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

SHANNON PEREZ, *et al.*, *Plaintiffs*, v. GREG ABBOTT, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead Case]

QUESADA PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING *COOPER v. HARRIS*

The Quesada Plaintiffs submit this supplemental brief pursuant to the Court's May 22, 2017 Order. This brief addresses the Quesada Plaintiffs' Fourteenth Amendment and Section 2 intentional discrimination/vote dilution claims against the 2013 plan (C235) statewide as well as in DFW specifically.

I. *Cooper v. Harris*'s General Legal Principles.

In *Cooper v. Harris*, 581 U.S. __ (2017), the Supreme Court upheld a district court's determination that two North Carolina congressional districts were unconstitutional *Shaw*-type racial gerrymanders. In doing so, the Court rejected North Carolina's contention that its configuration of Congressional District 12 was based on partisan, not racial, considerations, *i.e.*, that the legislature desired to pack District 12 with *Democrats*, not African American voters, in order to shore up the Republican performance of adjacent districts. When such a defense is raised, the Court noted, the district court "must 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 the district's lines." *Id.*, Slip Op. at 19-20 (quoting *Hunt*

v. Cromartie, 526 U.S. 541, 546 (1999) ("*Cromartie I*") (internal quotation marks omitted)). Though this inquiry is "sensitive," the plaintiffs' task is not too tall. "[I]f legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests . . . their action still triggers strict scrutiny. In other words, 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.*, Slip Op. at 20 n.7.

Although *Cooper* was a *Shaw*-type racial gerrymandering case, the Court's rejection of North Carolina's "race as a proxy for party" defense is all the more salient in cases such as this one which involve intentional discrimination/vote dilution claims. As this Court has explained,

> the Court agrees with *Defendants* that statements made about determining motive in the *Shaw*-type cases can have application to intentional vote dilution cases, even though *Shaw*-type cases involve a different motive than intentional vote dilution cases. . . . [B]oth are based on the Equal Protection Clause and both are fundamentally based on the use of race in districting decisionmaking.

May 2, 2017 Order at 122, ECF No. 1390 (emphasis added). At the time, of course, Defendants appealed to "certain language from *Shaw*-type racial gerrymandering cases," *id.* at 122, because they thought the *Shaw* cases offered support for their partisan-motive defense. But *Cooper* forecloses Defendants' argument, and underscores this Court's conclusion that, in intentional vote dilution cases, "[i]f the Republican-dominated Legislature targeted voters who, based on race, were unlikely to vote for Republicans, that constitutes racial discrimination even if done for partisan ends." *Id.* at 124.

II. *Cooper*'s Statewide Ramifications.[1]

The Quesada Plaintiffs allege that Defendants engaged in intentional discrimination/vote dilution statewide in plan C235. *See* Quesada Third Am. Compl. ¶¶ 64-66; pp. 21-22. Defendants did so by improperly using race as a proxy for party in line drawing, intentionally drawing fewer minority opportunity districts than were required by number and proportion and doing so to attain partisan goals.

Defendants' statewide redistricting goal was to create a "3-1 map" "that increased the number of Republican seats by three and Democrat seats by only one." *Id.* at 41. This Court has already concluded that Defendants relied upon racial data across the state to achieve this goal. For example, Defendants used race as a proxy for party in the DFW region to crack and pack minority voters to benefit Republicans. *See infra* Part III. Defendants utilized racial data to draw the boundaries of CD23 in 2011 "to create the façade of a Latino district," *id.* at 21 (quotation marks omitted), with the actual purpose of protecting an Anglo Republican incumbent who was not Latinos' candidate of choice. *See id.* at 22 ("Downton used race to increase the SSVR and HCVAP of CD23 to create the façade of a Latino opportunity district, while he intentionally manipulated Hispanic voter cohesion and turnout to reduce the performance of the district for Hispanic candidates of choice."). CD23 changed only minimally from C185 to C235.

Likewise, Defendants improperly relied on racial data as a proxy for party in the Austin area in order to draw CD 35 as a majority-minority district that also eliminated an existing cross-over Democratic district. This Court concluded that "Downton chose which population to include

[1] *Cooper* compels the conclusion that Defendants have engaged in intentional discrimination/vote dilution statewide, as illustrated by their region-specific conduct with respect to DFW and CDs 23, 27, and 35. The Quesada Plaintiffs discuss these statewide claims in Section II, but devote more attention to *Cooper*'s ramification on DFW in Section III.

in CD35 on the basis of race, not political affiliation," *id.* at 40, and that "[h]e created a Hispanic-majority district so that he could use the creation of exactly such a district (which appeared to be friendly to Hispanic voters and in compliance with the VRA) to fulfill a political motive of unseating Doggett . . . ," *id.* The purpose of this distortion was to meet Defendants' statewide objective: to "allow[] the Republican-dominated Legislature to create a new majority-minority district while simultaneously destroying an existing Democrat district, in accord with the objective to create a '3-1 map' that increased the number of Republican seats by three and Democrat seats by only one." *Id.* at 41. CD35 was unchanged from plan C185 to plan C235.

Finally, this Court has concluded that Defendants used race to achieve political goals in the drawing of CD27 in order to protect Republican incumbent Blake Farenthold. "The challenged district CD27 has the effect of diluting Nueces County Hispanic voters' electoral opportunity—that is in fact why the State chose to put those voters in an Anglo-majority district, to protect an incumbent who was not the candidate of choice of those Latino voters. *Id.* at 54-55; *see id.* at 55 ("[T]he court finds that the primary and dominant motive was to place the incumbent Farenthold, who lives in Nueces County and would likely to be ousted by the existing Latino majority, into an Anglo-majority district (and thus to take away the opportunity to elect that Nueces County Latinos had enjoyed"). CD27 remained unchanged from C185 to C235.

Defendants acted with discriminatory intent by employing race to achieve their "3-1 map" political goal on a statewide basis. *Cooper* prohibits this conduct. The Court's existing findings, when applied to the holding in *Cooper*, compel the conclusion that Defendants intentionally discriminated in violation of the Fourteenth Amendment and Section 2 statewide by improperly using race to achieve their political goals. This improper motive carried forward into C235.

III. *Cooper*'s Effect on DFW Districts.

This Court has already concluded that, despite Defendants' partisan-motive defense, the legislature intentionally discriminated by cracking and packing minorities in DFW, thus diluting their votes.

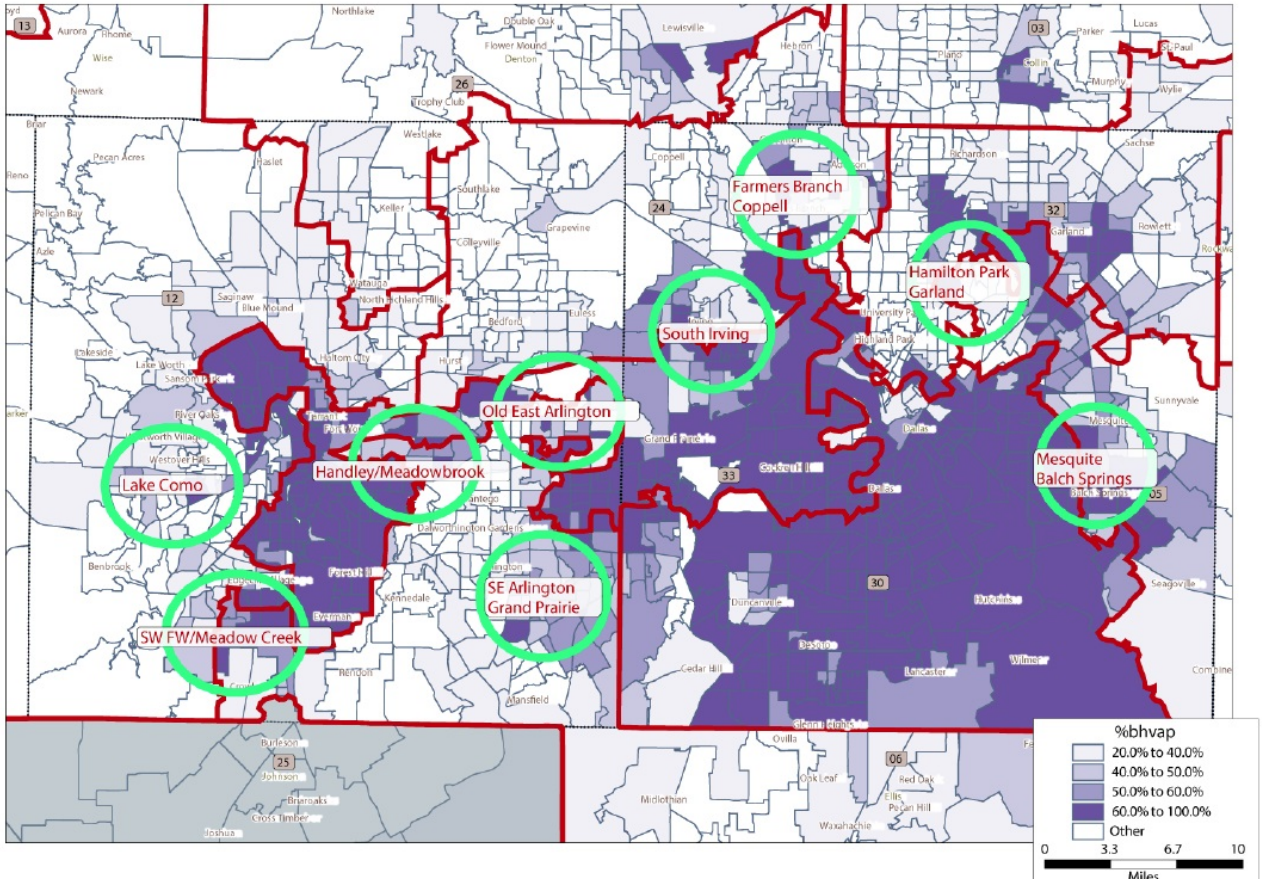
> While there is certainly an overlap between cracking and packing Democrats and cracking and packing minorities, the Court finds that Plaintiffs have satisfied their burden of showing that intentional minority vote dilution was a motivating factor in the drawing of district lines in DFW and that mapdrawers intentionally diluted minority voting strength in order to gain partisan advantage.

Id. at 125 (emphasis added). In support of that conclusion, this Court cited the fact that "the Republican-dominated Legislature viewed minority districts as Democrat districts" and would not create such districts unless they felt compelled by "the most restrictive positions on the VRA." *Id.* "Thus, the record indicates not just a hostility toward Democrat districts, but a hostility toward minority districts, and a willingness to use race for partisan advantage." *Id.* at 125-26.

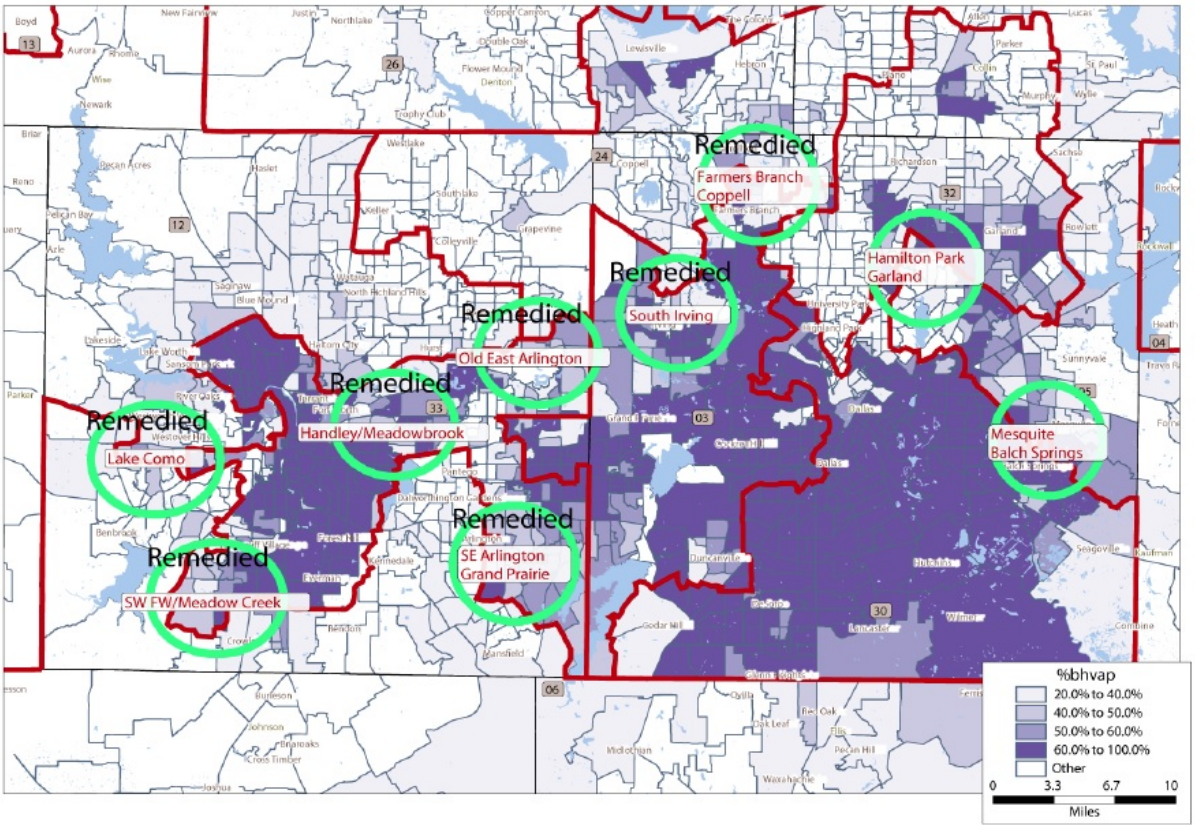
This Court then recounted the trial evidence at length, concluding that it demonstrated that the legislature packed CD 30 with minorities, removed Anglos, and then cracked minorities among the remaining DFW districts to dilute their votes. *See id.* at 126-34; *e.g. id.* at 131 ("The Court finds that race was used as a proxy for political affiliation, and that this was done intentionally to dilute minority voting strength."); *id.* at 133 ("The progression of [Downton's] maps demonstrates that he included a minority district in the map, then cracked it into Anglo-majority districts. This is consistent with a motive to disadvantage minorities, not Democrats. Moreover, it is consistent with a motive to crack and limit *minority* population within the Republican districts to curb the effect of continued minority growth"); *see also* Findings of Fact ¶¶ 286, 287, 315, 325, 332, 333. All of this evidence, this Court concluded, "persuasively demonstrates that mapdrawers intentionally packed and cracked on the basis of race (using race as a proxy for voting behavior)

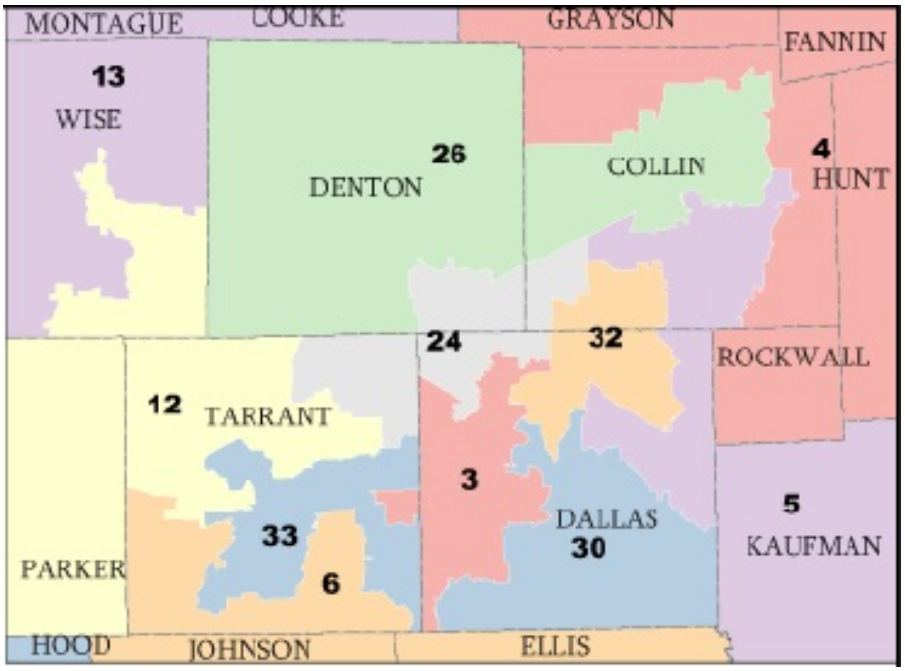
with the intent to dilute minority voting strength." *Id.* at 134. Likewise, the Court concluded, the *Arlington Heights* factors supported a finding of intentional discrimination. *Id.* at 134-145. And the "packing and cracking is an effective dilution technique that had the intended effect in DFW." *Id.* at 145.

Although plan C235, which this Court imposed based upon a preliminary legal analysis, and which the State enacted without change in 2013, remedied *some* of the cracking in DFW, it maintained CD 30 as a packed district and failed to remedy a substantial number of cracked minority communities, leaving those voters stranded in Anglo districts and unable to elect their preferred candidate. The map below demonstrates how plan C235 continues to leave minority neighborhoods throughout DFW cracked and stranded in Anglo districts in which minority voters are unable to elect their preferred candidates.



As this Court has concluded, the legislature originally cracked the above-illustrated minority neighborhoods in 2011 "on the basis of race (using race as a proxy for voting behavior) with the intent to dilute minority voting strength." *Id.* at 134. The legislature declined to remedy that intentional discrimination by reuniting any of the above-illustrated minority communities when it enacted plan C235 in 2013. It easily could have done so—indeed, the natural result of the unpacking and uncracking in DFW is the appearance of three compact districts in which minorities have the opportunity to elect their candidates of choice, as demonstrated by the Quesada plaintiffs' demonstrative map C273, shown below (with new CD 3 as a Latino opportunity district, and current CD 33 moving entirely into Tarrant County to remedy all the cracking of minority neighborhoods in Tarrant County in the existing plan C235).





Texas's contention that it cracked these neighborhoods in the 2011 map based on partisan motives is foreclosed by this Court's decision and by the Supreme Court's decision in *Cooper*. Both decisions compel the conclusion that the remaining cracked minority neighborhoods in DFW are the product of unconstitutionally discriminatory vote dilution, which Texas cannot defend on partisan grounds. *Cooper* forecloses Texas's only defense for why it cracked these minority neighborhoods in its 2011 plan, and why it kept them cracked in its 2013 plan.

IV. Defendants' Contention that Adoption of the Court's Interim Map Insulates it from Liability is Misplaced.

As they have repeatedly, Defendants in their brief today contend that "the 2013 Texas Legislature was not determining where lines in redistricting maps should be drawn when it enacted the 2013 plans," rather "the Legislature simply adopted wholesale the interim congressional plan drawn by this Court in 2012," which this Court was required to draw "free from any taint of arbitrariness or discrimination." Defendants' Brief at 14, ECF No. 1413. Defendants continue,

reasoning that "[w]hen 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." *Id.* at 15 (emphasis added). The Defendants' simplistic gloss on the circumstances leading up to C235's imposition on an interim basis, and Defendants' later enactment of that plan, misses the mark.

First, this Court, in its March 19, 2012 Order imposing C235 as the interim map, gave Defendants *substantial* reasons to believe that the map might continue to contain legal infirmities. The Court explained that it was an "interim plan for the districts used to elect members in 2012" and that "[t]his interim map is not a final ruling on the merits of *any claims* asserted by the Plaintiffs. Mar. 19, 2012 Order at 1, ECF No. 691 (emphasis added). The Court further noted that "[b]oth the § 2 and Fourteenth Amendment claims presented in this case involve difficult and unsettled legal issues as well as numerous factual disputes. . . . Further, both the trial of these complex issues and the Court's analysis have been necessarily expedited and curtailed, rendering such a standard even more difficult to apply." *Id.* at 1-2. To punctuate the point, the Court stated that it "has attempted to apply the standards set forth in *Perry v. Perez*, but emphasizes that it has been able to make only preliminary conclusions that may be revised upon full analysis." *Id.* at 2 (emphasis added). The Court then explained that the exigency of the calendar required quick imposition of a map, and thus it would adopt the compromise plan (with minor revisions) offered by "[s]ome Plaintiffs and Intervenors." *Id*. Defendants cannot plausibly contend that the Legislature had "no reason" to think there might be a legal problem with plan C235, in light of this Court's clear warnings.

Second, this Court's March 19, 2012 Order, on which Defendants claim to have relied, was not the only judicial decision on point. Indeed, this Court explained that, given the calendar, it had

not been able to fully review the record from the D.C. preclearance trial, which had concluded but was awaiting final judgment. *See id.* at 14 ("Given the exigencies of time, this Court is unable to review the entire record from the D.C. trial . . . ."). Five months later, on August 28, 2012, the D.C. Court denied preclearance to the 2011 plan, C185, concluding that Texas had intentionally discriminated in drawing district lines. In particular, the D.C. Court's opinion concluded that the 2011 plan either had—or potentially had—legal infirmities in a number of areas that *remained unaddressed* by C235. For example, the D.C. Court concluded that "benchmark CD 27 is a clear Hispanic ability district" and that, under the 2011 plan, "CD 27 will no longer perform for minority voters." *Texas v. United States*, 887 F. Supp. 2d 133, 153-54 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (June 27, 2013). CD 27 from the 2011 plan remains unchanged in C235. As another example, the D.C. Court put Texas on plain notice that its failure to create a Hispanic ability district in DFW—something C235 also failed to do—was possibly the result of intentional discrimination. The D.C. Court explained that "[t]he parties have provided more evidence of discriminatory intent that we have space, or need, to address here. Our silence on other arguments the parties raised, such as potential discriminatory intent in the selective drawing of CD 23 and *failure to include a Hispanic ability district in the Dallas-Fort Worth metroplex*, reflects only this, and not our views on the merits of these additional claims." *Id.* at 161 n.32 (emphasis added). Texas could not possibly have had "no reason," as it now contends, to worry about the legality of C235 when it enacted it nearly a year after the D.C. Court's decision. Rather, that decision put it on clear notice that there were serious flaws in the plan.

Third, Defendants effort to evade liability for its intentional discrimination must be rejected as a matter of law. Defendants contend, in essence, that it does not matter that they acted with discriminatory *intent* in 2011 because that plan was never implemented in its exact form, and thus

did not have discriminatory *effects*. *See* Def.'s Mot. for Summ. J. at 7-8, ECF No. 996. And, according to this same theory, it does not matter that the 2013 plan has discriminatory *effects* because it lacked the discriminatory *intent* present in the original enactment. So long as a legislature *bifurcates* its discrimination, say Defendants, it can avoid liability.[2]

That is not the law. In fact, this type of argument is precisely why the Supreme Court has explained that states cannot avoid liability by claiming mootness where a repealed law is capable of repetition yet evades review. It is "the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice'" because "'repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.'" *Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (quoting *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). In *City of Jacksonville*, that principle was all the more relevant because "[t]here is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; *it has already done so*." *Id.* (emphasis added). "Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot. . . . The new ordinance may disadvantage [petitioners] to a lesser degree than the old one, . . . [but] it disadvantages the in the same fundamental way." *Id.* (emphasis in original).

So too here. Not only was there a risk of Defendants reenacting a discriminatory plan, but they have done so. Two of the districts this Court has already found infirm, CDs 27 and 35, were

[2] To be clear, the Quesada plaintiffs disagree that the 2011 plan did not have discriminatory effects regardless of its repeal, rather this is merely Defendants' argument. Indeed, as this Court has explained, the 2011 plan's discriminatory effects have carried into the 2013 plan.

re-enacted *unchanged*. Many of the legal flaws this Court found with the 2011 plan, including with respect to CD 23 and with respect to intentional packing and cracking in DFW, remain in the 2013 enactment. And even if this Court's necessarily hurried and preliminary analysis in March 2012 missed some of these conclusions, its warning about its interim ruling—and the subsequent warnings by the D.C. court—put Defendants on fair notice of the problems. Just as Defendants' repeal and reenactment did not moot plaintiffs' claims against the 2011 map, the repeal and reenactment did not function to bifurcate the discriminatory *intent* from the discriminatory *effects* and thus permit Defendants to evade liability. A contrary conclusion would contravene the holding in *City of Jacksonville* and would create seriously perverse incentives that would undermine the Nation's civil rights laws.

CONCLUSION

The Supreme Court's decision in *Cooper* eliminates Defendants' partisan motive defense with respect to the legally infirm aspects of the 2011 plan and those aspects there were carried through into the 2013 plan.

Dated: June 6, 2017

Respectfully submitted,

/s/ J. Gerald Hebert
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2017, I served a copy of the foregoing on counsel who are registered to receive NEFs through the CM/ECF system. All attorneys who have not yet registered to receive NEFs have been served via first-class mail, postage prepaid.

/s/ J. Gerald Hebert
J. GERALD HEBERT