

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

SHANNON PEREZ, *et al.*,

Plaintiffs,

and

UNITED STATES of AMERICA,

Plaintiff-Intervenor,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-360
(OLG-JES-XR)
Three-Judge Court
[Lead Case]

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

Plaintiff,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-361
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

TEXAS LATINO REDISTRICTING TASK FORCE,
et al.,

Plaintiffs,

v.

GREG ABBOTT,

Defendant.

Civil Action No. 5:11-cv-490
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

MARGARITA V. QUESADA, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, *et al.*,

Defendants.

Civil Action No. 5:11-cv-592
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

JOHN T. MORRIS,

Plaintiff,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-615
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

EDDIE RODRIGUEZ, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, *et al.*,

Defendants.

Civil Action No. 5:11-cv-635
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

UNITED STATES' ADVISORY CONCERNING
THE SUPREME COURT'S DECISION IN
ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA

The United States submits this advisory pursuant to the Court's Order (ECF No. 1301) requesting briefing on the impact of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), on this case.

The Supreme Court's decision in the Alabama case does not affect the United States' claim in this case and does not justify delaying resolution of this case. All Plaintiffs who have alleged discriminatory purpose in this case—including the United States—have brought claims of intentional vote dilution, an issue that was not before the Supreme Court in the Alabama case. Rather, the Supreme Court's decision in *Alabama Legislative Black Caucus* involved a claim of racial gerrymandering under the doctrine originating in *Shaw v. Reno*, 509 U.S. 630 (1993). As the Supreme Court has explained, *Shaw* claims are “analytically distinct” from intentional vote dilution claims, *Miller v. Johnson*, 515 U.S. 900, 911 (1995), and the Court's decision in the Alabama case reinforces that distinction and confirms that the *Shaw* jurisprudence does not apply to intentional vote dilution claims. Because *Alabama Legislative Black Caucus* did not alter the legal standard for intentional vote dilution claims, no further factual development is necessary to resolve those claims in this case.

This Court should proceed with its resolution of the intentional vote dilution claims. A finding of intentional vote dilution alone would support an imposition of a preclearance remedy under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c). And a prompt resolution of the United States' and Plaintiffs' claims of intentional vote dilution would allow for any further remedial redistricting to occur prior to the 2015 candidate qualification deadlines for the 2016 legislative elections in Texas.

I. THE UNITED STATES HAS NOT BROUGHT A SHAW RACIAL GERRYMANDERING CLAIM.

The United States’ claim in this case is that Texas’s 2011 Congressional Plan and 2011 House Plan were adopted with the purpose of diluting minority voting strength in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, which enforces the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution. U.S. Compl. (ECF No. 907).¹ The United States’ claim here is an intentional vote dilution claim—not a *Shaw* claim. *See, e.g.*, U.S. Advisory at 2 n.1 (ECF No. 1290).

II. ALABAMA LEGISLATIVE BLACK CAUCUS REINFORCES THE DISTINCTION BETWEEN SHAW CLAIMS AND INTENTIONAL VOTE DILUTION.

The Supreme Court in *Alabama Legislative Black Caucus* made clear that it was analyzing a *Shaw* claim, not an intentional vote dilution claim. As the Court explained, the appeal “focus[ed] upon the appellants’ claims that new district boundaries create ‘racial gerrymanders,’ in violation of the Fourteenth Amendment’s Equal Protection Clause,” 135 S. Ct. at 1262 (quoting *Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996)).” Although the plaintiffs in the Alabama case had raised both a *Shaw* claim and an intentional vote dilution claim in the district court and had sought appellate review of both claims, the Supreme Court specifically declined to review the dilution claim. *Id.* at 1274.² By refining the *Shaw* jurisprudence at the same time that

¹ While the United States’ claims turn on the discriminatory intent of the 2011 Texas Congressional and House Plans in their entireties, the United States has identified the configuration of the following districts as probative of the State’s discriminatory intent: Congressional Districts 2, 7, 8, 10, 22, and 36 (Harris County); Congressional Districts 6, 12, 26, 30, and 33 (Dallas-Fort Worth Metroplex); Congressional District 23 (West Texas); Congressional District 27 (South Texas and the Coastal Bend); House Districts 31, 36, 37, 38, 39, 40, 41, and 43 (Rio Grande Valley); House Districts 32, 33, and 34 (current and former Nueces County); House District 35 (South Texas); House Districts 77 and 78 (El Paso County); House Districts 103, 104, and 105 (Dallas County); House Districts 117 and 118 (Bexar County); and House Districts 137 and 149 (current and former Harris County).

² The district court had rejected a distinct intentional vote dilution claim advanced by the Alabama Democratic Caucus. *See Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1287-90 (M.D. Ala. 2013) (three-judge court). The Alabama Democratic Caucus appealed regarding its

it refused to review the appellants' vote dilution claim, *id.*, *Alabama Legislative Black Caucus* reinforced the distinction between *Shaw* racial gerrymandering claims and the intentional vote dilution claims of the type advanced by the United States and other Plaintiffs in this case.

Intentional vote dilution occurs when “the State has enacted a particular voting scheme as a purposeful device ‘to minimize or cancel out the voting potential of racial or ethnic minorities,’ an action disadvantaging voters of a particular race.” *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980)). By contrast, *Shaw v. Reno* “recognized a claim ‘analytically distinct’ from a vote dilution claim.” *Miller*, 515 U.S. at 911 (quoting *Shaw v. Reno*, 509 U.S. at 652); *see also* Trial Tr. 152:13-14, July 29, 2014 (Texas conceding this point in closing argument). Simply put, “the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts.” *Miller*, 515 U.S. at 911. In other words, a *Shaw* violation can occur without proof that the defendant intended to dilute the voting strength of any racial or ethnic group.

The standards for proving impermissible consideration of race also differ depending on whether the claim alleges a *Shaw* violation or, instead, intentional vote dilution. As the Supreme Court reiterated in *Alabama Legislative Black Caucus*, “[a] plaintiff pursuing a [*Shaw*] racial gerrymandering claim must show that ‘race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.’” 135 S. Ct. at 1270 (quoting *Miller*, 515 U.S. at 916). In contrast to the “predominant motive” standard for analyzing *Shaw* claims, “[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act” to constitute intentional vote dilution. *United*

intentional vote dilution claim, *see* Jurisdictional Statement at i, 23-28, *Ala. Democratic Caucus v. Alabama*, No. 13-1138 (U.S. Mar. 14, 2014) (ECF No. 1290-2), but the Supreme Court limited its review to *Shaw* claims and standing issues, *see Ala. Democratic Caucus v. Alabama*, 134 S. Ct. 2697 (2014).

States v. Brown, 561 F.3d 420, 433 (5th Cir. 2009) (quoting *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984)); *see also Arlington Heights*, 429 U.S. at 265-66. Moreover, the inquiry regarding an intentional vote dilution claim is broader than the focus on the use of race in one district. Assessing an intentional vote dilution claim “‘demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available’” and incorporates a range of evidence beyond district boundaries, demographics, and direct evidence. *Rogers v. Lodge*, 458 U.S. 613, 618-22 (1982) (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)); *cf. Ala. Legislative Black Caucus*, 135 S. Ct. at 1267.³

III. NO FURTHER FACTUAL DEVELOPMENT IS NECESSARY TO IMPOSE THE PRINCIPAL RELIEF SOUGHT REGARDING THE 2011 PLANS.

Although the Supreme Court’s decision to vacate and remand in the Alabama case will allow the district court in that case to consider reopening the record as part of the further proceedings on remand, 135 S. Ct. at 1264-65, no further factual development is necessary in this case. The remand in the Alabama case was based on the distinct legal errors made by the district court in that case in evaluating the plaintiffs’ *Shaw* claims presented there. By contrast, all plaintiffs who have alleged discriminatory purpose in this case have brought a claim for intentional vote dilution, which is not affected by the Supreme Court’s recent clarification of the

³ To the extent that *Alabama Legislative Black Caucus* is relevant to this case, it suggests that mechanical reliance on population percentages is not a method of defeating intentional discrimination claims. *See e.g.* 135 S. Ct. at 1272 (“Section 5 [of the Voting Rights Act] . . . does not require a covered jurisdiction to maintain a particular numerical minority percentage.”). Here, Texas drew districts to maintain a 50.1% Spanish Surname Registered Voter majority while crafting those districts to elect candidates preferred by Anglo voters, eliminating minority voters’ opportunity to elect their representative of choice. *See, e.g.*, Trial Tr. 374:14-23, 387:17-388:16, July 15, 2014 (Garza); US Ex. 75; US Ex. 190; US Ex. 198 at 15-18. Texas’s purported reliance on a 50.1% standard, which Texas Legislative Council attorney David Hanna described as “phony,” US Ex. 193A at 4-5; US Ex. 635, is not a *bona fide* alternative explanation displacing the intentional discrimination that motivated Texas’s 2011 Congressional and House Plans. *Cf. Ala. Legislative Black Caucus*, 135 S. Ct. at 1272-73 (adopting the United States’ position that Section 5 protects a minority group’s functional ability to elect its candidates of choice and holding that mechanical reliance on population percentages is not narrowly tailored to Section 5 compliance).

analytically distinct *Shaw* doctrine in the Alabama case. Critically, a finding of intentional vote dilution in Texas' 2011 Congressional Plan and the 2011 House Plan would be a sufficient basis for this Court to impose a remedy under Section 3(c) of the Voting Rights Act, 52 U.S.C.

§ 10302(c), the principal form of relief still at issue regarding the 2011 plans. *See* Order at 14-15 (ECF No. 886). Thus, to the extent that this Court determines that the intentional vote dilution claims pending before it “justify equitable relief,” 52 U.S.C. § 10302(c), it would not be necessary to delay this litigation for additional factual development regarding the pending *Shaw* claims brought by some of the other Plaintiffs.

Texas's early candidate qualification period provides an additional reason for this Court to resolve Plaintiffs' intentional vote dilution claims without additional factfinding concerning alleged *Shaw* violations. Texas's next elections for its legislature will occur in 2016, and the candidate qualifying period will run from November 14 to December 14, 2015. *See* Tex. Elec. Code § 172.023. Most districts in Texas's 2011 House Plan and 2011 Congressional Plan were incorporated in the 2013 plans, and further remedial redistricting may be necessary if this Court determines that any of the incorporated districts reflect intentional discrimination. For remedial redistricting to occur before candidate qualification—without shifting the statutory qualifying deadline—districts would have to be redrawn by the fall of 2015. Thus, an earlier ruling by this Court on the claims already fully submitted reduces the likelihood of any disruption to election administration.

For the foregoing reasons, the United States respectfully requests that this Court resolve the pending intentional vote dilution claims without reopening the factual record.

Date: April 20, 2015

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I hereby certify that on April 20, 2015, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

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