IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,	)	
Plaintiffs,	)	
v.	)	**2:12-CV-00691-WKW-MHT-WHP**
	)	**(Three Judge Court)**
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	
ALABAMA DEMOCRATIC CONFERENCE, et al.,	)	
Plaintiffs,	)	
v.	)	**2:12-CV-01081-WKW-MHT-WHP**
	)	**(Three Judge Court)**
STATE OF ALABAMA, et al.,	)	
Defendants.	)	

MOTION TO REQUIRE THAT DEFENDANTS DEMONSTRATE THAT ANY REMEDIAL PLANS SUBMITTED TO THIS COURT FULLY COMPLY WITH RECENT SUPREME COURT DECISIONS

Since this court's remedial order of February 10, 2017, the Supreme Court has decided two cases, including one earlier this week, that bear directly on this court's prior opinion and the constitutionality of any plans Alabama submits to repair the constitutional violations this court has already recognized.

In *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788, decided on March 1, 2017, the Supreme Court held that the three-judge court in the Eastern District of Virginia used the incorrect legal standard for evaluating whether racial gerrymandering had occurred with

respect to eleven Virginia state legislative districts. The Court clarified that plaintiffs alleging a racial gerrymander need not show as a prerequisite that the districts they are challenging do not conform to traditional districting criteria and further explained that the state cannot defend against a racial gerrymander by relying on a district's compliance with traditional districting criteria.

And then earlier this week, in *Cooper v. Harris*, 2017 U.S. Lexis 3214 (May 22, 2017) the Supreme Court held that North Carolina had engaged in racial gerrymandering with respect of its congressional districts because, with respect to Congressional District 1, the state had established a racial target for the districts with no strong basis in evidence to believe that such a target was necessary for the minority community to elect a candidate of choice.

In light of these two significant recent decisions, the Alabama Democratic Conference requests that this court order the defendants to address, for the recently-enacted redistricting plans they have submitted to this court, whether and how these new plans fully comply not only with this court's earlier opinion and remedial order, but also with these recent holdings of the Supreme Court. A three-judge federal district court in the Western District of Texas, as discussed below, issued such an order, *sua sponte*, in the immediate aftermath of the Supreme Court's decision earlier this week in *Cooper*.

I. Ensuring Compliance With *Bethune-Hill v. Virginia State Board of Elections* and *Cooper v. Harris*

Bethune-Hill clarified, in unmistakable terms, two important points directly relevant here. First, the Supreme Court held that in conducting the racial predominance inquiry, a court must look at the *actual considerations* that led the State to draw district lines as it did. The Supreme Court clarified that it is legal error to base the racial predominance inquiry on either *post hoc*

justifications that did not actually provide the reasons for the State's choices or on evaluations of whether the legislature *could have drawn* the same lines on the basis of traditional criteria. In *Bethune-Hill*, the State specifically argued that racial predominance could not be established "if the legislature could have drawn the same lines in accordance with traditional districting criteria." Slip op. at 9. The Supreme Court expressly held "[t]his is not correct." Id. As the Court squarely held: "The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." Id.

Second, the Supreme Court unanimously held that "[r]ace may predominate even when a reapportionment plan respects traditional districting principles." Slip op. at 9. If a State uses race-based means to move voters between districts, racial predominance can be established, even if the State does not subordinate traditional districting principles to race. As the Court held: "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory condition in order for a challenger to establish a claim of racial gerrymandering." Slip op. at 10. The Court acknowledged that at one point in time, racial predominance might be found only when a conflict with traditional principles existed. But the Court held it had rejected that approach many years ago, in *Miller v. Johnson*, 515 U.S. 900 (1995), and to eliminate any doubt about that, *Bethune-Hill* stated numerous times and in several different ways that "[r]ace may predominate even when a reapportionment plan respects traditional districting principles." Slip op. at 9. In yet another unequivocal statement of this principle, the Court declared: "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." Slip op. at 9.

The Supreme Court's decision in *Bethune-Hill* is consistent with the position on the racial predominance inquiry taken by Judge Thompson in the dissent in this case and calls into question the constitutionality of the ten districts for which the dissent, but not the majority, would have found that race predominated. The *Bethune-Hill* decision appears to contradict this court's view that race cannot predominate if the design of a district "*can* be explained by traditional districting criteria." *Ala. Legislative Black Caucus v. Alabama*, 2017 U.S. Dist. LEXIS 7867 at 34 (2017) (*ALBC*) (emphasis added). Indeed, the Supreme Court stated that it is precisely because traditional districting principles are "numerous and malleable" that racial predominance *must* be judged only on the basis of the State's actual reasons for a district's design. Slip op. at 9. The Supreme Court squarely endorsed precisely the position of Judge Thompson's dissent on this point.

This court must, of course, ensure that Alabama's remedial plans fully comply with the Constitution and with all relevant Supreme Court precedent interpreting the Constitution. Plaintiffs therefore respectfully suggest that the court order defendants to explain how their recently adopted redistricting plans fully comply not only with this court's initial opinion and remedial order, but also with the constitutional constraints on racial gerrymandering explained in *Bethune-Hill*. For example, although the court's current remedial order requires only that the state provide "for any district intentionally drawn with a black VAP in a manner that subordinates traditional districting principles, the factual basis upon which the Legislature concluded that the VRA requires such a black VAP," *Bethune-Hill* makes clear that a "strong basis in evidence" is necessary for any VRA-required district intentionally drawn with a certain black VAP, regardless of whether that district "subordinates traditional districting principles." Thus, for any and all districts the State claims are required by the VRA (whether or not such districts can be said to subordinate traditional districting principles), the State should be required to provide the factual

basis on which the legislature concluded that the VRA required the level of black population of that district. Likewise, the court should require defendants to explain how their plans are consistent with the rule reiterated in *Cooper* that, when redistricters "purposefully establish[] a racial target" that "'ha[s] a direct and significant impact"' on a district's configuration, a racial gerrymander has been established. Slip op. at 11. To illustrate, the Court noted that if a mapmaker were told "to make sure [a district's] BVAP hit 75%," it would be clear "[b]ased on such evidence" that race predominated. Slip op. at 29.

The dissenting opinion in this court had urged that same principle as the correct understanding of the law. But the majority rejected this view and characterized it as "closer to the view of the dissenting justices" in earlier Supreme Court cases. *ALBC,* 2017 U.S. Dist. LEXIS at 65. Yet as the Solicitor General of Alabama recognizes, as noted below, after the Court's recent decisions, the law on what constitutes racial predominance has changed. The Supreme Court was unanimous in *Bethune-Hill* and in *Cooper* (regarding CD 1) in holding that race can predominate even when a State adheres to traditional districting principles, and that race predominates when a State sets a racial target for a district which then has a direct and significant impact on the district's design. *Cooper* cited evidence of districts "with stark racial borders: Within the same counties, the portions that fall inside District 1 have black populations two to three times larger than the portions placed in neighboring districts." Slip op. at 11.

The Supreme Court's instruction to focus only on the "actual reasons" for the State's choices is particularly important in this case because the State did not keep a contemporaneous record of why the drafters designed many of the districts as they did. As these recent Supreme Court decisions note, it will often be easy to come up with post-hoc theories that are consistent with the array of "traditional districting principles" that are available and that could be suggested

retrospectively to fit the design of the districts that emerged. But in this case, this court has acknowledged already, as it was bound to do by virtue of the Supreme Court's decision in this case, that "Alabama Had a Statewide Policy of Racial Targets," and that this policy provides evidence that race motivated the drawing of lines in multiple districts. *ALBC*, 2017 U.S. Dist. LEXIS at 63. In the ten districts about which the majority and dissent disagreed regarding racial predominance, the black populations all came within 0.60% or less of their prior population; six are less than 0.1% from their prior populations. After the Supreme Court opinions, the courts have been admonished not to speculate about whether race-neutral approaches could have, or might have, accounted for these stark patterns. Before approving new districting plans for these districts, the court must focus on whether the "actual reasons" for the State's choices do not involve racial predominance, if the State still manages to hit its initial targets so precisely.

Where this court's opinion and *Bethune-Hill* or *Cooper v. Harris* conflict, this court must now apply those decisions in evaluating the State's plans.

II. Proper Application of Strict Scrutiny, in Light of the Supreme Court's Recent Decisions

ADC also believes that the two Supreme Court decisions call into question the majority's holding that Alabama satisfied strict scrutiny for the racially-gerrymandered SD 23 and HD 68. ADC acknowledges that the Supreme Court's decisions do not directly conflict with this court's prior opinion on these points in the same way as with the points above, but there is considerable tension, at the least, between this court's analysis and that of the Supreme Court. To ensure that this court, when it evaluates the State's new plans, properly applies the governing law, this court should reconsider whether these districts satisfy strict scrutiny.

This court held that the "strong basis in evidence" standard was satisfied here because Alabama relied principally on comments made at public hearings by incumbent legislators to conclude that constructing these districts at close to 65% black population was necessary to preserve the ability to elect. But in *Cooper*, the Supreme Court held that State must engage in a "meaningful legislative inquiry" as to whether a particular level of black population is necessary to preserve the ability to election, and that the State must "carefully evaluate" the evidence in order to have a "strong basis in evidence" for believing race-based gerrymandering at particular level is required by the VRA. The reliance on incumbent legislators as to how safe their districts ought to be, rather than a "careful evaluation" and a "meaningful legislative inquiry," is not consistent with the Court's instructions in *Cooper*.

Similarly, the Court's opinion in *Bethune-Hill* shows the kind of "meaningful legislative inquiry" that is sufficient. There the drafters considered turnout rates, the results of recently contested primary and general elections, the fact that the specific district at issue included a large population of disenfranchised black prisoners, and they discussed many times with incumbents what was necessary to preserve the ability to elect. Slip op. at 15. At the end of that "functional analysis", the legislature had a "strong basis in evidence" for concluding that a 55% BVAP was required. Here, by contrast, the redistricters considered none of the detailed kinds of information relied upon in Virginia. Yet they ended up deciding that nearly 65% districts were required to preserve the ability to elect. But such excessively supermajority districts are necessary virtually nowhere in the United States today to preserve the ability of African Americans to elect candidates of choice (for Hispanics, with much lower levels of citizenship, the facts might well differ). To support concluding that racial-gerrymandered districts with a nearly two thirds black population are necessary to preserve the ability to elect, Alabama needed to do considerably more – under the

Supreme Court's recent decisions -- than simply point to the vague comments of incumbent legislators.

* * *

ADC also notes that Alabama's lead counsel, the Solicitor General, has already acknowledged that the Supreme Court's pair of decisions this Term significantly clarify the racial predominance inquiry in a way that requires lower courts to find racial gerrymanders more readily than before these decisions. Thus, Solicitor General Brasher, writing about the significance of these decisions in a Symposium for SCOTUSblog, concluded that *Bethune-Hill* and *Cooper* make it "relatively easy to get to strict scrutiny" and that, after these cases, "there is a low bar for plaintiffs to show racial predominance. . . ."[1] At greater length, Solicitor General Brashser concluded:

> In affirming the lower court's rejection of the redistricters' partisan explanation for CD 12, the Supreme Court followed its decision in Bethune-Hill, which likewise *lowered the bar for plaintiffs to show that race predominates in a district.* This glide path to strict scrutiny is contrary to the way the court evaluated racial gerrymandering claims when it created the cause of action in the 1990s. In *Shaw v. Reno* and follow-on cases, the court suggested that it would be the rare case in which race predominated and strict scrutiny applied. *Now, the court is suggesting that any serious consideration of race in the redistricting process may be enough for a lower court to find that race predominated in a district.* (emphasis added)

Similarly recognizing the significance of the Supreme Court's recent decisions, the three-judge federal court in the Western District of Texas, which is currently in the midst of preparing for a trial on multiple racial gerrymandering, VRA, and intentional discrimination challenges to state house and federal congressional election districts in Texas issued an immediate order, *sua*

[1] *See* http://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting/.

sponte, the same day *Cooper* was decided, requiring the parties to file supplemental briefing addressing the effects of *Cooper* and *Bethune-Hill* on the various claims in that case. That order is attached to this motion. Tellingly as to the importance of these decisions, the court also asked the Stat e of Texas if it intended to "voluntarily undertake redistricting in a special session in light of the *Cooper* opinion." *Perez, et al. v. Abbott, et al*., Dkt. 1395, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. May 22, 2017).

The Supreme Court's two recent decisions require this court to revisit the racial-predominance and strict scrutiny analysis in its prior opinion when the court evaluates the State's remedial plans. In light of that, ADC respectfully requests that the court order the defendants to explain how and why their remedial plans fully comply with the Supreme Court's recent decision.

Respectfully submitted this 25th day of May, 2017.

s/ Richard H. Pildes
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CERTIFICATE OF SERVICE

I certify that on May 25, 2017 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record in this case.

s/ Richard H. Pildes

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER

In light of today's Supreme Court decision in *Cooper v. Harris*, the Court invites the parties to file supplemental briefs, in whatever length they find appropriate, addressing the effect of *Cooper* (and, if desired, *Bethune-Hill v. Virginia State Board of Elections*) on the various claims in the congressional and Texas House cases. Such briefs shall be due **June 6, 2017**. It would be most helpful, to the extent reasonably possible, for any such comments to designate the specific districts to which they are addressed and (if applicable) any specific 2017 findings/conclusions and legal analysis from this panel to which the comments pertain.

In addition to any such briefing, the Court directs Defendants' counsel to confer with their client(s) about whether the State wishes to voluntarily undertake redistricting in a special session in light of the *Cooper* opinion and counsel shall report their clients' position to this Court no later than **May 26,**

2017.

SIGNED this 22nd day of May, 2017,

_____/s/_____

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel