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

SHANNON PEREZ, ET AL.,	§	
	§	
Plaintiffs	§	
	§	
v.	§	**CIVIL ACTION NO.**
	§	**11-CA-360-OLG-JES-XR**
STATE OF TEXAS, ET AL.	§	**CONSOLIDATED ACTION**
	§	**[Lead case]**
Defendants	§	

TEXAS LATINO REDISTRICTING TASK FORCE ADVISORY REGARDING COOPER V. HARRIS AND BETHUNE-HILL V. VIRGINIA STATE BD. OF ELECTIONS

Plaintiffs Texas Latino Redistricting Task Force, *et al*. ("Latino Task Force") file this Advisory pursuant to the Court's order of May 22, 2017 (ECF No. 1395) regarding recent decisions of the U.S. Supreme Court in *Cooper v. Harris* and *Bethune-Hill v. Virginia State Board of Elections*.

The State recognized in its Advisory that *Bethune-Hill* "clarified and applied established racial-predominance and strict scrutiny standards" in racial gerrymandering cases and that *Cooper* held that states must conduct meaningful legislative inquiries into their use of race and compliance with the requirements of the Voting Rights Act. *See* Dkt. 1413 at 2, 6. In fact, both cases provide important new guidance to the parties and this Court regarding evaluation of racial gerrymandering claims.

In *Cooper*, the Supreme Court expanded upon when and how a racial gerrymander can occur when a state adopts a new redistricting plan. *Cooper* further instructs that a state must examine each new district carefully to assess both what the *Shaw* doctrine prohibits and what the Voting Rights Act requires. *See Cooper v. Harris*, No. 15-1262, 2017 WL 2216930 ("*Cooper*

slip op.") at *13 (May 22, 2017) ("a legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements.")

A State must pay close attention to racial voting patterns, including polarized voting and crossover voting. *Cooper* slip op. at *13 (criticizing North Carolina for downplaying "a longtime pattern of white crossover voting" and citing favorably language in *Thornburg v. Gingles*, 478 U.S. 30, 57 (1986) noting "that longtime voting patterns are highly probative of racial polarization").

A State must also determine whether its new boundaries should be adjusted to avoid section 2 liability. *Cooper* slip op. at *13 (requiring a "meaningful legislative inquiry" into potential section 2 liability when adopting a new redistricting plan). Specifically, a State must "carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures." *Cooper* slip op. at *13.

Furthermore, a State must ensure that it does not "use race as the predominant factor in drawing district lines unless it has a compelling reason." *Cooper* slip op. at *6. In order to comply with the Equal Protection Clause in this respect, redistricters must take care to examine the boundaries of each district and consider whether race is a predominant factor in the placement of those boundaries; if so, redistricters must ask whether the State has "a strong basis in evidence" for placing the boundary where it did. *Cooper* slip op. at *7 (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257, 1274 (2015)). Even if "reasonable compliance measures . . . may prove, in perfect hindsight, not to have been needed," a State must

still carefully examine what is legally required before adopting specific district boundaries. Slip op. at 7 (citing *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017)).

In *Bethune-Hill*, the Supreme Court explained the type of careful analysis that a state must employ to justify the predominant use of race in redistricting. For example, in attempting to create an ability-to-elect district in compliance with the Voting Rights Act, the State should perform a "functional analysis" and consider factors such as "turnout rates, the results of the recent [elections], and the district's large population of [ineligible voters and whether] white and black voters in the area tend to vote as blocs." *Bethune-Hill*, 137 S. Ct. at 801.

This Court concluded in its decisions on C185 and H283 that several districts challenged by the Task Force as racial gerrymanders were predominantly motivated by race and that the use of race was not justified by a compelling state interest. *See, e.g.* Dkt. 1390 at 29-32 (CD23), 101-108 (CD26) and Dkt. 1365 at 40 (HD32/34) and 89 (HD117). These rulings are consistent with the reasoning of *Cooper* and *Bethune-Hill*. Furthermore, elements of these racial gerrymanders were carried forward and not cured by Texas in its 2013 enactments C235 and H358, specifically in the configuration of CD23 and the House districts in Nueces County.

Texas cannot rely on claims of a safe harbor in enacting the Court's interim congressional plan and most of the Court's interim House plan. *Cooper* and *Bethune-Hill* hold that a state is required to conduct a careful, district-specific inquiry into the use of race in each district that it enacts in a redistricting plan. Texas argues only that it adopted the Court's interim plans wholesale.

With regard to this Court's evaluation of claims that the racial gerrymanders of 2011 continue to infect the State's 2013 redistricting plans, *Bethune-Hill* reiterated and applied the principle that in racial gerrymandering challenges, the court's inquiry extends far beyond

examining a state's adherence to traditional redistricting criteria. Parties "may show predominance 'either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose.'" *Id*. at 798 (quoting *Miller v. Johnson* 515 U.S. 900, 913, 916 (1995); *see also Bethune-Hill* at 799 ("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.").

Bethune-Hill emphasized the Court's previous ruling in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) that "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill* at 800. Beyond specific boundaries that may depart from traditional redistricting criteria, the district as a whole can display the predominant use of race, including through the use of a racial target or threshold. *See id.* ("The ultimate object of the inquiry, however, is the legislature's predominant motive for the design of the district as a whole. A court faced with a racial gerrymandering claim therefore must consider all of the lines of the district at issue[.]")

Evidence of the predominance of race includes setting a fixed racial target for the district (*Cooper* slip op. at *11) as well as failing to conduct a careful inquiry into the requirements of the Voting Rights Act. *See id*. at *13 ("To have a strong basis in evidence to conclude that § 2 demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions . . . We see nothing in the legislative record that fits that description.")

With respect to the 2013 redistricting, in essence the State argues that the Court's interim plans were the equivalent of traditional redistricting criteria that, once relied upon, absolve the

State of any further liability for the racial gerrymanders carried forward into the 2013 plans. However, even if this Court's interim plans could be understood as providing traditional redistricting criteria, *Bethune-Hill* clarified that racial gerrymandering claims do not turn exclusively on whether the state relied on or departed from traditional redistricting criteria. *See Bethune Hill* at 800 ("It follows that a court may consider evidence regarding certain portions of a district's lines, including portions that conflict with traditional redistricting principles. The ultimate object of the inquiry, however, is the legislature's predominant motive for the design of the district as a whole.")

Thus, when considering racial gerrymandering claims against C235 and H358, this Court will be guided by *Cooper* and *Bethune-Hill* to conduct an examination that extends well beyond adherence to traditional redistricting criteria and that includes whether the districts adopted by Texas carried forward racially gerrymandered boundaries, whether Texas failed to conduct a careful and specific analysis of the use of race in the new district boundaries, and whether the challenged district boundaries were required by the Voting Rights Act.

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Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

/s/ Nina Perales
Nina Perales
TX Bar No. 24005046
Ernest I. Herrera
TX Bar No. 24094718
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
FAX (210) 224-5382

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

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2017, I served a copy of the foregoing document on all counsel registered to receive NEFs through this Court's CM/ECF system. All attorneys who are not registered to receive NEFs have been served via email.

/s/ Nina Perales
Nina Perales