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

SHANNON PEREZ, ET AL.	**§**	
	§	
v.	**§**	**SA-11-CV-360**
	§	
RICK PERRY, ET AL.	**§**	

TEXAS LATINO REDISTRICTING TASK FORCE, ET AL. ADVISORY REGARDING ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA

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The Texas Latino Redistricting Task Force plaintiffs ("Latino Task Force") file this Advisory pursuant to the Court's order of March 25, 2015 requesting briefs discussing the U.S. Supreme Court's recent opinion in *Alabama Legislative Black Caucus, et al. v. Alabama, et al*., 575 U.S. ___ (2015).

I. INTRODUCTION

The U.S. Supreme Court in *Alabama* vacated the district court decision and remanded the case with instructions to reconsider the plaintiffs' claims of unconstitutional racial gerrymandering in Alabama's legislative redistricting plans.

The Court reiterated the well-known standard for unconstitutional racial gerrymandering:

> [E]lectoral districting violates the Equal Protection Clause when (1) race is the "dominant and controlling" or "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 913, 916 (1995), and (2) the use of race is not "narrowly tailored to serve a compelling state interest," *Shaw II*, 517 U. S., at 902; *see also Shaw* v. *Reno*, 509 U. S. 630, 649 (1993) (*Shaw I*) (Constitution forbids "separat[ion of] voters into different districts on the basis of race" when the separation "lacks sufficient justification"); *Bush* v. *Vera*, 517 U. S. 952, 958–959, 976 (1996) (principal opinion of O'Connor, J.) (same).

Slip op. at 3-4.

The Court emphasized that a claim of racial gerrymandering requires showing that race "was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." Slip Op. at 6 (emphasis in original) (citing *Shaw I*, 509 U. S., at 649 (violation consists of "separat[ing] voters *into different districts* on the basis of race" (emphasis added)); *Vera*, 517 U. S., at 965 (principal opinion) ("[Courts] must scrutinize *each challenged district* . . ." (emphasis added)) *Miller*, *supra*, at 916 (plaintiff 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*" (emphasis added)).)

II. THE LATINO TASK FORCE PLAINTIFFS CHALLENGED SPECIFIC DISTRICTS AS UNCONSTITUTIONAL RACIAL GERRYMANDERS

The Latino Task Force Plaintiffs alleged that the following districts were unconstitutionally racially gerrymandered:

In Plan C185

- CD 23 in Plan C185
- Congressional districts in the Dallas Ft. Worth Metroplex

In Plan H283

- HD 117
- House districts in El Paso County

In Plan H358

- HD 90

See Task Force Fourth Amended Complaint, Dkt. 891, at ¶¶ 37, 41, 42, 53, 56, 67, and 78.[1]

In their Complaint, the Latino Task Force Plaintiffs specifically alleged that the congressional and state redistricting plans "use[d] race *as a predominant factor* to allocate Latino voters into and out of" specific districts.[2] *Ibid*. (emphasis added); *see also Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). As described further below, the Latino Task Force Plaintiffs

[1] In the 2011 phase of the case, the Latino Task Force Plaintiffs explained in their post-trial brief: "Here, the State intentionally discriminated against Latinos through vote dilution as well as through race-based redistricting prohibited by the *Shaw v. Reno* line of cases." *See* Latino Task Force Plaintiffs' Post Trial Brief, Dkt. 416 at 42.

[2] The State's contention, in its Advisory of November 2014, that the Task Force Plaintiffs "do not clearly make an actual *Shaw* claim [because] [t]hey do not argue, for example, that race predominated in the creation of any particular district" (Dkt. 1289 at 3) is meritless.

presented detailed evidence of the State's use of race as a predominant factor in redistricting the challenged congressional and state house districts.

In their post-trial brief, the Latino Task Force Plaintiffs argued:

> The State's congressional redistricting plan intentionally discriminated against Latinos through vote dilution as well as through race-based redistricting prohibited by the *Shaw v. Reno* line of cases. The State assigned Latino voters into and out of CD 23 because of their race and also acted expressly to limit the voting power of Latinos. The State also assigned Latino voters in the Dallas Ft. Worth area into and out of CDs 6 and 26 on the basis of their race.

See Latino Task Force Plaintiffs' Post Trial Brief, Dkt. 1282, at 67 [hereinafter "Task Force Post-Trial Br."]. The Latino Task Force Plaintiffs also argued that the State's racial redistricting was not explained or justified by adherence to traditional redistricting principles. Task Force Post-Trial Br. at 61 – 65, 102 - 103.

With respect to the House Plan H283, the Latino Task Force Plaintiffs argued that Plan H283 violated the *Shaw* doctrine because the plan "employs race-based redistricting . . . flaunting traditional redistricting criteria." Task Force Post-Trial Br. at 61. The Latino Task Force Plaintiffs also argued that in H283 redistricters "[used] race to draw districts with a nominal Latino majority that would not elect the Latino-preferred candidate" and that redistricters made excessive and impermissible use of race when drawing specific districts in Bexar County and El Paso County. *Id*. at 46-47.

In its December 2014 Advisory, Texas argued that the Latino Task Force Plaintiffs do not present *Shaw* claims because the Latino Task Force Plaintiffs claim the State used race intentionally to reduce Latino voting strength. Defs.'Advisory Regarding Potential Applicability of Alabama Legislative Black Caucus v. Alabama, Dkt. 1289, at 3-4. Although the *Shaw* line of cases dealt with districts intended to elect the minority candidate of choice, there is no support for the State's suggestion that a racial gerrymandering claim cannot lie against a district intended

to dilute minority voting strength. As explained in the *Alabama* decision, the pivotal questions in a *Shaw* case are whether "(1) race is the "dominant and controlling" or "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," . . . and (2) [whether] the use of race is not "narrowly tailored to serve a compelling state interest,"[.]" Slip Op at 4 (citations omitted). The fact that Texas cynically and predominantly used race to create districts that would *not* elect the Latino candidate of choice does not absolve the State of liability for racial gerrymandering or remove the case from the *Shaw* analytical framework.[3]

III. THE LATINO TASK FORCE PLAINTIFFS PRESENTED EVIDENCE OF STATEWIDE POLICY THAT MADE EXCESSIVE USE OF RACE AND EVIDENCE OF DISTRICT-SPECIFIC RACIAL GERRYMANDERING

In addition to affirming the *Shaw* legal standards relied upon by the Latino Task Force Plaintiffs to present their racial gerrymandering claims, the Supreme Court in *Alabama* provided additional guidance to courts weighing specific evidence of racial gerrymandering. The Court's guidance demonstrates that the evidence provided by the Latino Task Force Plaintiffs is more than sufficient to prevail on their *Shaw* claims.

A. The Latino Task Force Plaintiffs Presented Evidence of Statewide Policies That led to Racial Gerrymandering in Specific Districts is Properly Considered as Part of the Shaw Analysis

In *Alabama*, the Supreme Court explained that "[v]oters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district." Slip Op. at 7, citing *Miller*, *supra*, at 916; *see also* slip op. at 10 (explaining such evidence is "perfectly relevant.").

1. Mechanical Use of the 50% SSVR Threshold

[3] Such actions also provide the basis for the analytically district claim of intentional vote dilution in violation of the 14th Amendment and section 2 of the Voting Rights Act. *See* Task Force Post-Trial Br. at 23.

Texas redistricters mechanically applied a strict threshold of 50% SSVR statewide to measure compliance with section 5, despite the State's awareness that the U.S. Department of Justice did not mechanically apply a demographic threshold to evaluate retrogression. Texas's informal preclearance submission to DOJ acknowledged that DOJ does not rely on predetermined demographic percentages to assess section 5 compliance. Latino Task Force post trial brief at 58. *See also Alabama* slip op. at 19-20 (the Justice "Department's preclearance determinations are not based 'on any predetermined or fixed demographic percentages[.]'") (quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011)).

Nevertheless, Texas redistricters insisted that districts be drawn with greater than 50% SSVR in order to count as ability to elect districts in the State's retrogression analysis. For example, Ryan Downton testified that he believed the way to resolve any section 5 retrogression concerns with the elimination of Latino-majority House District 33 in Nueces County was to find another district somewhere in the state that was below 50% SSVR and raise the SSVR above 50%. Task Force Post-Trial Br. at 59. Gerardo Interiano instructed HD117 incumbent John Garza that his district had to remain over 50% SSVR. Task Force Post-Trial Br. at 42; Texas Latino Redistrict Task Force Plfs.' Proposed Findings of Fact and Conclusions of Law [hereinafter FOF] 630. Also, David Hanna prepared a series of retrogression memos for redistricters analyzing whether draft districts were above or below 50% SSVR. *See* Def. Exh. D-122, 123 and 327. Texas claimed in its post-trial brief that it drew HD117 to "comply with the Voting Rights Act by maintaining the district's SSVR over 50%." Texas Post-Trial Br. at 55.

After eliminating Latino-majority HD33 in their House plan, redistricters increased the SSVR of HD90 and HD148 over 50% in H283 in order to count them as additional Latino

districts in the retrogression analysis—even though HD90 and HD148 were already Latino ability to elect districts. *Id*. at 58-59. When redistricters put more Latino population into the existing ability districts HD90 and HD148, Mr. Hanna authored an email concluding, based on his 50% SSVR head count of districts, that there were a sufficient number of districts over 50% SSVR to offset the elimination of HD33 under section 5. Def. Exh. D-328. Gerardo Interiano and Ryan Downton accepted the Hanna SSVR head-count memo as the "green light" to bring the state house redistricting bill to the floor. *Id*. at 57.[4]

The U.S. Supreme Court emphasized in *Alabama* that "Section 5, which covered particular States and certain other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." Slip op. at 19. Texas certainly knew how to evaluate Latino voters' ability to elect their preferred candidate since its redistricters relied on the OAG10 (which measured Latino ability to elect using an index of ten racially contested elections) to evaluate districts. Task Force Post-Trial Br. at 44, 95 – 97; FOF 664, 1350, 1352, 1358.

In *Alabama*, the Court criticized the district court and the Alabama Legislature for "rel[ying] heavily upon a mechanically numerical view as to what counts as forbidden retrogression." *Id*. at 21. The Court further explained that a state cannot use mechanical racial quotas to place minority population into a district and then claim that the action is permissible because it ensures non-retrogression. *See id*. at 22 ("[F]or that reason, it would be difficult to explain just why a plan that uses racial criteria predominately to maintain the black population at

[4] In fact, because HD90 and HD148 were already Latino ability to elect districts, eliminating HD33 caused a net loss of Latino ability to elect districts statewide. Task Force Post-Trial Br. at 26-27. The Texas Latino Redistricting Task Force urged redistricters not to count the increase in SSVR in HD 90 and HD148 as offsetting the loss of HD33 because it would be improper under section 5. Task Force Exh PL 277.

70% is "narrowly tailored" to achieve a "compelling state interest," namely the interest in preventing §5 retrogression.")

Texas's mechanical 50% SSVR test to claim non-retrogression was not only legally and factually incorrect, it also drove redistricters to use race as the predominant and controlling factor in crafting HD117. Benchmark HD117 was 50.3% SSVR and counted as a Latino ability to elect district in David Hanna's memos to redistricters. State Representative Michael Villareal, who coordinated the redistricting efforts of Bexar County's House delegation, raised concerns when he saw drafts of HD 117 that decreased the SSVR below 50%. Task Force Post-Trial Br. at 42. The incumbent of HD 117, John Garza, was unhappy when informed by Mr. Interiano that HD117 should remain above 50% SSVR; Rep. Garza wanted to spin his district farther north to gain Anglo population. Task Force Post-Trial Br. at 40, 42; FOF 607. Mr. Interiano explained that when he redistricted HD117 he had to perform a careful balancing act in the State's REDAPPL software, shading for SSVR and using race and election results to craft the final HD117. Task Force Post-Trial Br. at 43-44.

The final version of HD117 raised the SSVR to 50.1% from previous drafts but maintained the percent vote for candidate Molina in 2006 below 50%. Task Force Post-Trial Br. at 42-44. Mr. Interiano reviewed the OAG10 analysis for HD117 and knew that the Hispanic performance, *i.e.* the rate at which Latino voters were able to elect their candidates of choice, dropped when compared to the benchmark. *Id*. at 44.

Rep. Garza rejected any proposal from his neighbor Rep. Joe Farias that would increase the SSVR of HD117 above 50.1% SSVR. *Id* at 45, 46; FOF 669. Rep. Garza also told Rep. Farias that HD117 had picked up the communities of Somerset and Whispering Winds because "all I want is more Mexicans in my district." Task Force Post-Trial Br. at 46; FOF 677. Mr.

Interiano rejected drafts by Rep. Villarreal that increased the SSVR of HD117 above 50.1%. Task Force Post-Trial Br. at 41-44; FOF 640-641, 650, 653.

Similarly, in CD23, Ryan Downton monitored the SSVR to make sure it would remain over 50% as he swapped precincts into and out of the district to reduce performance for Latino-preferred candidates in the ten elections presented in the OAG10. Task Force Post-Trial Br. at 82-83; *see also* FOF 1215. Mr. Downton testified that he used SSVR data as he looked for precincts to include in CD23. Task Force Post-Trial Br. at 93.

The State's mechanical use of the 50% SSVR standard to claim non-retrogression contorted the redistricting process by making race a predominant factor and led redistricters far afield of traditional redistricting considerations in crafting CD23 and HD117.

2. The "Nudge Factor"

The Latino Task Force Plaintiffs also proved that Texas redistricters used a racial "nudge factor" where demographically possible to create districts that did not provide Latino voters the opportunity to elect their candidate of choice. The "nudge factor" was a race-based statewide policy applied to districts with bare Latino majorities that threatened to elect Latino-preferred candidates: CD23, HD78 and HD117. *See, e.g. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 403 (2006) ("In essence, the State took away [Latinos'] opportunity because they were about to exercise it.").

In November 2010, attorneys working for House Speaker Joe Straus exchanged emails setting out the "nudge factor," which involved using data on Latino population and Latino voter turnout to create bare Latino majority districts that would not elect Latino candidates of choice. Task Force Post-Trial Br. at 75-76. When using the "nudge factor," redistricters would rely on racial data to swap precincts into and out of a district to achieve the desired demographic and

electoral result. The tools for the "nudge factor" included data on Latino citizen voting age population, Latino voter registration (SSVR) and the results of ten racially-contested (Latino v. non-Latino) elections provided by the Texas Attorney General's Office (the OAG10). *Ibid*. and at 35-47, 81-82, 95-97.

Texas redistricters employed the "nudge factor" to create CD23 in C185 as a Latino-majority district that would elect the Latino-preferred candidate in only one out of ten elections. *Id*. at 92-97; FOF 1327-1330, 1341-1342, 1348-1370, 1414-1415. Texas redistricters also used race, Latino registration and electoral data to swap territory into and out of HD78 and HD117 to create those districts as Latino majority and not likely to elect the Latino candidate of choice. Task Force Post-Trial Br. at 38, 40-44, 46-47; Task Force FOF 560-564, 609-621. In each instance, the evidence demonstrates that redistricters used similar racial data and made predominant use of race in drawing the districts, including turning on racial shading in REDAPPL and selecting population on the basis of race for assignment into and out of districts.

The "nudge factor" was a statewide policy that made race a predominant and controlling factor in drawing districts. The "nudge factor" memo, testimony from mapdrawers that they turned on racial shading in REDAPPL and swapped precincts into and out of the challenged districts based on race and the resulting districts, which lowered Latino ability to elect based on the OAG10 (a measure of Latino ability to elect as opposed to a partisan index), demonstrate that race was the predominant consideration in the redistricting of CD23, HD78 and HD117. The outcome was a "reapportionment statute . . . [that] 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[.]" *Shaw v. Reno*, 509 U.S. at 649.

B. The Latino Task Force Plaintiffs' Evidence of District-Specific Practices Satisfies their Burden Under *Shaw*.

In *Alabama*, the Supreme Court identified district-level practices that provide evidence of unconstitutional racial gerrymandering. These practices include deliberately choosing population of a particular race to move into or out of a district (slip op. at 8-9, 17-18) and departing from traditional redistricting criteria (slip op. at 18). The Latino Task Force Plaintiffs presented both types of evidence in support of their case.

1. Texas Assigned Population to Districts on the Basis of Race

In Congressional District 23, redistricters performed very detailed searches for and selected VTDs that contained a majority of Latino registered voters (and that also underperformed for Latino-preferred candidates). Task Force Post-Trial Br. at 97; FOF 1323. Mr. Downton testified that he turned on the shading for election results and SSVR when drawing CD23. Task Force Post-Trial Br. at 97; FOF 1327. This meant he saw the effects on SSVR of every change he made the instant he made the change. Task Force Post-Trial Br. at 97; FOF 1327. Mr. Downton made these changes precinct-by- precinct, based on race. Task Force Post-Trial Br. at 97; FOF1328.

In the Dallas-Ft. Worth Metroplex, Ryan Downton testified that he used racial shading to draw the "lightning bolt" boundary of CD 26 and to assign voters to districts on the basis of their race. Task Force Post-Trial Br. at 97; FOF 1375-1376. As a result, the Tarrant County portion of CD 26 contains 65% Hispanic population, even though CD26 itself is only 28% Hispanic. *See* RED-100 for C185 (Task Force Exh. 1127). Mr. Downton explained that he used racial shading in REDAPPL to assign Hispanic population to the "lightning bolt" of CD26 because he did not have personal knowledge of the community characteristics of the residents who lived inside the "lightning bolt" and used racial shading as a proxy for community of interest. *Id*.

Mr. Downton further testified that the boundary of CD26, where it splits precincts, takes in higher concentrations of Latino population and leaves the less Latino blocks outside of the split; similarly, in Dallas County, where the boundary of CD6 splits precincts, he placed a higher percentage of Hispanic population inside CD6 and he placed a lower percentage of Hispanic population outside CD6. Task Force Post-Trial Br. at 97-98; FOF 1381-1387.

Mr. Downton also separated African American voters from Latino voters in order to place African American voters into CD 12. Task Force Post-Trial Br. at 88-89 ("Changes made to keep the Black population together in District 12."). David Hanna, counsel for the redistricters, testified that dividing Latino population from Black population at the block level in DFW would raise concerns under *Shaw*. (Aug. 2014 Tr. at 1574:24-1576:9). However, Mr. Hanna testified that he never performed a *Shaw* analysis on the 'lightning bolt' of CD26 and did not look at the number of split precincts or the extent to which block level redistricting might have followed racial lines. (Aug. 2014 Tr. at 1547:5-23).

With respect to HD117, Rep. Garza's racial statements and Mr. Interiano's method of swapping territory in and out of the district while striving 50.1% SSVR constitute direct evidence of the use of race as a predominant factor when crafting the district. *See* Task Force Post-Trial Br. at 47; FOF 652.

In El Paso County, Ryan Downton used block-level data for Hispanic population while he drew the boundary between HD 77 and 78. Task Force Post-Trial Br. at 46. He turned on the racial shading in REDAPPL while he was mapping and selected blocks based on Hispanic shading while keeping an eye on the fluctuations in the plan statistics on political results. Task Force Post-Trial Br. at 46; FOF 563.

2. Texas's Failure to Adhere to its Traditional Redistricting Criteria Provides Further Evidence that Race was the Predominant Motive in Drawing the Challenged Districts.

In *Alabama*, the Supreme Court affirmed that "[a] plaintiff pursuing a racial gerrymandering claim . . . 'must prove that the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations.'" Slip op. at 16, quoting *Miller*, 515 U.S. at 916. The Court further identified several traditional race neutral redistricting criteria, including not splitting precincts, "'compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,' incumbency protection, and political affiliation[.]" Slip op. at 2, 16 (quoting *Miller*, 515 U.S. at 916), 18.[5]

a. Splitting Precincts

The Latino Task Force Plaintiffs demonstrated that avoiding split precincts was a legislative goal in Texas 2011 redistricting. Task Force Post-Trial Br. at 62 and 64; FOF 839, 895. Rep. Joe Pickett testified that Redistricting Chairman Burt Solomons "put the fear of God" into him not to split precincts in his House plan proposal. Task Force Post-Trial Br.at 62; FOF 839. Nevertheless, Texas redistricters split numerous precincts when crafting the districts challenged here as *Shaw* violations.

In Congressional District 23, Ryan Downton split 19 precincts in Bexar County. Task Force Post-Trial Br. at 103; FOF 1459. He also split two VTDs in the City of Eagle Pass. FOF 1456.

In the Dallas Ft. Worth Metroplex, Ryan Downton split numerous precincts. The boundary of CD 6 in Dallas split precincts 1105, 1127, 4614, 4610. FOF 1389 – 1391. Mr.

[5] In addition to the factors set out in *Alabama*, a district shape can provide important evidence of race-based gerrymandering. *See Shaw v. Reno*, 509 U.S. 630, 642 (1993) (the Equal Protection Clause can be violated by "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."). In this case, the bizarre boundaries of HD77/78 and CDs 6 and 24 indicate that race was the predominant factor in their creation.

Downton also split 14 precincts with the "lightning bolt" of CD 26 and 4 precincts with the boundary between CD 12 and CD 33 in Tarrant County. Task Force Post-Trial Br. at 97-98; FOF 1393.

In HD 117, Gerardo Interiano split one precinct along the HD 117/118 boundary. *See* Red-370 Split Precincts in District by County for Plan H283, Task Force Exh. PL 733.

In El Paso County, Ryan Downton split 14 precincts along the HD77/78 boundary. Task Force Post-Trial Br. at 46. He did so even after the El Paso delegation chair, Rep. Pickett, sent the House Redistricting Committee a map with no split precincts and an SSVR higher than the benchmark HD78. Task Force Post-Trial Br. at 37.

b. Divided Communities of Interest

The Latino Task Plaintiffs also demonstrated that Texas redistricters either disregarded or cynically used information about communities of interest when drawing the district lines that comprise *Shaw* violations.

i. Congressional District 23

Mr. Downton testified that when he drafted CD23, he split Maverick County and the City of Eagle Pass, communities of interest that would normally be kept together by mapdrawers following traditional redistricting criteria. Task Force Post-Trial Br. at 102-103; FOF 1455. Mr. Downton testified that Chairman Solomons had the final sign-off on the splitting of that community. Task Force Post-Trial Br. at 103; FOF 1457.

ii. Dallas Ft. Worth

In Fort Worth, Mr. Downton used racial shading as a proxy for community of interest because he did not have personal knowledge of the community characteristics of residents inside of the "lightning bolt." Task Force Post-Trial Br. at 97; FOF 1377. However, Mr. Downton also

testified that he drew CD 26 to encompass Ft. Worth Latino communities from the North and South of the city because he had read "on a blog"—for which he did not know the information sources—that these areas formed a community of interest. Task Force Post-Trial Br. at 89; FOF 1283.

iii. HD 78

Ryan Downton's map-drawing in El Paso County also demonstrated a blatant disregard for communities of interest. With regard to the roads they followed, the HD77/78 boundary lines confounded the former state representative, Dee Margo, for whom the lines were supposedly drawn. *See* Task Force Trial Br. at 62. That boundary also divided a community with its own identity, packing the high-performing Latino population into HD 77. Task Force Trial Br. at 63; FOF 888. HD 78 also carved out Latino neighborhoods along Doniphan Road and cut out a majorly Latino Catholic Parish. Task Force Trial Brief at 63; FOF 892, 894.

c. Failure to Follow Expressed Criteria in HD117

Even when redistricters articulated separate neutral redistricting criteria, those criteria were not followed. In Bexar County, redistricters stated that criteria for drawing HD 117 were to make the district more rural, take it outside of the City of San Antonio, and exclude the Bexar Met water district because of water regulation issues. Task Force Trial Br. at 63-64. Gerardo Interiano and Rep. Garza's office disregarded each of these criteria. Rep. Garza could not testify as to how the district boundaries of HD117 lined up with the boundaries of the BexarMet Water District. Task Force Trial Brief at 64; FOF 902. HD 117 neither stayed in rural areas nor outside the City of San Antonio. Task Force Trial Brief at 64; FOF 898-899.

d. Mapdrawers Ignored Legal Standards

Texas claims it drew district boundaries on the basis of race to comply with the Voting Rights Act. *See, e.g.* Texas Post Trial Brief at 36 ("To the limited extent that mapdrawers split precincts on the basis of racial data, they did so only to comply with the Voting Rights Act."), at 73 (on the boundary of HD77 and HD78, Ryan Downton "considered racial data at the block level while splitting these precincts in order to comply with the Voting Rights Act."), at 114 (goal in drawing CD23 was "to maintain or improve the benchmark level of HCVAP and SSVR to comply with the Voting Rights Act"), and at 117 (redistricters split Maverick County in CD23 "for Voting Rights Act compliance."). However, the evidence at trial demonstrated that Texas did not consider section 2 requirements in either the State House or congressional redistricting plans, disingenuously employed the wrong legal standard to evaluate compliance with section 5, and did not review the final maps for legal compliance, providing further support for the Latino Task Force Plaintiffs' racial gerrymandering claims.

i. Failure to Employ Voting Rights Act Standards when Drawing the Map

Mr. Hanna testified that he was never asked to provide a section 2 analysis for the House Committee's redistricting plans as they evolved. Task Force Post-Trial Br. at 50; FOF 720. Mr. Interiano testified that instead of making an assessment whether to draw an additional Latino opportunity district in a particular county, he simply dropped a county delegation's draft into the map. 2011 Tr. 1445:13-18. House Redistricting Committee Chairman Burt Solomons did nothing to determine whether it was possible to draw additional minority opportunity districts in plans passed by the House or whether Latino opportunity districts needed to be added considering Latino growth. Task Force Post-Trial Br. at 50; FOF 724-725. He also failed to check for the presence of racially polarized voting in the state. Task Force Post-Trial Br. at 50; FOF 726-727.

Legislative leadership also failed to employ Voting Rights Act Standards with respect to House districts in El Paso County. Mr. Interiano testified that he never attempted to draw a fifth Latino opportunity district in El Paso County. Task Force Post-Trial Br. at 52; FOF 743. Mr. Downton testified that if Texas redistricters had wanted to, they could have created another majority Latino district in El Paso but they made the policy choice not to create that district. Task Force Post-Trial Br. at 52; FOF 744. Chairman Solomons acknowledged that it is possible that a member from El Paso that is elected from a non-Latino opportunity district might have wanted his boundary lines to remain the same despite it being a violation of the Voting Rights Act. Task Force Post-Trial Br. at 52; FOF 745.

In the congressional redistricting, Mr. Interiano did not undertake any analysis to determine how many Latino opportunity congressional districts should be drawn in the new plan. Task Force Post-Trial Br. at 101; FOF 1454. Also, despite acknowledging the legal risk of failing to do so, Mr. Downton explained that the decision not to increase the number of Latino opportunity congressional districts in South Texas was a "political" decision. Task Force Trial Br. at 101; FOF 1442-1444.

Senator Kel Seliger, Chair of the Texas Senate Redistricting Committee, testified that no analysis of CD23 was done to determine if Congressman Canseco was the Latino candidate of choice. Task Force Trial Br. at 101; FOF 1439. Chairman Seliger conceded that if Mr. Canseco were not the Latino candidate of choice, and the Legislature nonetheless was taking steps to make this district safer for Mr. Canseco, "it would be a violation [of the Voting Rights Act]." Task Force Trial Br. at 101; FOF 1441. Similarly, Mr. Interiano never conducted an analysis to determine if Representative Canseco was the Latino preferred candidate in CD23. Task Force Trial Br. at 101; FOF 1453.

The legislative leadership also ignored concerns raised by staff and advisors that the House and Congressional plans violated the Voting Rights Act. Task Force Post-Trial Br. 32-34, 105; FOF 718, 1156, 1201, 1264, 1451, 1472, 1474.

ii. The Redistricting Leadership did not Review Maps for Legal Compliance

The House leadership failed to review the House redistricting maps for Voting Rights Act compliance. Chairman Solomons did not independently verify whether counties had enough Latino opportunity districts. Task Force Post-Trial Br. at 60-61; FOF 825-826. The Speaker's counsel, Mr. Interiano, ignored possible compliance problems and failed to investigate further whether Plan H283 had the correct number of minority opportunity districts under the Voting Rights Act. Task Force Post-Trial Br. at 61; FOF 778, 827.

The same lapse in care with regard to VRA compliance occurred during Congressional redistricting. Senator Seliger failed to examine racially polarized voting in general or in Republican primary elections. Senator Seliger also did not analyze which candidates would be Latino candidates of choice in a particular election despite his awareness of Texas's history of voting rights violations. Task Force Post-Trial Br. at 103; FOF 1461, 1466. Chairman Solomons sat with Mr. Downton in front of a computer with redistricting software to work on the Congressional map and knew that there was a problematic drop in election performance for Latino candidates of choice. Task Force Post-Trial Br. at 104; FOF 825-826. Chairman Solomons's testimony regarding his ultimate reliance on redistricting staff lacked credibility considering his knowledge of concerns raised by experienced redistricting lawyers at the Texas Legislative Council. *See* Task Force Trial Br. at 104.

e. Failure to Protect Partisan Interests

In HD78, redistricters worked against partisan goals. Ryan Downton swapped out geography on the basis of race that HD78's incumbent Dee Margo wanted to keep because those areas voted for him. Task Force Post-Trial Br. at 61. Mr. Margo would have preferred to keep geographic areas, including areas with Hispanic Republicans, that provided him electoral and financial support; respecting Mr. Margo's goals would have resulted in a more compact HD78 but instead Ryan Downton split 14 precincts on the basis of race when drawing the boundary between HD77 and HD78. *Id*. at 61-62.

In HD117, then-incumbent John Garza wanted to extend his district farther north to pick up Anglo territory to bolster his chances of reelection. Task Force Post-Trial Br. at 40; FOF 607. Mr. Garza's partisan goals, and his draft proposals, did not show a desire to move into the southern portion of Bexar County. *See* Task Force Exh. PL 529. Indeed, Rep. Garza was unhappy that he had to go back to the drawing board because he wanted his district to take in more territory to the north. Task Force Post-Trial Br. at 42; FOF 632. Mr. Interiano testified that there were two ways to raise the SSVR of HD117 above 50%. One was to take the district into the far south of Bexar County and into Whispering Winds area. The second was to go into inner city San Antonio. Task Force Post-Trial Br. at 42; FOF 633. Mr. Interiano testified that raising the SSVR in HD117 was a balancing act because of the goal to keep Rep. Garza's "political numbers up." Task Force Post-Trial Br. at 42; FOF 634. Redistricters elevated race over partisanship when they reached farther into the north and south of Bexar County and incorporated territory from within Loop 1604. Task Force Post-Trial Br. at 43-44; FOF 644-654.

In Dallas Ft. Worth, Ryan Downton testified that he was aware of the potential beneficial effects on members of the Republican delegation by creating a minority opportunity district: creating a new minority opportunity district in Dallas Ft. Worth served a Republican partisan

purpose by taking Democratic votes and concentrating them in a new district. Task Force Post-Trial Br. at 88, 105-106; FOF 1271, 1276. Despite the proposal from a majority of the Republican congressional delegation that placed Latinos and African Americans together in a congressional district in the DFW Metroplex, Mr. Downton used race to separate Latinos into CDs 24 and 6 and used race to separate African Americans into CD12. *Id*. at 88-89; *see also* FOF 1280 ("Changes made to keep the Black population together in District 12.").

In CD23, then-incumbent U.S. Representative Francisco Canseco wanted to keep areas that would support a Latino Republican in the primary, including precincts in the south side of San Antonio and some of the border counties. Task Force Post-Trial Br. at 78-79; FOF 1180, 1549-1551. Although redistricters knew that the incumbent Rep. Canseco would have to be nominated in the Republican primary in order to be re-elected, Mr. Interiano did not review any re-aggregated election analysis containing primary elections and Mr. Downton did not look at primary data at all. Task Force Post-Trial Br. at 108-109, FOF 1505. The final version of CD23 excluded precincts in the south side of San Antonio, some of the border counties and other areas of CD23 that supported Mr. Canseco in his 2010 primary election. *See* Task Force Exh. PL 349, 350.

f. Failure to Preserve Existing Boundaries Where Possible

The most glaring example of the State's failure to preserve existing boundaries of districts is in CD 23, which was overpopulated by 149,000. Senator Kel Seliger testified that because CD23 was overpopulated, it was certainly possible to have simply pulled CD23 closer down towards the border and not have extended the district to take in counties north of the Pecos River. Task Force Post-Trial Br. at 107; FOF 1498. Then-incumbent Rep. Canseco wanted to maintain the border character of his district and maintain the integrity of CD23 as a Latino

majority district. Task Force Post-Trial Br. at 78-79; FOF 1183. However, instead of simply removing 149,000 individuals from CD23, the redistricters moved over 600,000 individuals into and out of the district. Task Force Post-Trial Br.at 86, 106-107; FOF 1494.

HD117 and HD78 were both overpopulated in the benchmark plan. *See* US Ex. 395. Departing from the pre-existing boundaries in ways not required by one person one vote, H283 stretched HD 117 north and south to take in large swaths of Bexar County (even though HD 117 was overpopulated by 52,000 people). *See* US Ex. 395. HD78 was overpopulated by only 1,148 people yet its boundaries changed dramatically to create the "antlers" of HD77. *See* US Ex. 395.

C. The State's Claim of Population Equalization Cannot Justify Race-Based Redistricting

Adherence to the requirement of one person one vote cannot explain or excuse racial gerrymandering. For example, CD 26 reaches down from Denton County to pick up 147,000 people in Tarrant County. However, the State could have met its goal of one person one vote simply by placing CD 26 entirely in Denton County and reaching into Tarrant or another county for only 30,000. *See* FOF 1393-1397.

Nevertheless, Texas claims that it split precincts along racial lines in part in order to equalize population. Mr. Downton explained his splitting of precincts in Fort Worth by saying that he needed to "zero out" population. (Aug. 2014 Tr. 1716:23-1718:24 ("Every time -- the way I would zero out is I would go around the borders of the districts and look for blocks of the size I needed to keep going until I got to zero")). Also, Mr. Downton testified in his deposition that he believed it was never necessary in the House plan to split a precinct to equalize population but then changed his testimony at trial to claim that it may have been necessary to split precincts in El Paso to equalize population. FOF 565.

D. The State's Defense That it was Complying With 5 Requirement Through Using Mechanical Demographic Targets are Unavailing

The Latino Task Force Plaintiffs proved that race was the predominant and controlling consideration in drawing the challenged districts. Under the *Shaw* analytical framework, this Court examines whether the State's race-based redistricting was justified by a compelling state interest. The Supreme Court's decision in *Alabama* provides helpful guidance on evaluating the State's claim that it was required by section 5 to follow strict, mechanical population targets in Latino districts.

The Supreme Court held in *Alabama* that the district court erred when it concluded that the State was required by section 5 to redistrict on the basis of race to maintain strict racial percentages in existing Black majority districts. Slip Op. at 19. The Court explained that "Section 5 . . . does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *Id.* In fact, "Alabama's mechanical interpretation of §5 can raise serious constitutional concerns." *Alabama* slip op. at 21, citing *Miller*, *supra*, at 926.

As described in Section III.A.1, *supra*, Texas used a strict mechanical threshold of 50% SSVR to claim compliance with section 5 of the Voting Rights Act and justify assigning voters to a district on the basis of race. Because there is no compelling state interest in applying a strict mechanical threshold of 50% SSVR, the State's racial gerrymandering cannot be justified with this rationale.

This case differs from *Alabama* because Texas knew how to measure minority ability to elect. FOF 1348-1370. The Attorney General's Office developed an index of ten Latino v. non-Latino elections and redistricters used this index when evaluating draft districts. However, the State did not use the OAG10 to maintain Latino ability to elect. Instead, Texas used the OAG10

to create districts in which Latino-preferred candidates were *less* likely to prevail when compared to the benchmark. Task Force Post-Trial Br. 96-97. There certainly can be no compelling state interest in using strict racial thresholds and race-based redistricting to create districts that the State knows will not elect the candidate of choice.

IV. THE *ALABAMA* DECISION FURTHER REINFORCES THE UTILITY OF CIRCUMSTANTIAL EVIDENCE IN EVALUATING CLAIMS UNDER THE FOURTEENTH AMENDMENT

To the extent the State suggests that only direct evidence serves to prove a violation of the Fourteenth Amendment (*see, e.g.* Texas Post-Trial Brief at 37-49, criticizing use of *Arlington Heights* factors in the plaintiffs' intentional discrimination case), the *Alabama* decision makes clear that circumstantial evidence can play a vital role in proving a violation under the Equal Protection Clause, including proving a claim of intentional vote dilution.

In *Alabama*, the Supreme Court approved the use of and examined circumstantial evidence of intent, including split precincts and failure to follow redistricting criteria such as not splitting precincts, "'compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,' incumbency protection, and political affiliation[.]" Slip op. at 2, 16 (quoting *Miller*, 515 U.S. at 916), 18. That evidence, and the circumstantial evidence of intent described in *Arlington Heights*, is properly used by plaintiffs to prove a claim of intentional discrimination, whether under *Shaw* or the analytically district claim of intentional vote dilution.

V. THE NEED FOR FURTHER FACTUAL DEVELOPMENT

The Latino Task Force Plaintiffs do not believe further factual development is necessary with regard to the merits of their claims or the question of standing, but are prepared to present any additional evidence the Court deems necessary.

With respect to standing, the Latino Task Force Plaintiffs include 16 individual Latino registered voters as well as the members of statewide Latino organizations, including the Mexican American Bar Association of Texas, Texas HOPE, NOMAR and Southwest Worker's Union. Texas Latino Redistricting Task Force Plfs.' Fourth Amd. Compl., Dkt. 891, at ¶¶ 4-22.

In *Alabama*, the Supreme Court reversed the District Court's ruling that the Alabama Democratic Conference lacked standing, explaining that if the district court had doubts about the standing of the plaintiffs and the court's subject matter jurisdiction, it should have granted the Alabama Democratic Conference the opportunity to provide additional evidence of its members' standing. *See Alabama* slip op. at 14 (2015). The Supreme Court ordered the District Court on remand to "reconsider the Conference's standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate." *Id*. at 15.

Following discovery in this case, including interrogatories regarding the residence of individuals in the Latino Task Force Plaintiff group, the State chose not to challenge their standing. However, if this Court has concerns regarding whether the Latino Task Force Plaintiffs includes individuals who live in the challenged districts, the Latino Task Force Plaintiffs are prepared to provide additional evidence regarding the issue of standing.

CONCLUSION

For the foregoing reasons, the Texas Latino Redistricting Task Force Plaintiffs respectfully request that the Court rely upon the additional guidance in the Alabama decision to conclude that the challenged districts in C185 and H283 are racially gerrymandered in violation of the Fourteenth Amendment.

DATED: April 20, 2015 Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

/s/ Nina Perales
Nina Perales
Texas Bar No. 24005046
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
FAX (210) 224-5382

COUNSEL FOR PLAINTIFFS TEXAS LATINO REDISTRICTING TASK FORCE, RUDOLFO ORTIZ, ARMANDO CORTEZ, SOCORRO RAMOS, GREGORIO BENITO PALOMINO, FLORINDA CHAVEZ, CYNTHIA VALADEZ, CESAR EDUARDO YEVENES, SERGIO CORONADO, GILBERTO TORRES, RENATO DE LOS SANTOS, JOEY CARDENAS, ALEX JIMENEZ, EMELDA MENENDEZ, TOMACITA OLIVARES, JOSE OLIVARES, ALEJANDRO ORTIZ, AND REBECCA ORTIZ

Certificate of Service

I hereby certify that on this 20th day of April, I served a copy of the foregoing on all counsel who are registered to receive NEFs through this Court's CM/ECF system. All attorneys who are not registered to receive NEFs have been served via email.

/s/ Nina Perales
Nina Perales