differences between this case and the Alabama cases. For one thing, unlike the Alabama cases, there is no allegation that the Texas Legislature established artificially high demographic targets for minority-majority districts. Rather, DOJ and the plaintiffs contend that minority population levels were too low in certain districts in the enacted plans and that the State's mapdrawers did not adequately consider the electoral performance of proposed districts. *See, e.g.*, United States' Post-Trial Brief at 22-23, 39-45, 73-76 (Oct. 30, 2014), ECF No. 1279. In the case of CD 23 and HD 117, for example, the plaintiffs complain that the State should have included *different* Latino voters in these districts than the ones they did. *See, e.g.*, Task Force Plaintiffs' Post-Trial Brief at 47, 91-97. These allegations are materially different from the factual allegations in the Alabama cases.

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shading as a proxy for community of interest," and noting that "where the boundary of CD6 splits precincts, Mr. Downton conceded that a higher percentage of Hispanic population is placed inside CD6 and a lower percentage of Hispanic population is placed outside CD6").

[11] *See* Task Force Plaintiffs' Post-Trial Brief at 46 (discussing HD 78 and HD 117 as examples of "the use of race to draw districts with a nominal Latino majority that would not elect the Latino-preferred candidate"); *id.* at 47 (alleging that "swapping geographic territory into and out of HD 117 while monitoring election performance and SSVR" was part of an effort to "minimize Latino electoral opportunity and elect the non-Latino-preferred candidate"); *id.* at 66 ("In HD78, Ryan Downton split 14 precincts along the boundary between HD77 and HD78 in order to create HD78 with 47.1% SSVR and a low percentage of votes for Latino-preferred candidates."); *id.* at 93 ("When he was drawing CD 23, Mr. Downton turned on the shading for election results and SSVR when drawing the maps. . . . [T]he precincts that Mr. Downton drew into CD23 had a slightly higher SSVR, but lower election results for Latino-preferred candidates.").

Depending on how the Supreme Court resolves the Alabama cases, its ruling may have some impact on the plaintiffs' claims against Texas's 2011 redistricting plans. For example, the Supreme Court's decision may effectively dispose of the plaintiffs' *Shaw* claims in this case or provide guidance on the extent to which a state's redistricting decisions prior to *Shelby County* could appropriately be based on efforts to comply with Section 5. Thus the Court could exercise its discretion to await a decision by the Supreme Court before ruling on the parties' 2011 challenges. However, the myriad factual differences between the cases, together with the predominance of intentional-vote-dilution claims over *Shaw* claims in this case, counsel against a delay pending the Supreme Court's ruling in the Alabama cases.

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