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., Defendants.	§	[Lead Case]

RODRIGUEZ PLAINTIFFS' SUPPLEMENTAL BRIEF ON *COOPER v. HARRIS*

The Rodriguez Plaintiffs[1] submit this supplemental brief in response to the Court's invitation in its Order of May 22, 2017 (Dkt. No. 1395).[2]

The Supreme Court's recent decision in *Cooper v. Harris*, No. 15-1262 (U.S. May 22, 2017),[3] addressed the question of whether the North Carolina legislature's post-2010 census redrawing of two congressional districts violated the Fourteenth Amendment's Equal Protection Clause. The district court struck down the challenged districts as unconstitutional racial gerrymanders. Applying settled constitutional principles governing redistricting and evaluating the trial court's factual findings under Rule 52(a)(6)'s clear error standard, the Supreme Court affirmed the district court judgment.

Cooper reiterates the two basic elements of a *Shaw* racial gerrymandering claim. First, challengers have to establish that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Slip Op.

[1] The Texas State Conference of NAACP Branches joins in the interpretation of *Cooper v. Harris* set forth herein.
[2] In a subsequent revision to the scheduling order, the Court directed that pre-trial briefs be filed no later than July 3, 2017, with "*Shaw*-type racial gerrymandering claim[s]" listed as one of the matters to be addressed. Order Re: Pre-trial Disclosures of June 1, 2017 (Dkt. No. 1404) at 2. Because of the latter adjustment in briefing requirements, this supplemental brief will summarize *Cooper*'s impact on the issues in this case, with a fuller treatment to be provided in the pre-trial brief.
[3] Citations are to the Supreme Court's *Cooper* slip opinion, available at https://www.supremecourt.gov/opinions/16pdf/15-1262_db8e.pdf.

at 2 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Second, once plaintiffs have met their burden, the district is subject to strict scrutiny. *Id*.

In reaffirming the fundamental legal principles of a racial gerrymandering claim upon which this Court relied, *see, e.g.*, Amended Order (Dkt. No. 1390) ("Amended Order") at 30, *Cooper* only bolsters this Court's conclusion that certain districts in Plan C185 are racial gerrymanders. Moreover, *Cooper* echoes this Court's conclusion that the use of race to gain partisan advantage does not "negate or excuse the use of racial criteria" in drawing district lines. Amended Order at 38 n.34. *Cooper* confirms that plaintiffs carry their burden on racial gerrymandering "even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones." Slip Op. at 2 n.1.

> So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests--perhaps thinking that a proposed district is more "sellable" as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing--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. at 20 n.7 (citing *Bush v. Vera*, 517 U.S. 952, 968-70 (1996) (plurality opinion), and *Miller v. Johnson*, 515 U.S. 900, 914 (1995)).

While *Cooper* was decided in the context of racial gerrymandering, its reach extends to this Court's evaluation of Plaintiffs' intentional discrimination claims as well. As this Court has noted, "statements made about determining motive in the *Shaw*-type cases can have application to intentional vote dilution cases," as "both are based on the Equal Protection Clause and both are fundamentally based on the use of race in districting decisionmaking." Amended Order at 122; *see also id.* at 33 n.29 ("While an intentional vote dilution and a *Shaw* claim are analytically distinct, meaning the Court must analyze them under different rubrics, they are not mutually

exclusive, and the allegations are sufficient to support both types of claims."). In either context, *Cooper* definitively forecloses any contention that partisan ends somehow justify the State's race-based means of drawing district lines.

This Court's Amended Order found multiple instances of race-based redistricting in service of political aims in Plan C185. For instance, the Court found that in CD23, "mapdrawers were willing to disadvantage minorities to gain partisan advantage." Amended Order at 125. Additionally, "they were willing to use race to gain partisan advantage, as was done in drawing race-based CD35 in Travis County to destroy the Democrat district CD25 and limit the number of Democrat districts overall." *Id.*; *see also id.* at 41 n.39 ("The political motive does not excuse or negate that use of race; rather, the use of race is ultimately problematic for precisely that reason--because of their political motive, they intentionally drew a district based on race in a location where such use of race was not justified by a compelling state interest."). And in Dallas-Fort Worth, "[w]hile there is certainly an overlap between cracking and packing Democrats and cracking and packing minorities," the Court found that "intentional minority vote dilution was a motivating factor in the drawing of district lines . . . and that mapdrawers intentionally diluted minority voting strength in order to gain partisan advantage." *Id.* at 125. *Cooper* confirms that the State's artful shuffling of minority populations is in no way inoculated by its partisan motives. Slip Op. at 20 n.7.

Plan C235, moreover, hardly cures the legal violations of Plan C185. On the contrary, as Plaintiffs will demonstrate at trial, Plan C235 once again carves up minority populations to extract Republican gains in defiance of population trends. The configuration of CD35 and Travis County, for instance, remains identical between Plan C185 and Plan C235. Just as the North Carolina General Assembly eliminated a functioning crossover district in purported compliance

with the Voting Rights Act, *see* Slip Op. at 14, 17, the Texas legislature "used the intentional creation of a Hispanic-majority district that extended in large part into Travis County to justify its destruction of Travis County-based CD25, which it knew had a substantial minority population that was successfully electing its candidate of choice, a Democrat," Amended Order at 41 n.38. *Compare* Slip Op. at 20 (race predominates where legislature believes a district "is more 'sellable' as a race-based VRA compliance measure than as a political gerrymander"), *with* Amended Order at 45 (by extending CD35 into Travis County, mapdrawers "were able to create the façade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state"). *Cooper* forecloses any defense of CD35--or the State's race-based carving of Travis County--on partisan grounds.

Nor have the changes to Plan C235 adequately addressed the legal violations of the prior plan; in fact, Plan C235 only generates new violations. For instance, as Dr. Stephen Ansolabehere will testify at trial,[4] while Plan C235 increased the Hispanic Citizen Voting Age Population ("HCVAP") of CD23, it did not meaningfully increase the number of Spanish Surname Voter Registrations in the district--and in fact the areas added to CD23 had lower turnout than those removed from the district. The end result is a Republican-favored district that still does not afford Latino voters an opportunity to elect their candidates of choice. In Dallas-Fort Worth, moreover, Plan C235 splits majority-minority cities to avoid creating an additional minority opportunity district. As a result, Plan C235 once again treats Anglos and minorities "quite differently," Amended Order at 139; Anglo voters in Dallas and Tarrant Counties are more than one and a half times more likely than Latinos and African Americans to be in a district in which they have the opportunity to elect their preferred candidates.

[4] The Supreme Court credited Dr. Ansolabehere' s analysis of racial predominance in *Cooper*. *See* Slip Op. at 26-27.

In sum, *Cooper* responds directly to Defendants' contention that "[b]ecause their reason for not drawing minority districts was political, . . . it was not racially discriminatory." Amended Order at 119. Like Plan C185, Plan C235 goes to great lengths to avoid creating minority-opportunity districts where demographic and traditional districting criteria demand them. Defendants' partisan goals do not inoculate--let alone justify--their use of race in drawing district lines. "If the Republican-dominated Legislature targeted voters who, based on race, were unlikely to vote for Republicans," Amended Order at 124, that violates voters' constitutional rights.

Respectfully submitted,

__/s/ *Bruce V. Spiva*

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2017, I filed a copy of the foregoing for service on counsel of record in this proceeding through the Court's CM/ECF system.

__/s/ *Bruce V. Spiva*
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