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]

DEFENDANTS' RESPONSE TO BRIEFS REGARDING *ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA* AND NOTICE OF FIFTH CIRCUIT DECISION IN *DAVIS V. ABBOTT*

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Defendants Greg Abbott, in his official capacity as Governor, Carlos Cascos, in his official capacity as Secretary of State, and the State of Texas (collectively, the "State" or "State Defendants") file this brief in response to the Plaintiffs' briefs regarding *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), and to address the Fifth Circuit's recent decision in *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015), which bears on this Court's subject-matter jurisdiction over claims against the State's 2011 redistricting plans.

INTRODUCTION

In *Alabama Legislative Black Caucus*, the Supreme Court considered claims that the Alabama legislature engaged in racial gerrymandering, contrary to *Shaw v. Reno*, 509 U.S. 630 (1993), when it redrew Alabama's House and Senate districts in 2012. The decision in *Alabama Legislative Black Caucus* has little effect, if any, on the claims in this case because the majority of the Plaintiffs have not asserted *Shaw* claims. The *Alabama Legislative Black Caucus* opinion provides minimal guidance on *Shaw* claims in any event because it turns on facts unique to that case, particularly Alabama's adoption of a rigid racial quota for majority-black legislative districts, which appeared to predominate over all other factors in certain districts. Texas did not adopt any such policy in 2011; its limited consideration of race did not predominate over other districting factors; and in each instance where Texas considered race, it had a strong basis in evidence to believe that such consideration was necessary to avoid liability under the Constitution or the Voting Rights Act.

DISCUSSION AND AUTHORITIES

I. *SHAW* CLAIMS ASSERTED BY PLAINTIFFS

The Fourteenth Amendment creates two possible claims against race-based redistricting: intentional vote-dilution, *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); and racial gerrymandering under *Shaw v. Reno*, 509 U.S. at 649. An intentional-vote-dilution claim requires proof that (1) the legislature enacted the challenged redistricting plans for a racially discriminatory purpose and (2) the plans had or will have a discriminatory effect. *E.g.*, *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C.) ("Viable vote dilution claims require proof that the districting scheme has a discriminatory effect and the legislature acted with a discriminatory purpose."), *aff'd*, 133 S. Ct. 156 (2012). Recognizing a separate claim for racial gerrymandering, *Shaw* held that "electoral 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,' and (2) the use of race is not 'narrowly tailored to serve a compelling state interest.'" *Alabama Legislative Black Caucus*, 135 S. Ct. at 1264 (internal citation omitted).

Vote-dilution and racial-gerrymandering claims both allege that the government made a decision based on race, but they are analytically distinct:

> Whereas a vote dilution claim alleges that 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, 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 v. Johnson, 515 U.S. 900, 911 (1995) (internal citation omitted); *see also LULAC v. Perry*, 548 U.S. 399, 514 (2006) (Scalia, J., concurring in part and dissenting in part) ("A vote-dilution claim focuses on the majority's intent to harm a minority's voting power; a *Shaw I* claim focuses instead on the State's purposeful classification of individuals by their race, regardless of whether they are helped or hurt."). In other words, *Shaw* focuses on the means employed by the government—the classification of individuals by race—whereas vote-dilution focuses on the government's purpose and ultimate goal—diminution of individual voting power because of race.

To trigger strict scrutiny under *Shaw*, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller*, 515 U.S. at 916. If strict scrutiny applies, the narrow-tailoring standard requires "only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." *Alabama Legislative Black Caucus*, 135 S. Ct. at 1274. To satisfy the narrow-tailoring requirement, the State's consideration of race need not "actually be necessary to achieve a compelling state interest in order to be constitutionally valid"; rather, "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id.* (internal quotation marks omitted).

A. With One Exception, Plaintiffs Have Not Raised *Shaw* Claims.

With the exception of the Task Force Plaintiffs, the Plaintiffs in this case have not pleaded or presented *Shaw* claims against Plan C185 or Plan H283. As the State Defendants noted in their initial brief regarding the Alabama case, *Shaw* is not cited or discussed in the post-trial briefs filed by the Perez Plaintiffs, MALC, the NAACP Plaintiffs, the African-American Congresspersons, or the joint post-trial brief of the LULAC, Quesada, and Rodriguez Plaintiffs. *See* Advisory Regarding Potential Applicability of *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama* at 3 (Dec. 2, 2014), ECF No. 1289. The Perez Plaintiffs have asserted vote-dilution and one-person, one-vote claims.[1] The NAACP Plaintiffs and African-American Congresspersons have limited their Fourteenth Amendment claims to intentional vote-dilution.[2] And the LULAC and Rodriguez Plaintiffs disavowed any

[1] These claims are directed at the 2013 plans, not the 2011 plans. *See* Plaintiffs' Sixth Amended Complaint ¶ 27 (Feb. 24, 2014), ECF No. 959-1 (alleging intentional vote dilution in Plan C235); *id.* ¶ 28 (alleging that Plan H358 "is littered with intentional diminution of minority strength and fragmentation of minority communities in violation of the 14th and 15th Amendments together with violations of 14th Amendment one person-one vote commands"); *see also id.* at 6 (requesting declaratory and injunctive relief against "the existing plans for election of the Texas House of Representatives and Texas Congressional seats").

[2] *See* Proposed Findings of Fact and Conclusions of Law of the NAACP and African American Congresspersons—2011 Congress and House, at 39-44 (Oct. 30, 2014), ECF No. 1281 (asserting claims of intentional vote dilution under the Fourteenth Amendment and Section 2); *see also* Closing Argument of NAACP Plaintiffs, Trial Tr. 23:1-15, July 29, 2014 (explaining that the NAACP Plaintiffs alleged violations of Section 2 and "intentional discrimination . . . under the standard announced in Arlington Heights").

Shaw claims.[3] The plaintiffs were therefore correct when they previously advised the Court that "the legal issues in the Alabama cases do not substantially overlap with legal issues in the instant case." Private Plaintiffs' Joint Advisory on the Alabama Redistricting Cases at 3 (Dec. 2, 2014), ECF No. 1288.

Though the Quesada Plaintiffs now claim that they have "identified certain districts as unconstitutional racial gerrymanders,"[4] they have not asserted a *Shaw* claim. The Quesada Plaintiffs refer to their now-superseded First Amended Complaint, which alleged that certain districts in Plan C185 "are racial gerrymanders, drawn with excessive and unjustified use of race and racial data." Quesada Plaintiffs' First Amended Complaint ¶ 61 (July 29, 2011), ECF No. 84-1. But their live pleading—the Third Amended Complaint—omits this language and does not assert a *Shaw* claim. *See* Quesada Plaintiffs' Third Amended Complaint ¶ 75 (Sept. 18, 2013), ECF No. 899 (Section 2 claim against Plan C185); *id.* ¶ 79 (alleging that Plan C185 "was developed in such a way and with the intent to disadvantage African-American and other minority voters" in violation of the Fourteenth and Fifteenth Amendments). The

[3] *See* Joint Post-Trial Response Brief for LULAC, Quesada, and Rodriguez Plaintiffs on the 2011 Congressional Redistricting Plan at 7 (Dec. 4, 2014), ECF No. 1292 ("The joint plaintiffs have pressed claims of intentional vote dilution embodied in Plan C185. Intentional vote dilution is not the same thing as a racial gerrymandering under the *Shaw* line of cases." (footnotes omitted)); *accord* Joint Supplemental Brief for LULAC, NAACP, and Rodriguez Plaintiffs on *Alabama LBC* Decision at 2 (April 20, 2015), ECF No. 1302 ("[T]he claims made by the joint plaintiffs are vote dilution claims . . . .").

[4] Supplemental Brief of Quesada Plaintiffs on Impact of Supreme Court's *Alabama* Decision at 2 (April 20, 2015), ECF No. 1305 (citing Quesada Plaintiffs' First Amended Complaint ¶ 62).

Quesada Plaintiffs cannot rely on their First Amended Complaint because it has been superseded by their live complaint. *See, e.g.*, *King v. Dogan*, 31 F.3d 344, 346 (5th Cir.1994) ("An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading."); 6 Fed. Prac. & Proc. Civ. § 1476 (3d ed.) ("[T]he original pleading, once superseded, cannot be utilized to cure defects in the amended pleading, unless the relevant portion is specifically incorporated in the new pleading." (footnote omitted)).

MALC has used the term "racial gerrymandering," but it has done so in the context of vote-dilution claims; it has not pleaded or pursued an independent claim of racial gerrymandering under *Shaw*. In its complaint, for instance, MALC alleges, "With the racial gerrymanders manifest in the 2011 and 2013 plans, which resulted in diminished and limited Latino and African American voting strength, the Defendants violated Section 2 of the Voting Rights Act and the 15th and 14th Amendments." Plaintiff MALC's Third Amended Complaint ¶ 10 (Sept. 17, 2013), ECF No. 897. Its claims for relief are limited to vote-dilution, *see id.* ¶ 75, and violation of one-person, one-vote, *see id.* ¶¶ 78, 81. In its closing argument, MALC did not refer to *Shaw*; instead, it argued that "C185 both violates Section Two of the Voting Rights Act and was adopted with the intent to minimize minority voting strength in violation of both Section Two and the 14th Amendment." Closing Argument of MALC Plaintiffs, Tr. 1942:2-5, Aug. 26, 2014. Its most recent brief makes clear that to the extent MALC

alleges excessive reliance on race, it does so to support vote-dilution claims under Section 2 and the Fourteenth Amendment, not racial-classification claims under *Shaw*. *See* Corrected Plaintiffs Cuellar and MALC's Advisory and Response to this Court's Order of March 25, 2015 at 6 (April 23, 2015), ECF No. 1309 (alleging that "race conscious redistricting was used to retrogress minority voting strength"). As MALC explains, its claims against specific districts "are aimed at one final truth. Texas impermissibly and intentional[ly] racially discriminated against minority voters." *Id.* at 35. That does not describe a *Shaw* claim.

B. The Task Force Plaintiffs Have Asserted *Shaw* Claims, But They Lack Standing To Pursue Claims In Certain Districts.

Only the Task Force Plaintiffs have attempted to pursue a *Shaw* claim against Texas's 2011 redistricting plans. Specifically, they allege *Shaw* violations in CD 23 and the Dallas-Fort Worth area in Plan C185 and in HD 117 and El Paso in Plan H283. Texas Latino Redistricting Task Force, et al., Advisory Regarding Alabama Legislative Black Caucus v. Alabama at 2 (April 20, 2015), ECF No. 1308.[5] The Task Force

[5] The State maintained that the Task Force Plaintiffs had not clearly articulated a *Shaw* claim because they appeared to rely on the Legislature's consideration of race as evidence in support of their intentional-vote-dilution claims, not a distinct racial-gerrymandering claim. *See, e.g.*, Opening Statement of Task Force Plaintiffs, Tr. 73:7-12, July 14, 2014 (alleging "the purposeful use of race to create a district in which Latinos cannot elect their candidate of choice" in HD 117). And until the congressional phase of the 2014 trial, vote-dilution appeared to be their exclusive theory of Fourteenth Amendment liability. *See* Closing Argument of Task Force Plaintiffs, Tr. 170:9-12, Aug. 11, 2014 ("The Task Force has alleged vote dilution in violation of Section 2 as well as intentional racial discrimination in violation of Section 2 and the 14th Amendment."); *id.* at 172:12-13 ("The elements of discriminatory purpose, we know from the Arlington Heights case . . . ."); *cf.* Closing Argument of Task Force Plaintiffs, Tr. 1951:3-7, Aug. 26, 2014 (citing *Miller v. Johnson* and asserting a claim of "racial gerrymandering or the predominant use of race in redistricting"). The State has

Plaintiffs lack standing to bring *Shaw* claims against HD 117 and CD 26. To the extent they have standing to bring *Shaw* claims, *Alabama Legislative Black Caucus* does not affect the analysis, and the Task Force Plaintiffs have not proven a violation. *See infra* Part II.A.

The Task Force Plaintiffs lack standing to bring racial-gerrymandering claims against HD 117 and CD 26 because they have failed to prove that any member of the association resides in either district. To establish associational standing, an association must prove that its members would independently meet Article III's standing requirements. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). To prove standing to bring a racial-gerrymandering claim under *Shaw*, the plaintiff must live in the gerrymandered district. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995). To bring a racial-gerrymandering claim against a particular district, the Task Force must therefore prove that one of its members lives in that district. The Task Force Plaintiffs have not identified any individual or any associational member who would have resided in HD 117 under Plan H283 or in CD 26 under Plan C185. *See, e.g.*, Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force, et al. ¶¶ 5-20 (Sept. 9, 2013), ECF No. 891.

The Task Force Plaintiffs have had every opportunity, and every reason, to prove standing. Contrary to their statement that "the State chose not to challenge

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never suggested that the use of race to harm minority voters would "absolve the State of liability for racial gerrymandering." Task Force Advisory (ECF No. 1308) at 4.

their standing," Task Force Advisory (ECF No. 1308) at 23, the State Defendants moved to dismiss the Task Force Plaintiffs' claims for lack of standing in August 2011. *See* Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and, In the Alternative, Motion for Judgment on the Pleadings at 12-15 (Aug. 17, 2011), ECF No. 209 (asserting that the Task Force Plaintiffs lacked standing because they failed to identify members who lived in contested districts). Despite receiving notice of the State Defendants' challenge to their standing in certain districts, the Task Force Plaintiffs have not alleged facts, much less offered evidence, to support their standing to challenge HD 117 and CD 26. *See, e.g.*, Texas Latino Redistricting Task Force's Fourth Amended Complaint ¶¶ 5-20 (Sept. 10, 2013), ECF No. 889-1 (failing to identify any plaintiff residing in HD 117 or CD 26).

The Task Force Plaintiffs are not entitled to cure their failure now because they have expressly refused to identify associational members, other than the named individual plaintiffs, with standing to sue. In July 2011, the State Defendants served an interrogatory on the Task Force asking it to identify each individual member of the association or any of its member associations with standing to assert the claims raised collectively by the Task Force Plaintiffs. The Task Force invoked the First Amendment, asserting a privilege against identifying its members. It refused to identify anyone other than the named plaintiffs, none of whom live in CD 26 or HD 117. *See* Ex. D-30, Plaintiff Texas Latino Redistricting Task Force's Response to Defendant's First Set of Interrogatories at 13-17 (July 28, 2011) (Interrogatory No. 4).

Alabama Legislative Black Caucus does not support the Task Force's suggestion that it get another chance to prove standing. *See* Task Force Advisory (ECF No. 1308) at 23. In the Alabama case, the district court held that the plaintiffs lacked standing *sua sponte*. 135 S. Ct. at 1268. The Supreme Court found "no reason to believe that the [plaintiff] would have been unable to provide a list of members, at least with respect to the majority-minority districts, had it been asked." *Id.* at 1269-70. Not so here. The Task Force has been asked—the State Defendants formally requested proof of standing. The Task Force expressly refused to provide it. Having chosen to stand on its objection for more than three years, despite notice of the State's challenge to its standing, the Task Force Plaintiffs should not be permitted to change their position.

II. THE SUPREME COURT'S DECISION IN *ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA* DOES NOT AFFECT ANY CLAIM IN THIS CASE.

The Supreme Court's opinion in *Alabama Legislative Black Caucus* is narrow in scope, focusing on racial-gerrymandering claims under *Shaw*, and its analysis is driven by the peculiar facts of Alabama's 2012 redistricting effort. Although the Alabama Legislature "sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents" when it redrew the State's legislative districts, "it placed yet greater importance on achieving two other goals." *Id.* at 1263. First, it limited deviation from ideal district population to plus or minus one percent—a standard that the Supreme Court characterized as "more rigorous . . . than our precedents have found necessary

under the Constitution." *Id.* (citing *Brown v. Thomson*, 462 U.S. 835, 842 (1983)). Second, it prioritized compliance with Section 5 of the Voting Rights Act, but "Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage in existing majority-minority districts." *Id.* In fact, Alabama "believed that § 5 forbids, not just *substantial* reductions, but *any* reduction in the percentage of black inhabitants of a majority-minority district." *Id.* at 1289 (Appendix B). The combination of a precise population-equality standard and a rigorous policy against reducing black population percentages led Alabama to elevate race above all other districting factors, at least in certain majority-black districts. The district court nevertheless denied the plaintiffs' *Shaw* claims.

The Supreme Court vacated and remanded, holding that the district court applied the wrong legal standard under *Shaw*. First, the district court erred by analyzing the *Shaw* claims in the context of the statewide plans rather than specific districts. *Id.* at 1265. Second, the district court held, *sua sponte*, that no plaintiff had standing to challenge specific districts, as opposed to the statewide plans in their entirety. *Id.* at 1268. Third, the district court erred by considering population equality as a race-neutral factor in determining whether race predominated over traditional race-neutral redistricting principles in the statewide plans. *Id.* at 1270. Finally, the district court erred in holding that Alabama's effort to prevent any reduction in the level of black population qualified as a compelling interest, under Section 5 of the Voting Rights Act, sufficient to justify the predominant use of race. *Id.* at 1272-73.

A. *Alabama Legislative Black Caucus* Does Not Affect The Analysis Or Outcome Of Any *Shaw* Claim In This Case.

The Supreme Court's decision should not affect the analysis or the outcome in this case for at least two reasons. First, and most importantly, the Texas Legislature did not adopt or implement a policy of maintaining artificially high population percentages in any district, nor has Texas relied on population equality as a race-neutral factor to prove that race did not predominate. Second, when the Texas Legislature considered race, it had a strong basis in evidence to believe that such consideration was necessary to avoid liability under the Fourteenth Amendment or the Voting Rights Act.

1. The Supreme Court's opinion in *Alabama Legislative Black Caucus* leaves little doubt that Alabama's insistence on maintaining or increasing benchmark levels of total black population, together with its strict one-percent deviation limit, subordinated all other redistricting objectives to race in redrawing existing majority-black districts. As the majority explained:

> That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State.

Alabama Legislative Black Caucus, 135 S. Ct. at 1267. Alabama's policy of maintaining benchmark levels of total black population required preservation of black population supermajorities, arbitrarily determined by the benchmark districts, that bore no relation to the preservation of black voting strength. Senate District 26, for example,

had 72.75% black total population under the benchmark plan, but was underpopulated by nearly 16,000. *Id.* at 1263. To satisfy its self-imposed 1% deviation limit while avoiding any reduction in the total black population percentage, Alabama added 15,785 people to Senate District 26, only 36 of whom were white. *Id.*

Unlike Alabama, Texas did not adopt a rigid policy against decreasing the total population percentage of any group, nor did it implement any arbitrarily high demographic threshold. There is no merit to the Plaintiffs' suggestion that the State's reliance on a 50% CVAP or SSVR standard in Hispanic opportunity districts is illegitimate in light of *Alabama Legislative Black Caucus*.[6] The Texas Legislature's reliance on a 50% threshold in certain districts is different in degree and in kind from the policy adopted by Alabama. As to degree, a 50% CVAP or SSVR threshold does not compare to the artificially high supermajorities at issue in *Alabama Legislative Black Caucus*, where Alabama's strict no-reduction policy locked in black population majorities of more than 70%. A 50% CVAP or SSVR threshold is different in kind because it has a firm basis in the Supreme Court's Section 2 jurisprudence, *see, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Bartlett v. Strickland*, 556 U.S. 1 (2009), and maintaining a voting majority is rationally related to preserving the opportunity to elect in single-member districts. Whether or not 50% of eligible or registered voters

[6] *See, e.g.*, Joint Supplemental Brief for LULAC, NAACP, and Rodriguez Plaintiffs (ECF No. 1302) at 4-8.

has any significance under Section 5 (a question not presented in *Alabama Legislative Black Caucus*), it forms a central part of the Section 2 analysis under *Gingles* and *Bartlett*.

To the extent that the Texas Legislature attempted to maintain any district's benchmark level of citizen-voting-age or registered-voter population, race did not predominate over other districting factors. And in every instance that the Texas Legislature considered race, it had a strong basis in evidence to believe that it was necessary to avoid liability under the Fourteenth Amendment and the Voting Rights Act. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (holding that race-based action is impermissible "unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute").

Whenever the Texas Legislature considered racial data to draw a particular district, it placed equal or greater emphasis on other information, such as election analysis and partisan shading. In CD 23, for example, the Legislature attempted to protect the Republican incumbent by increasing the district's Republican voting strength—a goal it pursued by relying on election data, not racial data. *See* Defendants Post-Trial Brief at 114-15, 121-22 (Oct. 30, 2014), ECF No. 1272; Defendants' Response to Plaintiffs' Post-Trial Briefs at 30, 74-75 (Dec. 4, 2014), ECF No. 1295; Defendants' Findings of Fact and Conclusions of Law at 5, 68 (Oct. 30, 2014), ECF No. 1276 (FOF ¶¶ 37, 631, 637). The same is true of HD 117. *See* Defendants' Response to Plaintiffs Post-Trial Briefs (ECF No. 1295) at 29-33. In the Dallas/Fort

Worth congressional districts, Ryan Downton relied primarily on partisan data to ensure that all Republican-leaning districts showed a similar level of Republican voting strength based on the 2008 presidential election. *See* Defendants' Post-Trial Brief (ECF No. 1272) at 130, 133-34. Downton considered racial data only when he was informed that he had inadvertently divided Hispanic and African-American communities in Tarrant County. *See id.* at 134-35. He considered racial data only to *avoid* fracturing Hispanic and African-American populations.

Texas also had a strong basis in evidence to believe that consideration of racial data was necessary to avoid liability under the Fourteenth Amendment or the Voting Rights Act. As a general matter, the State had a strong basis to believe that Section 5 required it to maintain SSVR majorities, if not the precise level of SSVR in the benchmark plan. Previous guidance from the Department of Justice, as well as guidance from the Texas Legislative Council, indicated that a 50% SSVR threshold was required by Section 5. *See* Defendants' Findings of Fact and Conclusions of Law (ECF No. 1276) at 5, 15 (FOF ¶¶ 38, 124-25). Texas had a particularly strong basis in evidence to believe that it could not reduce the level of Hispanic CVAP or SSVR in CD 23 without violating Section 2 of the Voting Rights Act because it had previously been found liable for eliminating CD 23's Hispanic CVAP majority. *See LULAC v. Perry*, 548 U.S. at 424 ("In the newly drawn district [CD 23], the Latino share of the citizen voting-age population dropped to 46%, though the Latino share of the total voting-age population remained just over 50%."). In the Dallas/Fort Worth

congressional districts, Ryan Downton had a strong basis in evidence to believe that reliance on racial data was necessary to avoid liability for fracturing or "cracking" minority populations.[7] *See* Defendants' Findings of Fact and Conclusions of Law (ECF No. 1276) at 71-72 (FOF ¶¶ 658-62, 664). Despite his efforts not to divide minority communities in the area, the Plaintiffs allege that "the minority community was severely cracked and intentionally so." Supplemental Brief of Quesada Plaintiffs (ECF No. 1305) at 17.

The Texas Legislature had a strong basis in evidence to conclude that it was required to create or maintain SSVR majorities when possible and to avoid significant reduction of the benchmark SSVR level in districts with substantial but sub-majority SSVR percentages. In HD 104, for example, David Hanna specifically advised Ryan Downton to preserve the district's SSVR majority. *See* Ex. D-122; Defendants' Post-Trial Brief (ECF No. 1272) at 63-64; Defendants' Findings of Fact and Conclusions of Law (ECF No. 1276) at 25 (FOF ¶¶ 221-22). The Legislature raised SSVR above 50% in HD 90 and HD 148 based on a request by MALDEF, consistent with concerns raised by David Hanna. Defendants' Post-Trial Brief (ECF No. 1272) at 82-83 (HD 148), 99-100 (HD 90); Defendants' Findings of Fact and Conclusions of Law

[7] Plaintiffs charge that Downton "used racial shading in REDAPPL as a proxy for communities of interest," Supplemental Brief of Quesada Plaintiffs (ECF No. 1305) at 19-20, but Plaintiffs themselves describe the relevant communities of interest only in terms of race, *see, e.g.*, *id.* at 16 ("cracking minority communities"); *id.* at 17 ("the minority community," "two large majority Hispanic communities of interest," "Hispanic communities"); *id.* at 19 ("minority communities of interest").

(ECF No. 1276) at 36, 48 (FOF ¶¶ 326-28 (HD 148), 438-43 (HD 90)). In HD 103, which was drawn in consultation with the incumbent, Representative Anchia, the Legislature attempted to maintain the benchmark SSVR level based on advice from David Hanna. *See* Ex. D-122; Defendants' Post-Trial Brief (ECF No. 1272) at 62-64; Defendants' Findings of Fact and Conclusions of Law (ECF No. 1276) at 25 (FOF ¶¶ 220-22). Similarly, Ryan Downton modified the El Paso delegation's proposed districts to increase SSVR in HD 78 based on a specific concern raised by David Hanna. *See* Defendants' Post-Trial Brief (ECF No. 1272) at 72-73; Defendants' Findings of Fact and Conclusions of Law (ECF No. 1276) at 30-31 (FOF ¶¶ 268-72). Race did not predominate in the configuration of the El Paso County districts, however; the basic configuration of the districts was determined by the El Paso delegation, *see* Defendants' Post-Trial Brief (ECF No. 1272) at 66-76, and the evidence shows that Representative Marquez drew HD 77 (including the so-called "antlers") to maintain its partisan character and to increase her chances of re-election, *see id.* at 68-70.

The Texas Legislature's limited consideration of race to address specific concerns bears no resemblance to Alabama's categorical focus on black population levels. Alabama employed an arbitrary total-population threshold determined solely by the benchmark district population without any legal or factual connection to black voters' ability to elect. The Supreme Court's conclusion that Section 5 did not require Alabama to maintain districts with over 70% black population does not call into

question the continuing validity of a 50% CVAP standard under Section 2.[8] And *Alabama Legislative Black Caucus* does not hold that the mere consideration of race, without more, triggers strict scrutiny under *Shaw*. *See Alabama Legislative Black Caucus*, 135 S. Ct. at 1272 (cautioning that the Court's opinion "does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny").

2. The Supreme Court's holding that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates,'" *id.* at 1270, does not change the analysis in this case because Texas has not relied on the general goal of equalizing population as a non-racial factor to balance against the use of race under *Shaw*. In *Alabama Legislative Black Caucus*, the district court erred by treating the general goal of equalizing population as an independent, non-racial factor to be "placed in the balance, among other nonracial factors." *Id.* The Supreme Court explained, however, that equal population "is part of the redistricting background, taken as a given." *Id.* It is not among the traditional race-

[8] Contrary to the United States' claim, David Hanna did not judge the 50% CVAP or SSVR standard to be "phony." *See* United States' Advisory Concerning the Supreme Court's Decision in *Alabama Legislative Black Caucus v. Alabama* at 4 n.3 (April 20, 2015), ECF No. 1304. In the exhibit cited by the United States—a draft of the State's preclearance submission to DOJ—Hanna says that "60% HVAP is just as phony as 50% because of variations in citizenship and registration." U.S. Ex. 193A at 5. This statement does not imply that a 50% SSVR or CVAP standard is similarly "phony." Because SSVR accounts for variations in citizenship and registration, it addresses the very flaws that rendered HVAP "phony" in Hanna's view. *See* Defendants' Findings of Fact and Conclusions of Law (ECF No. 1276) at 15 (FOF ¶¶ 126-27).

neutral factors—e.g., "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, political affiliation," *id.*—because it is mandatory. If the abstract goal of population equality weighed in the balance as a non-racial factor, it would artificially tip the balance from the outset regardless of how it was accomplished.

That population equality cannot factor into *Shaw*'s predominance analysis does not mean, however, that efforts to achieve equal population are irrelevant to claims of race-based decision-making. On the contrary, *Alabama Legislative Black Caucus* demonstrates that the manner in which a legislature equalizes population may or may not indicate reliance on race. In *Alabama Legislative Black Caucus*, for example, Alabama equalized population in Senate District 26 by moving 15,785 individuals, only 36 of whom were white—"a remarkable feat given the local demographics." *Id.* at 1271. It would be possible, by contrast, to consider only raw population data when equalizing population, which would not involve reliance on race at all. Thus in some instances, equalizing population may introduce racial considerations; in others, it may be race-neutral.

The notion that equalizing population may be race-neutral seems obvious, but it is particularly important in the context of congressional districts, which are subject to a strict population-equality standard. *See Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (explaining that the population-equality standard for congressional districts "requires that the State make a good-faith effort to achieve precise mathematical equality"

(quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969))); *see also* Texas Legislative Council, State and Federal Law Governing Redistricting in Texas at 26 (2011) (Ex. D-128 at 32) ("Congressional districts are now required to contain precisely equal populations, with exceptions only for population deviation that is either: (1) unavoidable despite a good faith effort to achieve absolute equality; or (2) necessary to achieve a legitimate state objective."). The obligation to eliminate any deviation in, or "zero out," each district gave Texas a compelling, race-neutral reason to split precincts.[9] In this case, Ryan Downton explained that he would split precincts to "zero out" the population deviation after every revision to a proposed congressional district. *See* Defendants' Response to Plaintiffs' Post-Trial Briefs (ECF No. 1295) at 91; Defendants' Findings of Fact and Conclusions of Law (ECF No. 1276) at 73 (FOF ¶ 671). While *Alabama Legislative Black Caucus* holds that those efforts to zero out cannot *offset* race-based decisions in *Shaw*'s predominance analysis, population-based precinct splits do not automatically weigh on the other side of the balance, either, because they are not necessarily race-based decisions to begin with. It follows that the number of precinct splits in the congressional plan (or the House plan, for that matter) does not support an inference of race-based decision-making unless Plaintiffs can prove that a precinct was actually split on the basis of race and not

[9] Unlike the Alabama Legislature, the 2011 Texas Legislature did not have a policy against splitting precincts. *Compare Alabama Legislative Black Caucus*, 135 S. Ct. at 1263 (listing "not splitting counties or precincts" among the Alabama Legislature's specific districting objectives), *with* Defendants' Post-Trial Brief (ECF No. 1272) at 35 (Texas Legislature had no general policy against splitting precincts).

merely to equalize population or meet some other race-neutral objective. *See, e.g.* Defendants' Post-Trial Brief (ECF No. 1272) at 35-36 (listing various race-neutral reasons to split precincts).[10]

B. *Alabama Legislative Black Caucus* Does Not Affect Any Other Claim in This Case.

1. *Alabama Legislative Black Caucus* Does Not Undermine The State's Reliance On The Whole-County Provision.

There is absolutely no basis for MALC's suggestion that *Alabama Legislative Black Caucus* precludes consideration of a state's whole-county rule as a race-neutral traditional redistricting principle. *See* Plaintiffs Cuellar and MALC's Advisory (ECF No. 1309) at 10-11. MALC's argument that compliance with the Texas Constitution's whole-county rule cannot factor into the predominance analysis is refuted by *Shaw*. There, the Court explained that "traditional districting principles such as compactness, contiguity, and respect for political subdivisions . . . are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 530 U.S. at 647. Nothing in *Alabama Legislative Black Caucus* calls this statement into question. On the contrary, the Supreme Court expressly recognized maintenance of political subdivisions as a traditional, race-neutral redistricting principle. *See Alabama*

[10] Certain Plaintiffs repeat the false claim that precincts cannot be split for political reasons. *See, e.g.*, Supplemental Brief of Quesada Plaintiffs (ECF No. 1305) at 15-16. This claim is addressed and disproven at pages 35 to 37 of Defendants' Post-Trial Brief (ECF No. 1272) and pages 27 to 29 of Defendants Response to Plaintiffs' Post-Trial Briefs (ECF No. 1295). In Alabama, by contrast, political data were apparently not available at the census-block level. *See* Brief for Appellants at 47, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (Nos. 13-895, 13-1138), 2014 WL 4059779, at *47.

Legislative Black Caucus, 135 S. Ct. at 1270 (listing "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation" as "traditional race-neutral districting principles" recognized by the Court) (internal citation and quotation marks omitted). In *Alabama Legislative Black Caucus* the Supreme Court cited Alabama's *failure* to follow its own whole-county rule as evidence that race predominated. *See id.* at 1271 (noting that preservation of county lines "seems of marginal importance since virtually all Senate District 26 boundaries departed from county lines").

2. *Alabama Legislative Black Caucus* Has No Bearing On *Larios* Claims.

The Perez and NAACP Plaintiffs discuss *Cox v. Larios*, 542 U.S. 947 (2004), in their most recent brief, but they do not explain how *Alabama Legislative Black Caucus* affects their one-person, one-vote claim. If anything, the Alabama case supports the Texas Legislature's reliance on a 5% deviation. Alabama imposed a 1% maximum deviation as one of its two primary redistricting goals, but the Supreme Court characterized that rule as "a more rigorous deviation standard than our precedents have found necessary under the Constitution." *Alabama Legislative Black Caucus*, 135 S. Ct. at 1263 (citing *Brown v. Thomson*, 462 U.S. 835, 842 (1983)). The Supreme Court did not suggest, much less hold, that the Constitution requires the States to achieve a deviation of less than 5% in state legislative districts.

III. THERE IS NO NEED FOR FURTHER FACTUAL DEVELOPMENT.

The State agrees that *Alabama Legislative Black Caucus* presents no need for further factual development in this case. But the State objects to the LULAC Plaintiffs' suggestion that they be allowed to submit proof of standing by declaration. *See* Joint Supplemental Brief for LULAC, NAACP, and Rodriguez Plaintiffs (ECF No. 1302) at 11. The Plaintiffs have had every opportunity to provide evidence of their standing to sue. If they have failed to identify individuals with standing to challenge specific districts, they should not get another chance now, particularly if they intend to do so through previously undisclosed witnesses or documents. If the LULAC Plaintiffs are allowed to present additional evidence, however, the State is entitled to test their proof and cross-examine witnesses.

IV. EFFECT OF THE FIFTH CIRCUIT'S DECISION IN *DAVIS V. ABBOTT*

In *Davis v. Abbott*, the Fifth Circuit held that the plaintiffs were not prevailing parties in their challenge to the Texas Legislature's 2011 Senate redistricting plan. The Fifth Circuit also held that the plaintiffs' lawsuit became moot when the Texas Legislature repealed the challenged plan in 2013. *See Davis*, 781 F.3d at 209 ("[A]fter the Court's decision, Texas repealed the contested redistricting plan and adopted the court-imposed plan in its place, thus mooting Plaintiffs' lawsuit."). The Fifth Circuit's conclusion regarding mootness is part of the holding in *Davis* because it was necessary to the Court's decision that Texas waived its opportunity to seek vacatur of this Court's interim-relief orders in light of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

See Davis, 781 F.3d at 215 ("But by the time Texas raised its *Shelby County* argument in the district court, Texas had already mooted the entire lawsuit by repealing the 2011 plan and adopting the interim plan in its place."); *id.* at 220 ("Texas did not return to the district court to seek vacatur after *Shelby County* came down. Instead, it repealed the 2011 plan and adopted the district court's interim plan in its place, thus mooting Plaintiffs' lawsuit.").

The Fifth Circuit's holding in *Davis* bears directly on this Court's jurisdiction over claims against the Texas Legislature's 2011 House and congressional redistricting plans. The Fifth Circuit stated that this Court's implementation of the interim Senate plan "caused Texas to repeal its 2011 plan and to adopt the interim plan in its place, thereby mooting the lawsuit and preventing Plaintiffs from obtaining final relief on the merits of their claims." *Id.* at 217. The court made clear that "after Texas repealed the 2011 plan, . . . the case became moot and eliminated the district court's jurisdiction over the remaining issues in the lawsuit." *Id.* at 220.

In the light of this new, binding authority on mootness from the Fifth Circuit, the State Defendants respectfully submit that the Plaintiffs' claims in this case were also mooted by the repeal of the challenged 2011 redistricting plans. (Because the United States did not file its complaint until after the challenged plans were repealed, it did not present a live case or controversy to begin with.) It follows from *Davis v. Abbott* that the Plaintiffs' claims became moot before final judgment; they should therefore be dismissed for lack of subject-matter jurisdiction. *See Rhodes v. Stewart*, 488

U.S. 1 (1988) (per curiam) (holding that a challenge to prison conditions became moot when one plaintiff died and the other was released from custody before entry of judgment by the district court); *Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999) ("If mootness occurred prior to the rendering of final judgment by the district court, *vacatur* and dismissal is automatic."). At the very least, *Davis* implies that the Plaintiffs' claims are moot if they challenge districts that were, like Senate District 10, modified by the Court and later adopted in modified form by the Legislature.

CONCLUSION

The Court should enter judgment for Defendants on all claims.

Date: May 4, 2015

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