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' SUPPLEMENTAL BRIEF ADDRESSING *COOPER V. HARRIS* AND *BETHUNE-HILL V. VIRGINIA STATE BOARD OF ELECTIONS*

Defendants submit this supplemental brief in response to the Court's order of May 22, 2017, inviting the parties to address the effect, if any, of the Supreme Court's recent decisions in *Cooper v. Harris*, No. 15-1262, 2017 WL 2216930 (May 22, 2017), and *Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, 137 S. Ct. 788 (March 1, 2017), on the Texas House and congressional claims in this case. As explained below, *Cooper* and *Bethune-Hill* have very little impact on this case for two reasons. *First*, those cases reaffirm longstanding redistricting principles; they do not break significant new legal ground. *Second*, *Cooper* and *Bethune-Hill* are, on the whole, narrow opinions focused on the particular circumstances of those respective redistricting plans, and this case is different in several significant ways.

I. *COOPER* AND *BETHUNE-HILL* REAFFIRMED ESTABLISHED REDISTRICTING PRINCIPLES.

The Court's decisions in *Cooper* and *Bethune-Hill* reaffirmed established equal protection redistricting principles. In *Bethune-Hill*, the Court explained that its holding "is controlled by precedent" and that its decision "reaffirms the basic racial predominance analysis explained in *Miller* [*v. Johnson*, 515 U.S. 900 (1995)] and *Shaw II* [*Shaw v. Hunt*, 517 U.S. 899 (1996)], and the basic narrow tailoring analysis explained in *Alabama* [*Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015)]." 137 S. Ct. at 802. *Cooper* also hewed to that established precedent.

A. *Bethune-Hill*

Bethune-Hill clarified and applied established racial-predominance and strict-scrutiny standards in an equal protection challenge to 12 Virginia state legislative districts. 137 S. Ct. at 794. Following the 2010 census, the Virginia General Assembly redrew several state legislative districts to ensure proper numerical apportionment among the districts. *Id.* at 795. In an effort to comply with §5 of the VRA by "maintain[ing] minority voters' ability to elect their preferred candidates in these districts" while also "complying with the one-person, one-vote criterion," Virginia legislators concluded that each of the 12 districts needed a black voting age population (BVAP) "'of at least 55%,'" and the districts were drawn such that each of the 12 "contained a BVAP greater than 55%." *Id.* at 795-96.

The Supreme Court ultimately upheld Virginia's use of a race-based statistical target (of 55% BVAP) for one of the challenged districts, while the Court remanded on the remaining districts after clarifying that the district court had erroneously imposed a threshold requirement of showing a conflict with traditional redistricting principles to assert racial-gerrymandering claim. *Id.* at 801.

The district court had concluded that race did not predominate in 11 of the 12 challenged districts because it found no actual conflict between race and traditional redistricting criteria, focusing only on portions of the challenged districts. *Id.* at 794. The Supreme Court disagreed with the district court's analysis on these 11 districts in two primary ways, and the Court remanded for further consideration. *Id.* at 797, 800. First, the Supreme Court recognized that a conflict with traditional redistricting criteria "'may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale,'" *id.* at 798 (quoting *Miller*, 515 U.S. at 913), making it an essential element of proof "in many cases, perhaps most cases," *id.* at 799. But it disapproved of a rule categorically requiring plaintiffs to establish such a conflict as a prerequisite to showing that "race for its own sake" predominated. *Id.* Second, the Court disapproved of the district court's failure to consider each district as a whole—as opposed to only assessing the particular district lines that conflict with traditional criteria—when assessing whether race predominated. *Id.* at 799-800. The Court explained that the racial-predominance inquiry should review

the entire district because it concerns the legislature's motive for "the design of the district as a whole." *Id.* at 800.

Separately, the Supreme Court addressed the one legislative district that the district court determined was drawn with race as the predominant factor (District 75). *Id.* at 800-01. The Court concluded that the State satisfied strict scrutiny because it had "'*good reasons*'" to think that drawing district boundaries to ensure 55% BVAP was necessary to avoid retrogression under § 5 of the VRA. *Id.* at 801. The Court noted that, among other things, it was undisputed that the district was an ability-to-elect district, and that "white and black voters in the area tend to vote as blocs." *Id.* Given the map drawers' "careful assessment of local conditions and structures," the Court concluded "the State had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression." *Id.* The Court specifically held that the narrow-tailoring analysis does *not* ask whether "a court would have found no [VRA] violation"; instead, "[t]he question is whether the State had '*good reasons*' to believe a 55% BVAP floor was necessary to avoid liability under [the VRA]." *Id.* at 802. "Holding otherwise," the Court explained, "would afford state legislatures too little breathing room, leaving them 'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause" *Id.*

B. ***Cooper v. Harris***

Cooper addressed racial gerrymandering challenges to two longstanding (and frequently litigated) congressional districts in North Carolina that were redrawn

following the 2010 census. *Cooper*, 2017 WL 2216930, at *9. In District 1, uncontested evidence showed that the State adopted (and accomplished) a racial voting-age-population target for the district: "African–Americans should make up no less than a majority of the voting-age population." *Id.* at *11. Given a "racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites," the Court applied strict scrutiny. *Id.* at *12.

The State argued in defense that it had good reasons to think a majority-minority district was required by section 2 of the Voting Rights Act (VRA) to avoid vote dilution. *Id.* The Supreme Court disagreed, given the particular facts of that district. North Carolina's District 1 had been a longstanding district that had covered mostly the same territory for over two decades. *Id.* at *13 (noting "a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1"). There was thus two decades worth of historical election results that could be analyzed in determining how that particular retained district would perform. The new North Carolina District 1, while largely retaining the same territory as the previous district, increased the BVAP "from 48.6% to 52.7." *Id.* at *9. And for the past two decades, "the district's BVAP usually hovered between 46% and 48%." *Id.* at *12. In other words, while District 1 was not quite a majority-minority district, it was very close to already being one. Thus, African–American preferred candidates had consistently been elected by large margins for two decades in that longstanding district before the State's new plan was created—even though African-Americans "made up less than a majority of District 1's voters."

Id. Accordingly, "experience gave the State no reason to think that the VRA required" it to increase BVAP in order to ensure African-American voters' ability to elect candidates of their choice in the district—given the unique facts of a district that had essentially covered the same territory for two decades and was very close to being a majority-minority district the entire time. *Id.*

The Court recognized that a legislature "must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements," but it faulted the State for not conducting any "meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability." *Id.* at *13. With no meaningful assessment, the State could not show good reasons for its race-based line drawing. *Id. Cooper*'s District 1 stands as an exception to the typical strict scrutiny VRA compliance case, reflected most recently in *Bethune-Hill*, where the Court affirmed the legislatures determination that "the State had a strong basis in evidence to believe a 55% BVAP floor was required" for VRA compliance. 137 S. Ct. at 801; *see also*, *id.* at 802 (explaining that "*Alabama* did not condemn the use of BVAP targets to comply with § 5 in every instance").

Turning to the other district at issue in *Cooper* (District 12), the Court concluded that the district court did not clearly err in concluding that race was the predominant factor in drawing the district, given a record filled with competing direct evidence on the issue—including public statements by legislators stating that "racial considerations

lay behind District 12's augmented BVAP." *Cooper*, 2017 WL 2216930, at *16; *see id.* at *15-16, 19. The Court also declined to categorically require plaintiffs to produce alternative maps showing that the legislature's political objectives could have been realized while improving racial balance, as a categorical prerequisite to establishing that race predominated in redistricting. *Id.* at *20. Nevertheless, the Court explained that alternative maps will sometimes be necessary due to the "'demanding'" burden in redistricting cases. *Id.* The Court noted, for example, that alternative maps were necessary in *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (*Cromartie II*) because plaintiffs produced "meager direct evidence of a racial gerrymander and needed to rely on evidence of forgone alternatives." *Id.* at *22.

C. The Supreme Court's Application of Established Redistricting Principles in *Cooper* and *Bethune-Hill*

Cooper and *Bethune-Hill* did not signal a doctrinal shift in redistricting, but a few insights can be gleaned from the Supreme Court's opinions and deserve mention.

1. Racial Gerrymandering Plaintiffs Must Prove That "Race for Its Own Sake" Was the "Overriding Reason" for Drawing the Challenged District Boundaries and the Criterion that "Could Not Be Compromised."

The Court once again emphasized in *Bethune-Hill* that "'electoral districting is a most difficult subject for legislators,' requiring a delicate balancing of competing considerations." 137 S. Ct. at 797 (quoting *Miller*, 515 U.S. at 915). The Court further expressed that "'redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of . .

. a variety of other demographic factors.'" *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*)).

In light of the "delicate balance" required of legislators in redistricting, the Court in *Bethune-Hill* and *Cooper* reaffirmed the difficult burden of proof placed on plaintiffs in racial gerrymandering cases. The Court emphasized the need for proof that "race was the predominant factor motivating the legislature's decision" in drawing district boundaries, which requires the plaintiff to demonstrate that "the legislature 'subordinated' other factors . . . to 'racial considerations,'" *Cooper*, 2017 WL 2216930, at *6 (quoting *Miller*, 515 U.S. at 916), such that "'[r]ace was the criterion that, in the State's view, could not be compromised,'" *Bethune-Hill*, 137 S. Ct. at 798. Put another way, plaintiffs must show that "race for its own sake" was "the overriding reason for choosing one map over others." *Id.* at 799.

2. Strict Scrutiny Requires Only "Good Reasons" for Thinking That Race-Based Redistricting Was Required to Comply with the VRA, Not Proof that a Court Would Find That It was Actually Necessary.

The Supreme Court reaffirmed in *Cooper* and *Bethune-Hill* that a narrow-tailoring analysis in redistricting must be a realistic and achievable standard because state legislatures need "breathing room" to avoid being "'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause." *Id.* at 802 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)); *Cooper*, 2017 WL 2216930, at *7 (explaining the standard "gives States 'breathing room' to adopt

reasonable compliance measures that may prove, in perfect hindsight, not to have been needed").

Satisfying strict scrutiny therefore does not require prescience or perfection; it will be satisfied so long as there are "good reasons" for the legislature "to think that it would transgress the [VRA] if it did *not* draw race-based district lines" even if a court concludes that, in hindsight, such actions were not actually necessary. *Id. Bethune-Hill* likewise explained that strict scrutiny "does not require the State to show that its action was 'actually . . . necessary' to avoid a statutory violation, so that, but for its use of race, the State would have lost in court." 137 S. Ct. at 801 (citing *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)). "Rather, the requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act, 'even if a court does not find that the actions were necessary for statutory compliance.'" *Id.* (quoting *Alabama*, 135 S. Ct. at 1274).

3. Establishing Racial Gerrymandering Will Generally Require Proof of Conflict with Traditional Redistricting Criteria.

In *Bethune-Hill* the Supreme Court recognized that plaintiffs usually cannot establish racial gerrymandering without showing that the challenged district lines were drawn in conflict with traditional redistricting principles. *Id.* at 799. The Court declined to adopt a categorical rule that a conflict or inconsistency is "a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering"—but it nevertheless held that "[a]s a practical matter, in many cases,

perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria." *Id.* This is because drawing district boundaries predominantly on the basis of race generally requires legislatures "to depart from traditional principles in order to do so." *Id.* Underscoring the importance of demonstrating such a conflict, the Court noted that it has never ruled for challengers on predominance "without evidence that some district lines deviated from traditional principles." *Id.* (citing *Alabama*, 135 S. Ct. at 1265–66, *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (*Cromartie I*); *Vera*, 517 U.S. at 962, 966, 974; *Shaw II*, 517 U.S. at 905-06; *Miller*, 515 U.S. at 917; *Shaw I,* 509 U.S. at 635–36).

4. Assessing Racial Gerrymandering Claims Requires District-Level Review.

In *Bethune-Hill*, the Supreme Court reaffirmed the principle that racial gerrymandering claims require review at the district level. 137 S. Ct. at 800. Citing *Alabama*, the Court criticized the district court for failing to assess predominance at the district level. *Id.* at 799-800. As the Court put it "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Id.* at 800.

5. Partisan redistricting is *not* a proxy for racial gerrymandering.

It is also important to note what *Cooper* and *Bethune-Hill* did *not* hold. These cases did not establish that partisan gerrymandering is a proxy for racial gerrymandering.

Shortly after *Cooper* was issued, one legal commentator interpreted *Cooper* to mean that "race and party are not really discrete categories and that discriminating on the basis of party in places of conjoined polarization is equivalent, at least sometimes, to making race the predominant factor in redistricting." Rick Hasen, *Breaking and Analysis: Supreme Court on 5-3 Vote Affirms NC Racial Gerrymandering Case, with Thomas in Majority and Roberts in Dissent*, Election Law Blog (May 22, 2017), http://electionlawblog.org/?p=92675. That gloss on *Cooper* is wrong, however, and has been roundly criticized by legal commentators across the political spectrum. Professor Justin Levitt, former Deputy Assistant Attorney General in the Department of Justice's Civil Rights Division, rejected Hasen's interpretation directly: "The Court did *not* just treat race and party as proxies for each other." Justin Levitt, *NC Redistricting, from Someone not named Rick*, Election Law Blog (May 22, 2017), http://electionlawblog.org/?p=92700. Professor Richard Pildes also disagreed with Hasen and explained:

> Contrary to Rick, the majority is not holding anything like the principle that it will treat partisan-based districting (or partisanly-motivated election regulation more generally) as a proxy for race-based districting (or race-based election regulation). Doing that certainly would be revolutionary, and would indeed trigger enormous debates within the Court. But there are no such debates today because the Court did nothing of this sort.

Richard Pildes, *Disagreeing with Rick Hasen on the North Carolina Case*, Election Law Blog (May 22, 2017), http://electionlawblog.org/?p=92706; *see also* Michael Parsons, *Cooper v. Harris: Proxy Battles & Partisan War*, Modern Democracy: On Law, Politics, and the

Republic (May 23 2017) ("Hasen seems to be looking for courts to treat 'politics as a proxy for race' ('party as race'). But *Cooper* does no such thing."), https://moderndemocracyblog.com/2017/05/23/cooper-v-harris-proxy-battles-partisan-war/.

There is a good reason for the criticism: nothing in *Cooper* supports the notion that the Court treats party-based redistricting as a proxy for race-based gerrymandering. To begin with, *Cooper* did not state that race and party were proxies for each other. To the contrary, the Court reaffirmed the opposite holding in the first footnote of the opinion when it quoted *Miller*'s statement that "'use of race as a proxy' for 'political interest[s]' is 'prohibit[ed].'" *Cooper*, 2017 WL 2216930, at *6 n.1. In another footnote, the Court similarly explained that "the 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." *Id.* at *15 n.7 (citing *Miller*, 515 U.S. at 914). Those holdings clarify that it is impermissible to use race for drawing district boundaries—even if the ultimate purpose is political. But they do not hold or imply that the use of political data or a purpose of partisan gerrymandering can be used to prove race-based redistricting.

The Court also recognized the reality that "political and racial reasons are capable of yielding similar oddities in a district's boundaries" because "'racial identification is highly correlated with political affiliation.'" *Id.* at *15 (quoting *Cromartie II*, 532 U.S. at 243). But rather than equating race and party, the Court explained that the correlation creates a formidable task for courts to "make '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 the former drove a district's lines." *Id.* If the Court were treating political affiliation as a proxy for race, then that "sensitive inquiry" would not be necessary. By affirming that this inquiry is necessary, *Cooper* confirms two principles: (1) race and politics are distinct factors; and (2) plaintiffs bear the demanding burden to disentangle race and politics in order to prove impermissible race-based redistricting.

II. *COOPER* AND *BETHUNE-HILL* ARE DISTINCT FROM THIS CASE IN SEVERAL RESPECTS.

Cooper and *Bethune-Hill* are not only narrow, fact-specific opinions, they are also different from this case in notable ways.

A. In the Few Districts Where the 2013 Texas Legislature Drew Boundaries at All, It Did Not Rely Predominantly on Race.

There is one overarching and dispositive distinction between *Cooper* and *Bethune-Hill* versus the Texas Legislature's 2013 plans at issue in this case: the use of race to draw district boundaries. Because the North Carolina and Virginia Legislatures relied on racial data to create the districts challenged in *Cooper* and *Bethune-Hill*, the Supreme Court considered whether their use of race satisfied strict scrutiny under the Voting Rights Act (VRA). *See Cooper*, 2017 WL 2216930, at *6; *Bethune-Hill*, 137 S. Ct. at 794. Here, by contrast, in all but a handful of Texas House districts, the 2013 Legislature could not have drawn district boundaries predominantly on the basis of race because it

did not redraw district boundaries at all—it adopted the boundaries drawn by this Court in its 2012 redistricting maps.

This case is fundamentally different from *Cooper* and *Bethune-Hill* because, except in a few Texas House districts, the 2013 Texas Legislature was not determining where lines in redistricting maps should be drawn when it enacted the 2013 plans. To the contrary, the Legislature simply adopted wholesale the interim congressional plan drawn by this Court in 2012, and it adopted the court-drawn interim Texas House plan with minor modifications that did not change the CVAP majority in any district.

This Court drew the 2012 interim plans in compliance with the Supreme Court's instruction "to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). Likewise, it followed the longstanding principle that court-ordered redistricting plans must be drawn "in a manner 'free from any taint of arbitrariness or discrimination.'" *Connor v. Finch*, 431 U.S. 407, 415 (1977) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). When the Court implemented the interim Congressional plan, it "t[ook] care not to incorporate into the interim plan any legal defects in the state plan." Order at 10–11 (March 19, 2012), ECF No. 691 (quoting *Perez*, 565 U.S. at 394). Similarly, in adopting the House plan, the Court followed "the Supreme Court's direction to leave undisturbed any district that is free from legal defect" but not to "incorporate any portion of the State map that is allegedly tainted by discriminatory purpose." Opinion at 3, 4 (March 19, 2012), ECF No. 690.

When the Legislature adopted the court-drawn plans in 2013, it had every reason to believe the Court's plans complied with the Constitution and Voting Rights Act, and it had no reason to believe that any district was drawn predominantly on the basis of race. And where the Legislature adopted districts from the court-drawn plans without changing the boundaries, it cannot possibly be said to have drawn districts predominantly on the basis of race; rather, the Legislature's purpose was to draw fair and legal maps that had already been drawn by this Court, and the Legislature itself did not draw district lines at all (except for a few Texas House districts). Accordingly, to the extent *Cooper* and *Bethune-Hill* consider legislatures' reliance on race to draw district boundaries, they have virtually no bearing on the validity of the Texas Legislature's 2013 plans.

B. *Cooper* Addressed Packing Minority Voters into a Crossover District That Largely Still Existed in the New Map and Had Traditionally Elected Minority Candidates For Two Decades, But No Such Packing Is at Issue in This Case.

In the redistricting plan at issue in *Cooper*, the North Carolina Legislature relied predominantly on race when it altered the boundary of District 1 to raise the BVAP from 48.6% to above 50%. The Supreme Court held that the Legislature's race-based decision failed strict-scrutiny review because District 1 had consistently elected candidates preferred by Black voters even with BVAP levels just below 50%. Because District 1 had already been very close to being majority-minority district (with a BVAP of 48.6%) and it had been performing as a crossover district in the benchmark plan and

for over two decades, North Carolina had no basis to conclude that increasing the BVAP was necessary to ensure Black voters' ability or opportunity to elect their preferred candidates; therefore, it could not reasonably claim that its reliance on race was justified by compliance with the Voting Rights Act. 2017 WL 2216930, at *12-13.

This case does not involve a similar attempt to rely on VRA compliance to justify an increase in Black or Hispanic CVAP in a district that was retained in new maps that already had been electing Black- or Hispanic-preferred candidates for two decades. To the limited extent that the 2013 Legislature redrew any district boundaries, it did not increase the minority voting population in any district with a proven history of electing minority candidates of choice. The only district in which the 2013 Legislature made changes that affected the relevant minority voting population was HD 90. But in that district, the changes made in 2013 slightly reduced Hispanic CVAP without affecting the existing HCVAP majority or Hispanic voters' opportunity to elect their candidate of choice.

The 2013 Legislature modified HD 90 at the request of the incumbent, but it did not engage in the type of race-based decisionmaking condemned in *Cooper* or *Bethune-Hill*. In *Cooper*, the North Carolina Legislature raised the percentage of Black voting-age population in District 1 above 50% even though the district had been "'an extraordinarily safe district for African-American preferred candidates'" with a BVAP between 46% and 48%. *See Cooper*, 2017 WL 2216930, at *12. The Texas Legislature, by contrast, was not dealing with a district that had a minority VAP below 50% and raising

it to a figure above 50%—or, obviously, arguing that the VRA required this. Rather than raising any group's voting population above 50% in a district that had elected that group's candidates of choice for decades, the 2013 Legislature reduced HD 90's HCVAP slightly, from 50.9% to 50.7%, and it reduced the district's SSVR slightly from 53.2% to 52%. It did so by adopting an unopposed amendment offered to return the Como neighborhood to the district, where it had been for decades. There is no evidence that the Legislature pursued any particular demographic target in adopting that amendment. At most, the Legislature reviewed the resulting HCVAP and SSVR percentages to ensure that they did not change materially.

But even if there were evidence that the Legislature made a deliberate effort to keep HD 90's HCVAP and SSVR above 50%, it had a strong basis to believe that maintaining a Hispanic voting majority in HD 90 was necessary to ensure that it continued to provide Hispanic voters with an opportunity to elect their candidates of choice. Indeed, even the minor reduction in HCVAP and SSVR prompted a claim—contradicted by expert analysis and subsequent elections—that the configuration of HD 90 under Plan H358 violated VRA § 2 by denying or abridging "the ability of Latino voters to nominate their preferred candidate in subsequent elections." Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force ¶ 41 (Sept. 9, 2013), ECF No. 891. Race did not predominate in the reconfiguration of HD 90, and to the extent the Legislature considered race in redrawing the district, it had a strong basis to believe that it was necessary to comply with the Voting Rights Act.

Nor does CD 35 raise the same issues considered in *Cooper* or *Bethune-Hill*. First, the 2013 Texas Legislature did rely on race to redraw CD 35—or any adjacent district, including CD 25—because it did not redraw the district lines at all. Because the Legislature merely kept the existing district boundaries, it could not have drawn any boundary predominantly on the basis of race. Second, even when it created CD 35 in 2011, the Legislature did not redraw an existing crossover district to raise Black or Hispanic CVAP above 50%. Instead, unlike North Carolina's reconfiguration of its long-established District 1, 2017 WL 2216930, at *12, the 2011 Texas Legislature created CD 35 as an entirely new HCVAP-majority district covering different territory in an area that had seen substantial Hispanic population growth.

If anything, *Cooper* undermines any claim against the 2011 Legislature's reconfiguration of CD 25, and it forecloses any remedy related to the district. In *Cooper*, the Court held that VRA § 2 could not require North Carolina to redraw District 1 as a BVAP-majority district because, as an existing crossover district, District 1 was not one in which white bloc voting was effective to defeat the election of Black-preferred candidates. *See Cooper*, 2017 WL 2216930, at *12. Reaffirming the plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court rejected the notion that "even in the absence of effective white bloc-voting, a § 2 claim could succeed in a district (like the old District 1) with an under-50% BVAP." *Cooper*, 2017 WL 2216930, at *14. *Bartlett v. Strickland*, it explained, "underscored the necessity of demonstrating effective white bloc-voting to prevail in a § 2 vote-dilution suit." *Id.* Based on this Court's finding that

minority voters in Travis County are not subject to effective white bloc voting, Order at 43-44 (March 10, 2017), ECF No. 1339, *Cooper* means that plaintiffs in Travis County cannot satisfy the *Gingles*[1] preconditions; therefore, a claim of vote-dilution could never justify the creation of a § 2 district in Travis County. *See Cooper*, 2017 WL 2216930, at *14 ("[T]his Court has made clear that unless *each* of the three *Gingles* prerequisites is established, 'there neither has been a wrong nor can be a remedy.'" (quoting *Growe v. Emison*, 507 U.S. 25, 41 (1993))). It follows that even if the Court redrew CD 35 to remedy alleged racial gerrymandering, § 2 could not justify the creation of a crossover district based in Travis County.

Finally, by strongly emphasizing the need to establish all three of the *Gingles* prerequisites, *Cooper* forecloses any vote-dilution claim by Hispanic voters in Nueces County. The plaintiffs have alleged, and this Court has found, that "approximately 200,000 Hispanic voters in Nueces County . . . had a § 2 right that could be remedied but was not." Order at 47 (March 10, 2017), ECF No. 1339. But the population of potential Hispanic voters in Nueces County is not 200,000; it is 133,370, which is not sufficiently large to satisfy the first *Gingles* precondition. *See* Fact Findings—General and Plan C185 ¶ 347 (March 10, 2017), ECF No. 1340 (finding that Nueces County contains "206,000 Hispanic residents, 195,000 Hispanic citizens, and 133,370 Hispanic citizens of voting age"). *Cooper* makes clear that those voters cannot establish vote-

[1] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

dilution under § 2: "When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply." *Cooper*, 2017 WL 2216930, at *13 (citing *Bartlett*, 556 U.S. at 18-20). A vote-dilution claim based on the rights of Hispanic voters in Nueces County, whether based on intent or effect, necessarily fails because they are not sufficiently numerous to constitute a majority in a constitutionally apportioned congressional district.

III. CONCLUSION

In *Cooper* and *Bethune-Hill*, the Supreme Court applied and reaffirmed established redistricting principles; it did not break new doctrinal ground or change the landscape of redistricting law. In so doing, the Court confirmed that Plaintiffs bear a heavy burden to establish that the State's redistricting plans violate Equal Protection or the Voting Rights Act.

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Respectfully submitted.

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