

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

SHANNON PEREZ, <i>et al.</i> ,)	
)	CIVIL ACTION NO.
<i>Plaintiffs,</i>)	SA-11-CA-360-OLG-JES-XR
)	
v.)	
)	
STATE OF TEXAS, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

**US CONGRESSMAN HENRY CUELLAR SUPPLEMENTAL BRIEF CONCERNING
*COOPER V. HARRIS***

The facts and legal issues raised in *Cooper* are very similar to the ones presented in this case. *Cooper* is instructive on two important legal issues: it affirmed strict scrutiny review of unjustified race based redistricting and extirpated the arguments that compliance with the Federal Voting Rights Act (VRA) or political considerations justified race based redistricting. See also *Bethune-Hill v. State Bd. Of Elections*, 137 S. Ct. 788, *788; 197 L. Ed. 2d 85, **85; 2017 U.S. LEXIS 1568.¹ In *Cooper* the Supreme Court reviewed the district court’s findings that race, not politics or compliance with the VRA, furnished the predominant rationale for drawn the congressional districts. It affirmed the district courts finding that complying with the VRA could not justify the consideration of race and the district court’s finding that partisan considerations did not justify the use of race to allocate population among congressional districts. *Cooper*, *Slip at 10 and 28*.

¹ In *Bethune-Hill*, the district court attempted to establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles; the Supreme Court reversed and did not impose any prerequisite; “actual” consideration of race in the line drawing was sufficient to trigger strict scrutiny, *Id* *799

More importantly, *Cooper* makes it clear that the district court's² factual findings will be reviewed for "clear error"; under this standard, the Supreme Court may not reverse just because they would have decided the [matter] differently, *id Slip op at p. 4*. The district court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for "clear error". See Fed. Rule Civ. Proc. 52(a)(6); *Easley v. Cromartie*, 532 U. S. 234, 242 (2001) (*Cromartie II*); *id.*, at 259 (THOMAS, J., dissenting).

Under that standard of review, we affirm the court's finding so long as it is "plausible"; we reverse only when "left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U. S., at 573–574;

As in *Cooper*, this Court is faced with the same issues; this Court's reasoning and well documented findings of fact³ that C185 violated the voting rights of Latinos in South/West Texas is consistent with the one used by the district court in *Cooper*.

C185 and the drawing of the Latino Districts in South/West Texas

CD23 as a Latino District in Compliance with the VRA:

CD 23 has long been subject to manipulation by the State of Texas for illegal purposes (see *LULAC v. Perry*, 548 U.S. 399 (2006), which concerned CD23 after the 2003 redistricting. In *LULAC* Texas reduced the Latino voting age population to protect an incumbent and the federal court struck it down, *Supra*. Now, in this case, Texas again used race data to reduce the effectiveness, not the population, of CD 23 as a district in which Latinos can elect a candidate of their choice. The mapdrawers manipulated voting precinct

² In *Cooper* as in the case, the district court was a three judge court with direct appeal to the Supreme Court, *Slip Op* p 3 fn 2

³ Even the dissent was impressed with the documented fact and law of the majority: "The majority's massive product, including its opinion and its findings and conclusions, is commendable, to say the least. I trust that the attorneys and litigants appreciate the efforts of my two colleagues and their staffs." Dkt #1339 p 166

racial data to either include or exclude particular voting precincts in CD 23.

Texas claimed that CD 23 was a Latino opportunity district because it had over 50% HCVAP and therefore, it complied with the VRA; no more than the 50% threshold was necessary they claimed. Texas applied the mechanical test that 50% HCVAP was, by definition, a Latino opportunity district. *Cooper* makes it clear and supports this Court's findings that "performance" should be the standard to determine if a district is a minority opportunity district, *Slip op at p. 13*. In fact, Justice Kennedy recognized that a majority-HCVAP district may still lack "real electoral opportunity." *LULAC*, 548 U.S. at 428 (Kennedy, J.); see also *Bartlett v. Strickland*, 556 U.S. 1, 39-40 (2009) (Souter, J., dissenting) ("[E]ven when the 50% threshold is satisfied, a court will still have to engage in factually messy enquiries about the 'potential' such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote-dilution under a totality of the circumstances.").

In *Cooper*, the three judge district court was faced with North Carolina's argument that its race based districting of CD 1 was justified by the State's interest in complying with the VRA; the same argument made by Texas in this case. The plaintiffs were able to prove that race was the dominant factor in North Carolina's drawing of CD 1 and that the race based redistricting was not justified by compliance with the VRA.

The Supreme Court made it clear, (*Cooper*, slip op., at 3), that:

When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action. *Alabama Legislative Black Caucus v. Alabama*, 575 U. S. ___, (2015) (slip op., at 22). Or said otherwise, the State must establish that it had "good reasons" to think that it would transgress the Act if it did *not* draw race-based district lines. *Ibid.*

In *Cooper* the districts court, as this court has done, evaluated similar mapdrawer and expert evidence and made similar factual determinations. Uncontested evidence clearly demonstrated that the North Carolina mapmakers, in drawing CD 1, purposefully established racial targets of over 50% African-American voting age (BVAP) population in order to comply with the VRA. Applying strict scrutiny and whether or not the VRA would require such a standard for CD 1, the district court considered the three threshold conditions for proving vote dilution under §2 of the VRA:

This Court identified, in *Thornburg v. Gingles*, three threshold conditions for proving vote dilution under §2 of the VRA. See 478 U. S., at 50–51. First, a “minority group” must be “sufficiently large and geographically compact to constitute a majority” in some reasonably configured legislative district. *Id.*, at 50. Second, the minority group must be “politically cohesive.” *Id.*, at 51. And third, a district’s white majority must “vote[] sufficiently as a bloc” to usually “defeat the minority’s preferred candidate.” *Ibid*

Applying strict scrutiny, the district court found that CD 1, with a population of less than 50% of BVAP, had, for twenty years, consistently elected the candidate of choice of the African American community. Indeed, CD 1 had always performed well for the electoral choice of the African American community with between 46% and 48% BVAP; therefore, the imposition of a 50% + standard for CD 1 did not survive strict scrutiny. In fact, it unjustifiably packed minorities into CD 1 and therefore the VRA did not justify the use of race for redistricting CD1..

As directed by *Cooper*, this court evaluated expert, lay and mapdrawers’ testimony of the plaintiffs and defendants and determined that, as a finding of fact, CD23 was intentionally drawn on the basis of race and violated federal law in intent and effect:

Considering all the evidence, including the mapdrawers’ intent to protect an

incumbent who was not the Latino candidate of choice and to lower the Latino performance of CD23, the expert testimony, the high level of racial polarization, the low Latino voter turnout, the manipulation of voter turnout and cohesion, the increase in the turnout gap, the splitting of cohesive, politically active areas (Maverick County, San Antonio), and the lingering effects of past discrimination on turnout and electoral participation, the Court finds that CD23 does not provide real electoral opportunity. ... Because mapdrawers had the intent to provide Hispanic voters less opportunity to participate in the political process and elect their candidates of choice, and they effectuated that intent in CD23, CD23 violates § 2 in both intent and in effect. (Dkt 1339, p28-29, see also p 57-58)

Moreover, under the *Cooper* standard, the Supreme Court may not reverse just because they “would have decided the [matter] differently.” *Anderson v. Bes- semer City*, 470 U. S. 564, 573 (1985). A finding that is “plausible” in light of the full record—even if another is equally or more so—must govern. *Id.*, at 574.

CD 35

The Court’s fact findings based on the entire record provide ample support for the conclusion that race was the predominant factor motivating the decision to place a significant number of voters within or without CD35. It is undisputed that the Legislature, and its mapdrawer Ryan Downton, intended to create CD35 as a new Latino opportunity district, meaning it had to have over 50% HCVAP. Tr915-16 (Downton) (stating that he was “directed to” create “a new citizen voting age population majority district for Hispanics in Texas”); Tr918 (Downton) (“When we drew the map originally, we were focused on getting District 35 above 50 percent of HCVAP.”); TrA1642 (Downton) (“When we were creating District 35, we were creating a Section 2 majority Hispanic CVAP district, so it had to be over 50 percent.”). That criteria (a majority HCVAP) was the number one criteria for drawing the district, and could not be compromised for any other purpose or traditional districting criteria. Downton 8-12-11 depo. (Joint Ex. J-62) at 86 (“We had to keep or we wanted to keep 35 above 50 percent.”).... The evidence is clear that racial considerations predominated in the

determination of what population to include in CD35 ...The Court thus finds that race predominated in the drawing of CD35 and that strict scrutiny applies. (Dkt # 1339 at 35-41)

Moreover, *Cooper* supports this Court finding that the seven (7) congressional districts drawn in South/West Texas as “Latino” districts in Plan C185 violated the rights of the Latino community. Texas’ argument for sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics. *Cooper*, slip at 20; See *Miller*, 515 U. S., at 914.

Was it race or pure politics that drove the drawing of the congressional districts in South/West Texas? The dissent asserts that politics explains the mapdrawing in South/west Texas not race:

I disagree with the panel majority’s conclusions that race, instead of partisan advantage, drove the decisions made in CD23, in Nueces County and throughout CD27, and in the Austin/San Antonio IH35 corridor affecting primarily CD25 and CD35. As to all those areas, a careful examination of the record in light of the applicable law reveals that, as the State maintains, the goal was to achieve the maximum number of Republican seats in the 36-member Congressional, (Dkt # 1339 p 181)

The same argument was made in *Cooper*; North Carolina attempted to justify the packing of African Americans into a congressional district strictly for political reasons; the State claimed that they “moved voters in and out of the district as part of a “strictly” political gerrymander, without regard to race ... mapmakers drew their lines, in other words, to “pack” District 12 with Democrats, not to diminish the voting rights of African Americans. “*Slip op at p. 19*. The district court conducted a “sensitive inquiry” into all “circumstantial and direct evidence of intent” to assess whether the plaintiffs have managed to disentangle race from politics and prove that race drove the districts lines. *Hunt v. Cromartie*, 526 U.S. 541, at 546 (1999).

In reference to CD 23, this Court found that “Dr. Alford’s [defendants expert]

conclusions regarding Bexar County are consistent with Plaintiffs' experts and do not undermine Dr. Flores's conclusions that the overall effect of areas moved in and out of CD23 was to decrease SSVR turnout, increase non-SSVR turnout, and widen the turnout gap." (Dkt #1339, p22 fn22) This Court's finding on CD 23 mirrored the *LULAC v Perry*, 548 US 399 (2006) at 438 finding involving CD23: " 'Latino voters were poised to elect their candidate of choice'. Thus, the Court found that Latino voters had a real opportunity to elect that was taken from them by the redistricting." (Dkt #1339, p 18):

Thus, to protect an incumbent who was not the choice of the Latino majority in the district and who they knew would likely be ousted in the next election by those Latino voters, mapdrawers intended to decrease and successfully decreased the performance of CD23 for minority-preferred candidates. There was both discriminatory motive and improper use of race to achieve the desired goal. While § 2 does not require relief merely due to lower Latino voter turnout, intentionally targeting Hispanic voter turnout and cohesion while advantaging Anglo cohesion and turnout is qualitatively different. And when done to minimize Hispanic electoral opportunity, it bears the mark of intentional discrimination. (Dkt #1339 at 23)

Instead of complying with the three threshold conditions set forth in *Thornburg v. Gingles* 478 U. S., at 50–51 as a reason for using a racial gerrymander, Texas lowered the electability of the choice of the Latino community in the seven congressional districts in South/West Texas in violation of § 2 in both intent and effect.

In this case, as in *Cooper*, this Court addressed Texas' claim that the congressional districts were drawn predominantly to advantage Republican not on the racial basis. They heard lay and expert testimony and found that race was the predominant factor in the redistricting:

In sum, Plaintiffs have established a § 2 violation, both in terms of intent and effect, in South/West Texas. Plaintiffs have shown that seven compact majority-HCVAP districts could and should be drawn there that would substantially address the § 2 rights of Hispanic voters in South/West Texas, including Nueces County. Defendants' decision to place Nueces County Hispanic voters in an Anglo district had the effect and was intended to dilute their opportunity to elect their candidate of choice. Meanwhile, race predominated in the drawing of CD35, and Defendants' decision to place majority-

HCVAP CD35 in Travis County was not to comply with the VRA but to minimize the number of Democrat districts in the plan overall. Plaintiffs have established an equal protection violation with regard to CD35. Defendants' manipulation of Latino voter turnout and cohesion in CD23 denied Latino voters equal opportunity and had the intent and effect of diluting Latino voter opportunity. Nueces County Hispanics and Hispanic voters in CD23 have proved their § 2 results and intentional vote dilution claims. The configurations of CD23, CD27, and CD35 in Plan C185 are therefore invalid. (Dkt #57-58)

Specifically, Latinos in CD 23, 35 and Nueces County were manipulated so that the Latino community had a viable chance to elect candidates of their choice in five (5) instead of seven (7) congressional districts. (Dkt #1339, p29 & 58). As in *Cooper*, Texas' use of racial data in the South/West Texas congressional districts was not used to comply with the VRA; indeed, it was used to violate Voting Rights Act by reducing the ability of Latinos to elect candidates of their choice.

Texas' position that the mapmaker moved voters in and out of the districts as part of a strictly political gerrymander without regard to race was justifiably debunked by this Court pointing out that:

Plaintiffs have shown that seven compact majority-HCVAP districts could and should be drawn there that would substantially address the § 2 rights of Hispanic voters in South/West Texas, including Nueces County. Defendants' decision to place Nueces County Hispanic voters in an Anglo district had the effect and was intended to dilute their opportunity to elect their candidate of choice. Dkt # 1339 p 58

This court's findings of fact and law are properly established by the record in this case. As in *Cooper*, the Supreme Court, will apply the "clear error" test to see if the district court's decision was "plausible"; "we reverse only when left with the definite and firm conviction that a mistake has been committed". *Anderson v. Bessemer City*, 470 U.S. 564, at 575 *Slip op at 20*.

Under this standard, this court's decision is strongly supported by the well documented record, facts and law.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this a true and correct copy of this Advisory of US Congressman Henry Cuellar has been served upon the Defendants using the electronic filing system.

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