UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNE HARDING, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
COUNTY OF DALLAS, TEXAS, et al.,	§	
	§	C.A. NO. 3:15-CV-00131-D
Defendants.	§	
	§	
	§	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The undisputed facts prove that defendants are entitled to summary judgment. Plaintiffs lack standing because they admit they have suffered no injury or ill effects as a result of the Enacted Plan; their Section 2 claim fails the second *Gingles* precondition and nearly all totality of circumstances factors; their own expert witness has testified his analysis of discriminatory intent is unreliable, based upon an analysis of the wrong map, and might, upon further review, prove the *absence* of discriminatory intent against Anglos; plaintiffs have not properly pled a racial gerrymandering claim but offer no evidence to support one even if they had; and their request that the Court declare Section 2 unconstitutional because they fail to satisfy its elements is foreclosed by binding Supreme Court precedent.

Three years after filing their suit, plaintiffs have been unable to marshal evidence to support their claim that white voters in Dallas County suffer discrimination on account of race. And several plaintiffs have testified as to their real objection—that they want the map gerrymandered to elect more Republicans—a number far in excess of their share of the population. Plaintiffs' complaint, however, contains no partisan gerrymandering claim and plaintiffs have offered no expert testimony to support such a claim. Defendants are to entitled summary judgment on all counts of plaintiffs' complaint.

STATEMENT OF UNDISPUTED FACTS

Dallas County's Population, Demographic Changes Since 2000.

1. Dallas County is governed by a Commissioners Court ("the Court"), which, by operation of state law, is comprised of four commissioners elected from single member precincts and the county judge, who is elected county-wide. Tex. Const. art. V, § 18(b).

2. Following the 2010 Census, it was necessary for the Court to enact new precinct lines, because the existing plan drawn following the previous Census (the "benchmark plan") had become malapportioned in violation of the one-person, one-vote principle; the ideal total population per precinct was 592,035, but the benchmark plan contained deviations from -68,500 person to +57,880 persons, a 21.4% top to bottom population deviation. App. 4-5.

3. The 2010 Census revealed that the overall population of Dallas County increased by 6.7%. App. 2.

4. That increase was attributable to growth among African American and Hispanic residents; while the Anglo population in Dallas County decreased by 198,624 persons from 2000 to 2010, the Hispanic population increased by 243,211 persons and the African American population increased by 73,016 persons. App. 2.

5. By 2010, Anglo residents' share of total population in Dallas County decreased from 44.3% to 33.1%. Hispanic residents' share of total population increased from 29.9% to 38.3%, and African American residents' share of total population increased from 20.1% to 21.9%. App. 2.

6. The same trend exists with respect to Voting Age Population ("VAP") and Citizen Voting Age Population ("CVAP"). According to the 2011-2015 U.S. Census American Community Survey, Anglos constituted 36.3% of the VAP and 45.1% of the CVAP in Dallas County; Hispanics constituted 34.1% of the VAP and 21.9% of the CVAP; and African Americans constituted 21.9% of the VAP and 26.7% of the CVAP. App. 122-23.

7. Dallas County's Anglo population is "most heavily concentrated in the north side" of the county. App. 206 (Morrison Depo. 146:19-147:5).

8. Dallas County's population growth from 2000 to 2010 disproportionately occurred

in its southern and western regions, where large concentrations of African Americans and Hispanics reside, in benchmark plan precincts 3 and 4. App. 5.

Emergence of Democratic Party Dominance in Dallas County Elections

9. In recent election cycles, the Democratic party has emerged as the dominant political party in Dallas County elections, with the Democratic Party receiving more straight-ticket votes than the Republican Party, more countywide elected officials than the Republican Party, more state house seats than the Republican Party, and more votes for its presidential candidates than the Republican Party's. App. 7-8.

10. While Democrats suffered losses nationwide in 2010, they gained a majority of the Dallas County Court with the victory of Dr. Elba Garcia over incumbent Republican Commissioner Ken Mayfield in Precinct 4. App. 7.

11. The Democratic nominees for president have carried Dallas County in every election since 2008. App. 45, 859.

Emergence of the Tea Party and Three-Way Fracture in Anglo Voting Behavior

12. Beginning in 2009, a new conservative faction took shape nationwide and in Texas, the Tea Party. App. 300 (Turner Depo 22:10-16).

13. A portion of Dallas County Anglos generally vote for Democratic candidates; on average, 23% of Dallas County Anglos tend to vote Democratic. App. 320.

14. The remaining 77% of Dallas County Anglos tend to vote for Republicans candidates. App. 320.

15. But among Anglo Republicans in Dallas County, there is a divide between those who support more conservative Tea Party candidates and more moderate, mainstream Republican

candidates. App. 320.

16. Elizabeth Alvarez, an attorney for plaintiffs in this case, testified in 2017, in the litigation over Texas's congressional redistricting plan, that Republicans in Dallas County are ideologically divided. App. 376-77 (Alvarez Depo. 133:12-135:22).

17. Testifying about losing her race for Dallas County Republican Chair in 2016, Ms. Alvarez testified that it "sa[id] something" about "political cohesiveness among the [R]epublican [P]arty in Dallas County," App. 376 (Alvarez Depo. 133:12-20): that "there are ideological lines within both parties and the Tea Party. There is a Tea Party coalition and a non-Tea Party coalition," App. 377 (Alvarez Depo. 134:2-6); *see also Perez v. Abbott*, No. 11-360 (W.D. Tex.), ECF No. 1514-2 at 7 (deposition transcript excerpts for E. Alvarez).

18. When asked if her election demonstrated a lack of political cohesion within the Republican Party, Ms. Alvarez testified that "yes, I think it's an example of different wings of the [R]epublican [P]arty who differ on ideological basis," App. 327 (Alvarez Depo 135:4-6), and that the divide in the Republican Party is "politically based," and not based upon race, App. 377 (Alvarez Depo Tr. 135:20-22).

19. Jeff Turner, a founding member of the Tea Party in Dallas County and a witness for plaintiffs, testified that among Dallas County Anglos, there are three factions: Democrats, members of the Tea Party, and Republicans unaffiliated with the Tea Party. App. 301 (Turner Depo. 29:14-25).

20. Results from six statewide Republican primary and runoff election results in Dallas County from 2012 and 2014 (for U.S. Senate, Lieutenant Governor, and Attorney General) show the Tea Party candidate receiving an average of 54.4% of the Anglo Republican vote and the non-

Tea Party candidate receiving an average of Anglo 45.6% of the Republican vote. App. 322.

21. Election results thus show that 23% of Dallas County Anglo voters support Democratic candidates, 42% support Tea Party candidates, and 35% support non-Tea Party Republicans. App. 320.

Socioeconomic Characteristics of Dallas County Residents and History of Discrimination and Government Responsiveness

22. Plaintiffs admit "there is no history of official discrimination against the Anglo population in Dallas County in the area of public accommodations." App. 460.

23. Plaintiffs admit "that Anglos in Dallas County do not bear the effects of past discrimination in areas such as education, employment and health which hinder their present ability to participate in the political process." App. 461.

24. Educational statistics show that Dallas County's Anglo students do not demonstrate lower performance indicators on the State of Texas Assessments of Academic Readiness (STAAR) than do African American and Latino students. App. 324-26.

25. Nor do Dallas County's Anglo students achieve lower graduation rates or SAT scores than do the county's African American and Latino students. App. 324-26.

26. According to Census data, Anglos in Dallas County do not perform worse than African Americans or Latinos in any of the following categories: income (including percentage living in poverty), educational attainment, holding careers in management/business, unemployment rate, possession of health insurance, and home ownership. App. 326.

27. U.S. Census data shows that Anglo business owners in Dallas County do not receive lower average sales receipts than African American or Latino business owners. App. 327.

28. U.S. Census data and data from the Texas Legislative Council show that Anglos in

Dallas County do not have lower voter turnout than do African Americans or Latinos. App. 328.

29. There is no slating process for elections in Dallas County. App. 130-31.

The 2011 Redistricting Process

30. At the time of redistricting in 2011, the four commissioners were: Precinct 1: Maurine Dickey (Republican), Precinct 2: Mike Cantrell (Republican), Precinct 3: John Wiley Price (Democrat), Precinct 4: Dr. Elba Garcia (Democrat). The county judge was Clay Jenkins (Democrat). App. 77. Dickey, Cantrell and Jenkins are Anglos; Price is Black; and Garcia is Hispanic. App. 300 (Turner Depo. 21:6-10).

31. By the time the Court considered redistricting in 2011, Commissioner Maurine Dickey had announced her intent to retire from the Court and not seek reelection, resulting in an open seat. App. 127.

32. In early 2011, legal counsel for the Court retained an expert, Matt Angle, to assist in drawing and presenting potential redrawn redistricting maps for consideration. App. 1.

33. At its April 26, 2011 regular meeting, the Court adopted Order No. 2011-775, which set forth criteria to be followed in drawing new precinct lines. App. 512.

34. The Order enumerated, in priority order, the following seven redistricting criteria: (1) complying with the one-person, one-vote requirement of the U.S. Constitution, (2) complying with the Voting Rights Act, including Section 5's prohibition on retrogression of racial and language minorities' ability to elect candidates of choice and Section 2's requirement that precincts be configured to permit racial and language minorities "the opportunity to elect their candidate of choice where their populations are sufficiently large and compact," (3) respecting population increases and decreases in Dallas County over the decade, (4) respecting boundaries of voting

tabulation districts where possible, and if not possible, creating voting precincts that ensure adequate polling place facilities, (5) considering completely redrawn maps, rather than single precinct maps, (6) respecting municipal and geographic boundaries (but subsidiary to requirements of Constitution and Voting Rights Act), and (7) creating geographically compact precincts composed of contiguous territory (but subsidiary to requirements of Constitution and Voting Rights Act). App. 512.

35. In public comments about the redistricting process, Commissioner Dickey expressed a desire that a "conservative" or "Tea Party" precinct be created. App. 9.

36. The map drawer, Matt Angle, began his work with Precinct 4, which was significantly overpopulated in the benchmark plan, and aimed to retain its geographic core in Grand Prairie, North Oak Cliff, and South Irving, and to retain its preexisting status as a precinct in which Hispanic voters could elect their candidate of choice. App. 9.

37. After revising Precinct 4, Mr. Angle worked on Precinct 1, aiming to increase its total population to comply with the one-person, one-vote rule, to preserve its geographic core of Park Cities, far North Dallas, Carrollton, and Richardson, and to create the "conservative" or "Tea Party" precinct Commissioner Dickey had advocated. App. 10.

38. Next, Mr. Angle turned to Precinct 3, aiming to decrease its total population while maintaining its geographic core in south Dallas and the suburban areas of DeSoto, Lancaster, and Balch Springs, to address concerns that it packed racial and language minority voters—a concern under the Voting Rights Act, and to retain its preexisting status as a precinct in which black voters could elect their candidate of choice. App. 10.

39. Mr. Angle testified that Precinct 3 in the benchmark plan "was heavily African-American plus Hispanic far beyond what election returns appear[] to show . . . [were] required to

elect the African-American candidate of choice." App. 480-81 (Angle Depo 57:10-58:8).

40. Finally, Mr. Angle worked on Precinct 2, aiming to retain much of its core territory while uniting neighborhoods in east Dallas and other nearby communities with more urban than suburban identity. App. 10.

41. Mr. Angle has testified that he followed the Order's criteria "to the best of [his] ability" and that he considered doing so "important." App. 476 (Angle Dep. 41:8-18).

42. The Court held public hearings in 2011 to solicit public input with respect to its 2011 redistricting plan. App. 463.

43. Prior to the June 7, 2011 Court meeting, at Commissioner Price's request, Mr. Angle amended the proposed plan to switch the numbering of Precincts 1 and 2. App. 14.

44. The requested precinct number swap was beneficial to incumbent Republican Commissioner Mike Cantrell, the candidate of choice of Anglo voters, because it resulted in his next election being in 2014 rather than in 2012. App. 129, 530-31 (Lichtman Depo. 68:22-73:17).

45. The Court adopted the plan Mr. Angle had drawn at its June 7, 2011 meeting. App. 14-15.

46. Mr. Angle testified that it was his belief that race was considered in drawing the redistricting plan only to the extent permitted by law. App. 487 (Angle Depo. 82:18-83:6).

47. The current County Commission, elected pursuant to the 2011 plan, consists of: Precinct 1: Dr. Theresa Daniel (Democrat); Precinct 2: Mike Cantrell (Republican); Precinct 3: John Wiley Price (Democrat); Precinct 4: Dr. Elba Garcia (Democrat); County Judge: Clay Jenkins (Democrat). Two of the four commissioners, Dr. Theresa Daniel and Mike Cantrell, are Anglo, as is County Judge Clay Jenkins. App. 300 (Turner Depo. 21:6-10). Sixty percent of the membership

of the current County Commission is thus Anglo. App. 122.

Plaintiffs' Testimony

48. Plaintiff Ray Huebner testified that, aside from his allegations in the lawsuit, he did not believe he had ever experienced discrimination based upon his race in Texas. App. 653 (Huebner Depo. 20:9-21).

49. Mr. Huebner testified that he had never had trouble voting at a polling location, had never been denied a public service or entry into a public building, and had never been denied a service at a hotel or restaurant because he was white. App. 653 (Huebner Depo. 20:22-21:8).

50. Mr. Huebner testified he had never had any contact with his representative on the Court, Commissioner Daniel of Precinct 1, and that aside from voting against Commissioner Daniel, he had nothing negative to say about her. App. 654 (Huebner Depo. 25:19-22).

51. Plaintiff Johannes Peter Schroer resides in Precinct 3 and is represented by Commissioner John Wiley Price. App. 684 (Schroer Depo. 13:4-12).

52. When asked whether he had either experience or witnessed any racial discrimination in Dallas, Mr. Schroer testified that "[p]ersonally I have never been in an event where I would see that. I've seen in the news things but I haven't experienced anything personally, no." App. 688 (Schroer Depo. 28:2-6).

53. Mr. Schroer likewise testified, when asked whether he had experienced discrimination on account of being Anglo: "[n]ot that I would recognize." App. 688 (Schroer Depo. 28:7-9).

54. Mr. Schroer testified he has never: met Commissioner Price; called his office or expressed any concern to him; attempted to contact his office regarding any issue; or talked to him

about redistricting. App. 684-85 (Schroer Dep. 13:12-14:3; 17:10-12).

55. Plaintiff Holly Leann Morse testified she resides in Precinct 2, but does not know who represents the precinct, and has never tried to make any contact with the Commissioner for Precinct 2 (Commissioner Cantrell). App. 711, 713 (Morse Depo. 16:1-11; 22:23-23:5).

56. Nonetheless, Ms. Morse does not think she has been able to elect her candidate of choice in Precinct 2. App. 712 (Morse Depo. 21:9-14).

57. When asked if she had any complaints regarding her representation in Precinct 2, Ms. Morse testified that "I would love to see more of a conservative choice," and that the incumbent was insufficiently conservative, but could not identify any particular issue or vote that led her to that conclusion. App. 713 (Morse Depo. 22:5-17).

58. When asked "can you describe for us an event or an item for consideration that has come up with the Commissioners Court where you were dissatisfied with the result or thought it should come out differently," Ms. Morse testified "I don't know." App. 713 (Morse Depo. 23:14-18).

59. Ms. Morse testified "I don't know" when asked to describe any discrimination she had experienced in Dallas County. App. 713 (Morse Depo. 24:12-14).

60. When asked whether she had seen any racial appeals against Caucasians in political advertisements, direct mail, or a phone call from a candidate, Ms. Morse testified "I don't know." App. 713 (Morse Depo. 24:15-20).

61. Ms. Morse testified that the schooling she received in Dallas County was at least on average with other schools in the county, and that she had never suffered any discrimination in travel or housing, and that she had never experienced discrimination at a polling location. App.

713, 715 (Morse Depo. 24:21-25:12; 31:11-13).

62. Ms. Morse also testified that she believed educational opportunities in Dallas County were equal among all races, and she did not know whether there was any official discrimination among Texas officials towards any given group or race. App. 716 (Morse Depo. 36:6-15).

63. Ms. Morse testified that she is unaware of any facts that would lead her to believe that the 2011 Commissioners map has the effect of harming her voting rights as a Caucasian citizen. App. 715 (Morse Depo. 33:21-25).

64. Ms. Morse testified that she could not describe or think of any examples of historical discrimination against Caucasians in Dallas County. App. 716 (Morse Depo. 35:4-14).

65. Ms. Morse testified that although she thinks the commissioner for Precinct 2 (Commissioner Cantrell) does not represent her interests, she did not know whether "there [was] a vote, set of events, a political position or positions that cause [her] to believe that," and could not describe, when asked, *anything* that caused her to conclude the commissioner in Precinct 2 was not representing her interests. App. 716 (Morse Depo. 35:15-36:1.

66. Ms. Morse testified that she had not "taken an opportunity to understand Commissioner Cantrell's position or votes on any issues," did not know whether he was "serving in office or voting in a way in which [she] would prefer [her] candidate to do," and when asked "[w]ell, I guess, then, how is it that you have concluded that Commissioner Cantrell is not sufficiently representing you," Ms. Morse testified: "I don't know." App. 717 (Morse Depo. 40:11-21).

67. Ms. Morse is unaware whether she has ever sought a service or information from Dallas County where the county has been unresponsive or unhelpful to her. App. 718 (Morse Depo. 44:8-12).

68. Regarding the 2011 redistricting map, Ms. Morse testified she had no complaints about how the map split cities, neighborhoods, or other political districts. App. 718 (Morse Depo. 45:19-22).

69. Other than the drawing of the redistricting map, Ms. Morse was not able to describe any complaints against any member of the Court. App. 720 (Morse Depo. 50:6-51:1).

70. Plaintiff Gregory R. Jacobs resides in Precinct 1 and is represented by Commissioner Theresa Daniel. App. 743 (Jacobs Dep. 13:11-14).

71. Although Mr. Jacobs did not vote for Commissioner Daniel because she is a member of the Democratic Party, App. 743-44 (Jacobs Depo 13:15-16; 14:6-10), he was unable to "come up with one" particular issue or vote of Commissioner Daniel's with which he disagreed, App. 744 (Jacobs Depo. 14:11-14).

72. Mr. Jacobs has never contacted Commissioner Daniel regarding an issue or county service or inquiry, but is aware his neighbors reached out to her regarding a pothole on the street, App. 744 (Jacobs Depo. 14:19-15:13); after they contacted Commissioner Daniel, the pothole was fixed, App. 744 (Jacobs Depo. 15:10-15).

73. Mr. Jacobs agreed that "with regard to [his] opinion of Commissioner Daniel, if she was a Republican [he] would support her." App. 751 (Jacobs Depo. 42:22-25).

74. Mr. Jacobs testified he wanted more Republicans on the Court, rather than more white officeholders, App. 746 (Jacobs Depo. 22:15-19), and that the way he votes for commissioners is on party label and nothing else, App. 751 (Jacobs Depo. 43:10-21).

75. Mr. Jacobs testified that he has never "experienced any disadvantages or barriers or discrimination as a result of [his] race in Texas." App. 742, 747 (Jacobs Depo. 9:16-19; 28:12-25).

76. When asked to describe, other than the allegations of this lawsuit, any "examples or experiences of yours where you felt that you were discriminated against because you're Anglo or white," Mr. Jacobs testified "I can't come up with one." App. 742-43 (Jacobs Depo. 9:24-10:7).

77. Mr. Jacobs has never requested a service or something from the county that has been denied. App. 744-45 (Jacobs Depo. 17:25-18:3).

78. When asked whether there is "something that [the] county government has done recently that . . . came out differently than you would have hoped, if you could have elected somebody different," Mr. Jacobs could not cite an example. App. 746 (Jacobs Depo. 22:7-14).

79. When asked to describe any harm he personally suffers as a result of the enacted Court districting map, Mr. Jacobs could not do so. App. 746 (Jacobs Depo. 24:1-7).

80. Mr. Jacobs has never had any problem or discrimination in voting, and has never experienced any discrimination from any state-level government official. App. 747-48 (Jacobs Depo. 28:1-15; 30:3-6).

81. When asked if he had any problem with the Commissioners Court prior to 2011, Mr. Jacobs testified that he did not. App. 748 (Jacobs Depo. 30:15-22).

82. Mr. Jacobs testified that although there was a history in Dallas County of discrimination against "blacks and maybe Hispanics, too," he could not recall or describe any such similar discrimination that Anglos in Dallas County have suffered. App. 751-52 (Jacobs Depo. 45:15-46:4).

83. Mr. Jacobs also testified that he thought educational and housing opportunities in Dallas County were equal among the races, App. 752 (Jacobs Depo. 46:18-25), and that the county government, with respect to building quality parks, roads, and schools, was equally responsive to the

races, App. 752 (Jacobs Depo. 47:1-6).

84. Mr. Jacobs testified "[a]bsolutely it's one of their motivations," when asked about incumbent protection in designing the 2011 Court map. App. 752 (Jacobs Depo. 47:24-48:3.

85. Plaintiff Anne Harding resides in Commission Precinct 4, and always votes Republican if it is an option on the ballot. App. 783 (Harding Depo. 14:21-24; 15:10-12).

86. Ms. Harding has never communicated with her representative, Dr. Elba Garcia, or any of the other commissioners or judge. App. 783 (Harding Depo. 15:13-20).

87. Ms. Harding testified that she believes politics played a role in drawing the 2011 map and that she "believe[s] that the district maps were drawn to favor the Democrats in Dallas County." App. 785 (Harding Depo. 24:3-11).

88. Ms. Harding believes the plan was drawn primarily to favor Democrats, rather than racial minorities. App. 785 (Harding Depo. 24:16-25) (Q. "So in your view this plan was drawn to protect the wishes of Hispanic and Black voters?" A. "I believe this map was drawn to favor the Democratic [P]arty which is most often represented by Blacks and Hispanics." Q. "Okay. So you would agree that the plan was drawn to favor minorities?" A. "I didn't say that. I think this map was drawn to favor the Democrat [P]arty which is most often voted into office by minorities.").

89. Ms. Harding has never made any requests of or interacted with the Court, nor has she expressed any concerns to the commissioners. App. 786 (Harding Depo. 26:21-27:8).

90. Ms. Harding has no idea how she would like the map changed, App. 786 (Harding Depo. 27:23-28:2), but would like "the Anglo community to be able to elect the candidates of choice . . . in [her] current precinct," App. 787 (Harding Depo. 31:23-32:10).

The Commissioners' 2011 Enacted Plan and Plaintiffs' Proposed Plan

91. Plaintiffs contend that the Enacted Plan Precincts have the following demographic characteristics: Precinct 1: 140,554 white CVAP (42.8%); Precinct 2: 276,285 white CVAP (69.8%); Precinct 3: 195,549 black CVAP and 53,547 Hispanic CVAP (combined 66.6%); Precinct 4: 115,934 Hispanic CVAP and 61,063 black CVAP (combined 56.6%). App. 804.

92. Plaintiffs have proposed an alternative redistricting plan that creates two precincts with a majority Anglo CVAP; proposed District 2 has an Anglo CVAP of 65.2% and proposed Precinct 4 (renumbered from Enacted Plan Precinct 1) has an Anglo CVAP of 55.1%. App. 810. Plaintiffs' proposed Precinct 3 increases the combined Black and Hispanic CVAP in the Precinct from 66.6% to 75.2%. Plaintiffs' proposed Precinct 1 (renumbered from Enacted Plan Precinct 4) has a combined Hispanic and Black CVAP of 56.7%. App. 810.

93. Despite claiming that Enacted Plan Precinct 2 was packed with "70-75 thousand White voters" whose votes are "wasted," App. 805, plaintiffs' proposed Precinct 2 reduces the Anglo CVAP by only 4.6% to 65.2%, or 23,565 voters. App. 804, 810.

94. Plaintiffs' expert, Dr. Morrison, testified that he views a district with 60% or 65% Anglo CVAP as potentially packed, because the excess Anglos "could have been put in another district where their votes have more influence; rather than being completely wasted." App. 193 (Morrison Depo. 94:10-96:5).

95. Dr. Morrison, conducted his analysis of the Enacted 2011 Plan using the wrong map; the boundaries of the plan he analyzed do not correspond with the current boundaries. App. 836-43.

96. As a consequence, nine of the sixteen city splits Dr. Morrison identified in the 2011

Enacted Plan do not exist. App. 836-43. The remaining involve splits in the City of Dallas or large suburban cities that are all split in the current legislative or congressional plans. App. 841.

97. When asked whether it would be difficult to conclude that the Enacted Plan contained too many city splits using an incorrect version of the map, Dr. Morrison testified that "I'm not entirely sure that all of the splits that I've identified are where they appear to be," and that "I'm not finished with the analysis and I'm not relying on it." App. 202 (Morrison Depo. 130:16-133:21).

98. Dr. Morrison testified that it "remains unresolved" whether any of the city splits he identified affect the Anglo-majority precinct in the Enacted Plan, and cannot "at this point" say whether any splits harmed the Anglo community. App. 204-05 (Morrison Depo. 141:17-21; 142:19-22).

99. When asked, just three weeks ago at his deposition, how he reached his conclusion regarding how the Enacted Plan caused discrimination against Anglo voters, Dr. Morrison testified that "I don't rule out the possibility that my entire analysis in Table 4, when it's finally completed and I get all the numbers right, may end up showing there is no real obvious, apparent statistical footprint of intent to pack Anglos. In which case, my conclusion is I guess it wasn't done here, but the demographic data show it was accomplished." App. 205 (Morrison Depo. 142:22-143:11).

100. An analysis of the 2016 election results shows that Democratic presidential candidate Hillary Clinton and Democratic sheriff candidate Lupe Valdez received similar vote totals in Dallas County, a pattern that held true across the precincts in the Enacted Plan—both Democratic candidates carried Precincts 1, 3, and 4, while both lost Precinct 2, as the following results show:

2016 Election Results – Enacted Plan

Precinct	Sheriff % D	Sheriff % R	President % D	President % R
1	**66.4**%	33.6%	**65.4**%	30.3%
2	44.1%	**55.9**%	45.9%	**49.2**%
3	**75.4**%	24.6%	**73.9**%	23.4%
4	**68.1**%	31.9%	**66.0**%	30.1%

App. 859.

101. Had plaintiffs' proposed plan been in effect, on the other hand, Ms. Clinton and Ms. Valdez would have carried *all four* precincts, including the two majority Anglo CVAP precincts (proposed Precincts 1 and 4), as demonstrated in the following chart:

2016 Election Results – Plaintiffs' Proposed Plan

Precinct	Sheriff % D	Sheriff % R	President % D	President % R
1	**50.6**%	49.4%	**52.8**%	42.2%
2	**83.1**%	16.9%	**81.7**%	15.6%
3	**66.3**%	33.7%	**64.0**%	32.1%
4	**50.8**%	49.2%	**49.8**%	46.0%

App. 859.

102. Plaintiffs' proposed Precinct 1 overlaps with much of Enacted Plan Precinct 2, but approximately 260,609 people, with an Anglo CVAP of 53.1%, outside Enacted Plan Precinct 2 are added in plaintiffs' proposed Precinct 1 (to replace the population not overlapping with Enacted Plan Precinct 2). App. 854.

103. Among those 260,609 people added into plaintiffs' proposed Precinct 1, Democrat Hillary Clinton received 67.7% support in the 2016 general election, and Democratic Sheriff Lupe Valdez received 63.3% support in the 2016 general election. App. 854.

104. Plaintiffs' proposed Precinct 4 largely overlaps with the portion of Enacted Precinct 2 *not* included in proposed Precinct 1, but also adds approximately 373,782 people, with an Anglo

CVAP of 47.6%, outside Enacted Plan Precinct 2 (to replace the population not overlapping with Enacted Plan Precinct 2). App. 857.

105. Among those 373,782 people, Democrat Hillary Clinton received 57.7% support in the 2016 general election, and Democratic Sheriff Lupe Valdez received 57.4% support in the 2016 general election. App. 857. Thus, even were the Court to rule for plaintiffs and impose their proposed alternative map, the likely result is that more Democrats are elected, not fewer, as Plaintiffs' stated at their depositions was their desire.

SUMMARY OF ARGUMENT

Defendants are entitled to summary judgment on all of plaintiffs' claims.

First, plaintiffs lack standing because they have no particularized injury that affects them in a personal and individual way, as required by Supreme Court standing precedent. Plaintiffs have testified under oath that they suffer no harm from the Enacted Plan, have never contacted the Court or any commissioners with any issues or concerns, and cannot name anything they think would have been decided differently if the district lines were drawn differently. Several plaintiffs testified that their only objection is partisan, not racial—a claim they did not plead in their complaint. Because plaintiffs admit they experience no harm, they have no standing to sue.

Second, defendants are entitled to summary judgment on plaintiffs' Section 2 claim (Count I) because the undisputed evidence proves Dallas County Anglos are not politically cohesive under *Gingles* prong two; the evidence shows they split among those who support Democrats, Tea Party candidates, and mainstream Republicans. Moreover, the lack of Anglo cohesion is particularly acute in the precise geographic area where plaintiffs contend a second Anglo-majority districts is required under Section 2, a fact fatal to their claim. In addition, plaintiffs' Section 2 claim also fails because

the evidence demonstrates any polarized voting among Anglos is attributable to partisanship, not race—as plaintiffs themselves admit. As such, they fail the *en banc* Fifth Circuit's requirement of proving "legally significant" racially polarized voting attributable to race, not politics. Finally, plaintiffs plainly fail the totality of circumstances factors; it is undisputed that all but one weigh against plaintiffs; with only one factor (of lesser importance) over which a genuine factual dispute exists. Critically, plaintiffs cannot show a lack of proportionality; indeed, the Enacted Plan is near exact proportionality, unlike plaintiffs' proposed plan.

Third, defendants are entitled to summary judgment on plaintiffs' Equal Protection claim (Count II) because the undisputed evidence is that the Court enacted race-neutral, traditional redistricting criteria, which the map drawer testified he followed. Plaintiffs' only attempt to show otherwise is a series of purported city splits that their expert, Dr. Morrison, admits are inaccurate and based upon an analysis of the wrong district boundaries; nor can he say whether Anglo voters were targeted by any decisions about where to draw lines. Incredibly, Dr. Morrison admits that he has no proof of discrimination, and that once he finally conducts an analysis of the correct map (and the deadline for disclosing expert opinions has passed), it is possible he will conclude that the evidence does not show any discriminatory intent. In addition, although plaintiffs' experts make vague references to the standard for racial gerrymandering claims, plaintiffs' live complaint does not present such a claim; Count II is phrased solely in terms of intentional vote dilution, which the Supreme Court has made clear is an analytically distinct claim. Plaintiffs cannot seek relief for a claim they have not pled. Even if they had pled it, defendants have offered substantial evidence that race did not predominate, and plaintiffs, after years of discovery, have nothing to show otherwise.

Fourth, defendants are entitled to summary judgment on plaintiffs' alternative Equal

Protection claim (Count III), which alleges that Section 2 of the Voting Rights Act is unconstitutional to the extent the Court concludes plaintiffs are an unprotected class under that provision. This misses the mark. The Fifth Circuit has held that Anglo voters can sue under Section 2, and the Supreme Court has accepted the constitutionality of Section 2. Plaintiffs' failure to satisfy the elements of a Section 2 claim does not mean *no* Anglo voters in *no* region could; Count III is foreclosed under longstanding, binding precedent.

In sum, three years after plaintiffs' complaint was filed, after ample opportunities to develop their case, the lay and expert witness testimony indisputably proves that plaintiffs do not satisfy the elements of any of their claims.

STANDARD OF REVIEW

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Rogers v. Bromac Title Servs., LLC*, 755 F.3d 347, 350 (5th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). Federal Rule of Civil Procedure 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Collins v. Jackson Pub. Sch. Dist.*, 609 F. App'x 792, 794-95 (5th Cir. Apr. 20, 2015) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine dispute "exists 'if the evidence is such that a reasonable [judge] could return a verdict for the nonmoving party.'" *Rogers*, 755 F.3d at 350 (quoting *Anderson v. Liberty Lobby, Inc.*, 471 U.S. 242, 248 (1986)). Although facts and inferences must be construed in favor of the non-moving party, "[s]ummary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." *Id.* (quoting *McFaul v. Valenzuela*, 684 F.3d 564, 571

(5th Cir. 2012) (bracket in original)).

ARGUMENT

I. Plaintiffs Lack Standing to Bring This Action Because They Suffer No Injury.

"To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (emphasis and bracket in original). The Supreme Court "has stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id.* A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, and n.1 (1992)). Plaintiffs lack standing to bring this action because they have admitted they suffer no injury.

Plaintiff Harding has testified that she has never interacted with the Court or any commissioners, including her commissioner Dr. Elba Garcia. App. 783, 785. Moreover, she has testified that her objection is not race-based, contrary to the claims in the complaint, but rather that she thinks the map was drawn to favor Democrats. App. 785. But plaintiffs' complaint does not allege a partisan gerrymandering claim, and Ms. Harding cannot rely upon an alleged injury she has not even pled in her complaint.

Plaintiff Jacobs likewise has suffered no injury. At his deposition, he was unable to identify any issue or vote of Commissioner Daniel with which he disagreed, and testified that he would support her if she were a Republican. App. 743-44, 751. Mr. Jacobs testified he has never been denied any request or service from the Court, and could not cite a single example of anything the

Court had done that "came out differently than you would have hoped, if you could have elected somebody different." App. 744-46 (Jacobs Depo. 22:7-14). Critically, when asked "[c]an you describe for us any harm that you personally suffer as a result of the Commissioners Court looking the way it does today," Mr. Jacobs testified: "Direct harm to me? I can't, but I don't focus on that." App. 746 (Jacobs Depo 24:1-5). Moreover, Mr. Jacobs does not reside in either of the two Anglo-majority districts plaintiffs propose, App. 778 (Jacobs Registration Card), and thus even if he had some injury, it would not be redressed by the remedy plaintiffs seek. *See Raines*, 521 U.S. at 818. Mr. Jacobs has no standing.

Plaintiff Morse testified she was unaware of any facts that would lead her to believe the Enacted Plan harms her voting rights as a Caucasian, App. 715 (Morse Depo. 33:21-25), could not describe any reason to believe she was being insufficiently represented, App. 716-17 (Morse Depo. 35:15-36:1; 40:11-21), could not describe any occasion in which the Court was unresponsive to her, App. 718 (Morse Depo. 44:8-12), has no complaints about any split cities, neighborhoods, or political districts, App. 718 (Morse Depo. 45:19-22), and her only complaint, despite not knowing the identity of her Commissioner, was that he was insufficiently conservative, App. 713 (Morse Depo. 22:5-17). Because Ms. Morse has no injury tethered to any of the complaints' legal claims, she has no standing.[1]

[1] To the extent the Court concludes plaintiffs have even pled a racial gerrymandering claim (they have not, *see infra* Part III.B.), only plaintiffs who live in the challenged district (Enacted Plan Precinct 2) have standing. *See United States v. Hays*, 515 U.S. 737, 746 (1995). Ms. Morse is the only plaintiff who resides in Enacted Plan Precinct 2, the only current majority Anglo district that plaintiffs seemingly contend is packed. Had plaintiffs actually pled a racial gerrymandering claim, Ms. Morse is the only plaintiff who could conceivably have standing for such a claim, but Ms. Morse has testified she suffers no injury and her only articulable objection is that her Commissioner (Cantrell) is insufficiently conservative—she articulated no injury related to any purported racial gerrymandering.

Finally, plaintiff Schroer likewise has never contacted or expressed any concerns to the Court about any issue, App. 684-85 (Schroer Depo. 13:12-14:3; 17:10-12), and nor has plaintiff Huebner, who testified that he has never had any contact with the Court or his commissioner, and has nothing negative to say about his representative, Commissioner Daniel. App. 654 (Huebner Depo. 25:19-22). As such, neither have experienced any discriminatory effects necessary to prevail on their claims, and thus have experienced no cognizable personal injury sufficient to establish standing.

Finally, Plaintiffs also lack standing because the remedy they propose with their own plan does not cure the harm they do complain of. *See Raines*, 521 U.S. at 819 (holding that injury must be "likely to be redressed by the requested relief"). But plaintiffs' proposed plan would likely elect Democrats to all of the districted seats. *See infra* Part II.A; App. 858-59.

II. Defendants Are Entitled to Summary Judgment on Plaintiffs' Section 2 Claim (Count I).

Defendants are entitled to summary judgment on plaintiffs' claim that the Enacted Plan violates Section 2 of the Voting Rights Act's prohibition on discriminatory results.[2]

To prove a Section 2 results claim, plaintiffs must first demonstrate the presence of three preconditions announced by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). First, plaintiffs must prove "the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1395 (5th Cir. 1996). "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice."

[2] Plaintiffs allege only a Section 2 "results" violation, *see* 2d Am. Compl. ¶ 26, ECF No. 31, and not a Section 2 "intent" violation, *see McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046 (5th Cir. 1984) (noting plaintiffs may allege both "results" and "intent" claim under Section 2).

Johnson v. De Grandy, 512 U.S. 997, 1008 (1994). Second, plaintiffs must prove that the "the minority group is politically cohesive." *Clark*, 88 F.3d at 1395. And third, plaintiffs must prove that "the [racial] majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." *Id.* These preconditions are "necessary but not sufficient to prove vote dilution." *Id.*

Finally, if plaintiffs have met their burden on those elements, they must prove that under the totality of the circumstances, "they do not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (en banc). "Courts are guided in this second inquiry by the so-called *Zimmer* factors listed in the Senate Report." *Id.* "It is well established that the existence of racially polarized voting and the extent to which minority group members have been elected to public office are the most important factors to be considered in a totality determination." *Fabela v. Farmers Branch*, No. 3:10-CV-1425-D, 2012 WL 3135545, at *13 (N.D. Tex. Aug. 2, 2012). In addition, the court must assess whether the number of majority-minority districts is proportional with the minority group's share of the population as a whole, because Section 2 guarantees "equal political and electoral opportunity," not entitlement to the maximum possible number of reasonably compact majority-minority districts. *See De Grandy*, 512 U.S. at 1022.

As explained below, the undisputed facts show that plaintiffs do not satisfy *Gingles* prong two, a necessary precondition for their claim, and that none of the factors considered under the totality of the circumstances supports finding a Section 2 violation. Furthermore, the undisputed evidence means that plaintiffs cannot prove a lack of proportionality in representation.

A. The Undisputed Evidence Proves that Dallas County Anglos Are Not Politically Cohesive, Failing *Gingles* Prong Two.

Defendants are entitled to summary judgment on plaintiffs' Section 2 claim because the undisputed evidence proves that Dallas County Anglo voters are not politically cohesive, and thus plaintiffs cannot establish the presence of *Gingles* prong two.

The purpose of the *Gingles* prong two inquiry is "to ascertain whether minority group members constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. "A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establish[ing] minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56. In addition to examining data from general elections, courts look to primary election results to determine minority political cohesion. In *Sessions v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004), the district court rejected a Section 2 claim in Dallas-Fort Worth brought by African American and Latino voters, concluding that there was "no serious dispute that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation." On appeal, in determining whether African Americans could control the general election outcome, the Supreme Court looked to primary election results. *See LULAC v. Perry*, 548 U.S. 399, 444-46 (2006). Therefore, as the district court considering Texas's congressional redistricting recently concluded, "*LULAC* . . . indicates that primaries can aid courts in determining voters' candidates of choice" and "the current case law from the Fifth Circuit and Supreme Court confirms that primaries are relevant" to assessing political cohesion under *Gingles* prong two. *Perez v. Abbott*, __ F.3d __, No. 11-cv-360, 2017 WL 3495922, at *23 (W.D. Tex. Aug. 15, 2017), *stayed pending appeal*, __ S. Ct. __, 2017 WL 4014835 (U.S. Sept. 12, 2017) (Mem.).

General and primary elections in Dallas County prove that Anglo voters are not politically cohesive and thus fail to satisfy *Gingles* prong two. Statistical analysis of primary and general election results shows that 23% of Dallas County Anglo voters support Democratic candidates, App. 320, and although 77% support Republican candidates, Anglo Republican voters are nearly evenly split between Tea Party affiliated candidates and more mainstream Republican candidates, with an average of 54.4% supporting Tea Party candidates and 45.6% supporting mainstream Republican candidates, App. 322. Together, this means that 23% of Dallas County Anglos support Democrats, 35% support mainstream Republicans, and 42% support Tea-Party affiliated candidates. App. 320.

Lay witness testimony confirms that Dallas County Anglos are not politically cohesive. *See Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (noting relevance of both statistical and lay witness evidence). Elizabeth Alvarez, one of plaintiffs' attorneys in this case, testified earlier this year in Texas's congressional redistricting case that there was an ideological divide among Dallas County Republicans between Tea Party affiliated voters and those who do not support Tea Party candidates. App. 376-77; *see also Perez v. Abbott*, No. 11-360 (W.D. Tex.), ECF No. 1514-2. She testified this divide demonstrated a lack of political cohesiveness among Dallas County Republicans. App. 376-77. Plaintiffs' witness Jeff Turner confirmed the split among Democratic, Tea Party, and mainstream Republican Anglo voters in Dallas County. App. 301.

The largest faction—Tea Party affiliated voters—constitutes merely 42% of Dallas County Anglo voters. Given the fractured Anglo vote, and the admissions of plaintiffs' own attorney and witness that Dallas County Republicans are divided ideologically, the undisputed facts in this case support only one conclusion: Dallas County Anglo voters do not "constitute a politically cohesive unit," *Gingles*, 478 U.S. at 56, and thus plaintiffs cannot satisfy *Gingles* prong 2.

Moreover, the absence of Anglo political cohesion is particularly acute among the specific Anglo voters plaintiffs propose to newly add to their proposed Precinct 1 (who are not currently in the Enacted Plan's Anglo-majority Precinct 2). Of the approximately 260,609 new people that plaintiffs added to Precinct 1—with an Anglo-majority CVAP of 53.1%—Democrat Hillary Clinton received 67.7% support in the 2016 general election, while Democratic Sheriff Lupe Valdez received 63.3% support. App. 854. Indeed, despite containing majority Anglo CVAPs, Ms. Clinton and Ms. Valdez carried *both* of the precincts plaintiffs contend are required by Section 2 to elect Anglos' candidates of choice (*i.e.*, Republican candidates). App. 859. Plaintiffs' demonstration plan thus creates a second Anglo-majority precinct only by grouping together the *least cohesive* set of Dallas County Anglos—by including in it the geographic area where Dallas County's *Democratic* Anglo voters are concentrated. Plaintiffs cannot satisfy *Gingles* prong two in this manner—by demonstrating potential Section 2 districts in which Anglo voters are not cohesive and their preferred candidates do not even prevail. The undisputed evidence requires judgment be granted in favor of defendants on plaintiffs' Section 2 claim.

B. Defendants Are Entitled to Judgment on Plaintiffs' Section 2 Claim Because Politics, Not Race, Drive Anglo Voting Behavior.

The undisputed evidence—including testimony by plaintiffs themselves—demonstrates that politics, not race, explains Anglo voters' choices and thus plaintiffs' Section 2 claim fails. In *Clements*, the *en banc* Fifth Circuit held that it was insufficient for plaintiffs to merely establish the presence of racially polarized voting for Section 2 claims, but rather plaintiffs must show that the voting choices are caused by race, rather than politics, in order for polarized voting to be "legally significant." "The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color.'"

Clements, 999 F.2d at 850. The Fifth Circuit explained that, were it otherwise, Section 2 would be removed "from its racial tether" and "illegal vote dilution" would become fused with "political defeat." *Id.* Because there is "a clean divide between actionable vote dilution and 'political defeat at the polls," *id.* (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971), Section 2 is not satisfied by polarized voting attributable to "partisan affiliation, not race," *id.*

The undisputed facts show that partisanship and ideology, not race, explains Anglo voting behavior in Dallas County. Plaintiffs' attorney Ms. Alvarez testified that Republican primary choice differences are "politically based," and not race-based. App. 377. Plaintiff Gregory Jacobs testified that his decision to vote against Commissioner Daniel is based entirely upon partisan affiliation—that he automatically votes against Democrats, that he has no dispute with Commissioner Daniel on an issue, and that he would vote for her if she were a Republican. App. 733-34, 751. Mr. Jacobs testified he wanted more Republicans, rather than more Anglos, on the Court, and that his vote for commissioner is based upon partisan affiliation and nothing else. App. 746, 751. Plaintiff Holly Leann Morse's sole complaint about her commissioner (who she could not identify) was that he was insufficiently conservative. App. 711, 713. And Plaintiff Ann Harding testified that she thought partisanship, as opposed to race, was the main factor in the map's design. App. 785.

Because the undisputed facts show that partisanship and ideology, not race, explain Anglo voting choices in Dallas County, the evidence of racially polarized voting in this case is not "legally significant," *Clements* 999 F.2d at 850, and is thus insufficient to satisfy *Gingles* prong two.

C. The Undisputed Evidence Precludes a Finding that the Totality of the Circumstances Warrant Section 2 Relief.

The undisputed record evidence precludes a finding that the totality of the circumstances warrants Section 2 relief. Nine factors, known as the "Senate Factors," are "essential for weighing

the totality of circumstances." *Fairley v. Hattiesburg*, 584 F.3d 660, 672 (5th Cir. 2009). They are (1) "the history of voting-related discrimination in the State or political subdivision," (2) "the extent to which voting in the elections in the State or political subdivision is racially polarized," (3) "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," (4) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process," (5) "the use of overt or subtle racial appeals in political campaigns," (6) "the extent to which members of the minority group have been elected to public office in the jurisdiction," (7) "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group," (8) "[evidence] that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous," and (9) "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *Id.* at 672-73 (quoting *LULAC*, 548 U.S. at 426 (bracket in original)).

These factors are not given equal weight. "Some of these factors are more important than others—the two most important are the extent to which members of the minority group have been elected to public office and the extent to which voting in the jurisdiction is racially polarized." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991).

The factual record precludes a finding that the totality of the circumstances supports finding a Section 2 violation. At the outset, Plaintiffs only allege the presence of *four* of these nine factors: Factor 1 (history of voting-related discrimination), Factor 2 (racially polarized voting), Factor 5 (overt

or subtle racial appeals), and Factor 7 (unresponsiveness to minority group). *See* 2d Am. Compl. ¶ 29, ECF No. 31.[3] Plaintiffs thus forfeit the remaining five factors, including one of "the two most important," *Westwego*, 946 F.2d at 1120, the extent to which Anglos have been elected to public office in Dallas County (Factor 6). And for good reason—the record proves these factors contradict plaintiffs' Section 2 claim. *See, e.g.*, App. 122, 300 (noting three of five Court members are Anglo, an overrepresentation of their share of the population); App. 653, 688, 713, 715, 742-43, 747-48 (testimony of plaintiffs that they have not experienced discrimination in voting on account of being Anglo); App. 460-61 (admission of plaintiffs that there is no history of discrimination against Anglos in public accommodations and Anglos do not bear the effects of past discrimination in education, employment, and health); App. 9-10, 476, 480-81, 512 (map was drawn pursuant to adopted Redistricting Criteria).

Moreover, the evidence demonstrates that Anglos are proportionally represented on the Court, and thus plaintiffs cannot show a lack of equal opportunity to participate in the political process redressable by Section 2. *See De Grandy*, 512 U.S. at 1014-15. In *De Grandy*, Hispanics constituted 47% of the VAP in the Dade County, Florida area and had an effective majority in 45% of the state house seats at issue. *Id.* at 1014. Given these figures, the Supreme Court held plaintiffs had no Section 2 rights to more state house districts. "Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing effectiveness in proportion to voting-age numbers, deny equal political opportunity. . . . [U]nder [the challenged

[3] Plaintiffs include in their Senate Factor list "the Anglo minority's proven inability over an extended period to elect its preferred candidates to office (barring exceptional circumstances)," 2d Am. Compl. ¶ 29, ECF No. 31, but that is not one of the Senate Factors, but rather merely a restatement of *Gingles* prong 3—a precondition to consideration of the totality of the circumstances.

map], Hispanics in the Dade County area would enjoy substantial proportionality." *Id.* This fact, the Court concluded, overcame the strong evidence of historic and current racial strife in the region targeting Hispanics:

> On this evidence, we think that the State's scheme would thwart the historical tendency to exclude Hispanics, not encourage or perpetuate it. Thus in spite of that history and its legacy, including the racial cleavages that characterize Dade County politics today, we see no grounds for holding in these cases that [the challenged plan's] district lines diluted the votes cast by Hispanic voters.

Id. at 1014-15.

De Grandy requires entry of judgment for defendants on plaintiffs' Section 2 claim. Anglos constitute only 31.5% of the total population in Dallas County and 36.3% of the VAP. App. 122-23. In assessing proportionality, however, these figures must be reduced to account for the approximately 23% of Dallas County Anglos who crossover to support black and Hispanic voters' candidates of choice, *i.e.*, Democratic candidates, App. 320, and who are therefore *not* part of the "minority" for whom plaintiffs seek relief. *See, e.g.*, App. 746 (testimony of plaintiff Jacobs that he desires more Republicans, rather than more Anglos, on the Court). Republican-supporting Anglos constitute just 24.3% of Dallas County's total population (.77 x .315) and 28.0% of Dallas County's VAP (.77 x .363). *See also* App. 333. Under the Enacted Plan, Anglo-supporting Republicans hold one of the four precincts—25%.[4] So Anglo Republican voters hold .7% *more* of the commissioner

[4] Plaintiffs count Anglo Democrats in claiming they lack proportional representation as a matter of their share of the population in Dallas County, but fail to count the elected Anglo Democrats on the defendant governing body, where three of the five representatives are Anglo. For purposes of assessing proportionality, Democratic Anglos must be treated consistently on both sides of the scale. If, contrary to the discussion above, they are counted as part of the equation, then elected Democratic Anglos must also be counted. Otherwise, the proportionality assessment does not compare apples to apples, and the resulting analysis is skewed. If Anglo Democrats are included in the assessment, Anglos control 50% of the districted commissioner seats, as well as the countywide-elected Judge seat. App. 122, 300.

seats than their share of total population, and just 3% fewer than their share of VAP. In *De Grandy*, Hispanic voters held 2% fewer seats than their share of VAP, a result the Supreme Court considered "substantial proportionality." 512 U.S. at 1014. The figures for Dallas County Anglos are indistinguishable. Moreover, in *De Grandy*, the substantial proportionality defeated a Section 2 claim in spite of the existence of historic and ongoing discrimination against Hispanics. Here, there is substantial proportionality *and* no discriminatory background. *De Grandy* controls and requires entry of judgment for defendants on plaintiffs' Section 2 claim.[5]

Even among the factors plaintiffs cite in their complaint, the record precludes a finding that the totality of the circumstances establishes a Section 2 violation. First, the evidence shows that

[5] Total population is the most appropriate metric for considering proportionality of representation. The Supreme Court last year held that total population was an appropriate metric for ensuring compliance with the one-person, one-vote principle of the Equal Protection Clause. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). "As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote." *Id.* This principle is all the more salient in assessing proportionality of representation under Section 2, enacted pursuant to the authority granted by those same Framers. *Cf. Fairley*, 584 F.3d at 674 (rejecting use of voter registration figures as metric for proportionality analysis).

Nevertheless, the evidence reflects proportionality for Dallas County Anglos regardless of the metric used. As discussed above, Anglo Republican VAP figures in Dallas County show nearly the exact same proportionality the Supreme Court found for Hispanic VAP in *De Grandy*. And to the extent CVAP is considered—which would be contrary to both *Evenwel* and *De Grandy*—the result is the same. Anglos (including Anglo Democrats) constitute 45.1% of Dallas County's CVAP, App. 122-23, and Anglo Republicans constitute 34.7% (.77 x .451). That number is closer to their current share of the precincts (25%) than the number they seek (50%); using CVAP, the Enacted Plan is only 9% off precise proportionality, versus a 15% difference under plaintiffs' proposed plan. To the extent plaintiffs complain that a more precise proportionality is not attainable, their quarrel is with the provision of the Texas Constitution mandating that each county have only four commissioner precincts, *see* Tex. Const. art. V, § 18(b), which necessarily results in 25-point interval jumps. It would be ironic, to say the least, to conclude that the Voting Rights Act mandates that African American and Latino voters be represented at *15% below* their proportional share in order to prevent White voters from being represented at *9% below* their proportional share.

while there is a history of voting-related discrimination against Blacks and Latinos in Dallas County, there is no such history against Anglos. *See, e.g.*, App. 111-20, 139-40; App. 751-52 (testimony of plaintiff Jacobs that there is history of discrimination against Blacks and Hispanics, not Anglos); App. 716 (testimony of plaintiff Morse that she is unable to identify any history of discrimination against Anglos). Because the totality of the circumstances inquiry is specific to the racial group seeking relief, plaintiffs cannot piggyback on Blacks and Latinos' history of enduring voting-related discrimination in Dallas County. *See LULAC*, 548 U.S. at 425-26 ("[T]he statutory text directs us to consider the 'totality of circumstances' to determine whether members of *a racial group* have less opportunity than do *other* members of the electorate." (emphasis added)). Factor 1 does not support plaintiffs' claim.

Second, the record does not permit a finding that Factor 2 (racially polarized voting) favors plaintiffs' claim for the same reason plaintiffs' fail at *Gingles* prong two—the evidence proves that to the extent Anglos bloc vote in Dallas County, partisanship, not race, explains their decision. *See* App. 376-77 (testimony of plaintiffs' attorney Elizabeth Alvarez that split in Republican primary is along ideological, not racial, lines); App. 713 (testimony of plaintiff Morse that only complaint against commissioner is he is insufficiently conservative); App. 743-44, 746, 751 (testimony of plaintiff Jacobs that he wants more Republicans, rather than more Anglos, on Court; that he has no issue disagreement with his commissioner and would support her if she were a Republican, and that his vote for commissioner is based upon party label and nothing else). Moreover, the undisputed record evidence shows that the two Anglo-majority districts plaintiffs advocate do not exhibit significant racial polarization; both were won by Democratic presidential and sheriff candidates despite strong Anglo majorities (55.1% and 65.2%). App. 854, 859. The victory by the Black and

Hispanic voters' candidates of choice in plaintiffs' proposed Anglo-majority precincts illustrates the lack of political cohesion among the specific Anglo voters plaintiffs include in them, and thus the absence of racially polarized voting in the precise geographic area plaintiffs' contend Section 2 requires Anglo opportunity districts be drawn.

Third, plaintiffs' allegation in their complaint of "the Commissioners Court's demonstrated unresponsiveness to its Anglo minority," 2d Am. Compl. ¶ 29, ECF No. 31, runs headlong into plaintiffs' own contrary testimony in this case. *See* App. 654 (testimony of plaintiff Huebner that he has never contacted his commissioner); App. 684 (testimony of plaintiff Schroer that he has never contacted his commissioner); App. 711, 713, 716-18 (testimony of plaintiff Morse that she does not know who her commissioner is, has never contacted him, does not know any issue on which she wishes the Court had voted differently, and is unaware of ever seeking any service or information from Dallas County in which the County was unresponsive or unhelpful); App. 744-46 (testimony of plaintiff Jacobs that he has never been denied any request or service from the County, that he cannot think of anything he wished the Commission had done differently, has never contacted his commissioner, but that his neighbors had regarding a pothole, which was then fixed); App. 783 (testimony of plaintiff Harding that she has never contacted any commissioner). Contrary to plaintiffs' allegation, their own sworn testimony is that the Court has been fully responsive to their requests for information or service (to the extent they had any), displaying no discrimination on account of their status as Anglos. The evidence precludes a finding that Factor 7 favors plaintiffs.

That leaves *one* factor—overt or subtle racial appeals (Factor 5)—over which there is a factual dispute. Although defendants are confident this factor also points heavily against plaintiffs, the presence of a factual dispute over *one* of the nine factors, particularly where it is not among the two

most important, cannot suffice to defeat summary judgment where there is no genuine dispute that the remaining *eight* factors point against plaintiffs' claim. Indeed, in *Fairley*, the Fifth Circuit affirmed the district court's rejection of a Section 2 claim where "[t]he only factor found by the district court weighing in favor of the plaintiffs was the second, namely, the existence of polarized voting . . . ." 584 F.3d at 673. If it is insufficient for a Section 2 claim if the single factor favoring plaintiffs is one of "the two most important," *Westwego*, 946 F.2d at 1120, then summary judgment in favor of defendants is proper here where the only *available* factor for plaintiffs (*i.e.*, the only one over which there is a factual dispute) is *not* one of the two most important.

Because the undisputed facts show that the totality of the circumstances considerations do not favor a finding of vote dilution, plaintiffs' Section 2 claim fails and defendants are entitled to summary judgment.

III. Defendants Are Entitled to Summary Judgment on Plaintiffs' Equal Protection Claim (Count II).

Defendants are entitled to summary judgment on plaintiffs' Equal Protection claim. Count II of plaintiffs' complaint alleges that the Court enacted the plan "to purposefully fragment Dallas's Anglos" and "to reduce and less[e]n Dallas's Anglos' electoral opportunities significantly below the level of opportunities that would have been available under a map compliant with neutral principles." 2d Am. Compl. ¶ 31, ECF No. 31. The uncontested and indisputable facts prove otherwise.

Redistricting legislation constitutes impermissible intentional vote dilution (through cracking and/or packing) in violation of the Fourteenth Amendment's Equal Protection Clause if it is "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v.*

Lodge, 458 U.S. 613, 617 (1982) (internal quotation marks omitted). Plaintiffs must prove "racially motivated discrimination" to prevail on a Fourteenth Amendment vote dilution claim. *Perez*, 2017 WL 3495922, at *10. "'[D]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Am'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted).

In assessing "whether invidious discriminatory purpose was a motivating factor in a government body's decisionmaking," *Perez*, 2017 WL 3495922, at *10, courts look to the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977). The "important starting point" for the *Arlington Heights* analysis is "the impact of the official action whether it bears more heavily on one race than another." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997) (quoting *Arlington Heights*, 429 U.S. at 266). The other factors include "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," "the specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and "[t]he legislative . . . history[,] . . . especially where there are contemporary statements by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 267-68.

Finally, if plaintiffs prove discriminatory intent, they must also show some discriminatory effect on the members of the targeted racial group. In *Palmer v. Thompson*, 403 U.S. 217, 224 (1971), the Court explained that "no case in this Court has held that a legislative act may violate equal

protection solely because of the motivations of the [people] who voted for it." The Court noted that "[i]f the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons." *Id.* at 225. *See also Perez v. Abbott*, 253 F. Supp. 3d 864, 962 (W.D. Tex. 2017) (analyzing discriminatory effects as part of Fourteenth Amendment vote dilution claim).

A. The Facts Show the Enacted Plan Was Not Motivated by Discriminatory Intent Against Anglos and Had No Discriminatory Effects.

The undisputed facts show that the Enacted Plan was not motivated by discriminatory intent against Anglos, and thus defendants are entitled to summary judgment on Count II.

The Court unanimously adopted an Order setting forth Redistricting Criteria that were to be followed in crafting the 2011 plan. App. 512. Among those criteria were complying with the one-person, one-vote principle, complying with Sections 5 (then extant) and 2 of the Voting Rights Act, respecting voter tabulation district lines, following municipal and other geographic boundaries, and creating geographically compact and contiguous districts. App. 512. The mapdrawer, Matt Angle, testified that he followed these "important" criteria "to the best of [his] ability." App. 476. Moreover, Mr. Angle testified as to the process by which he drew the Enacted Plan: he started with Precinct 4 to reduce its population, maintain its geographic core, and retained its ability to elect Hispanic voters' candidates of choice (and thus prevent Section 5 retrogression). App. 9. Next, he worked to increase Precinct 1's (later renumbered Precinct 2) population and to create a strongly conservative "Tea Party" precinct in accord with Anglo Commissioner Dickey's (R) request. App. 10. Then he worked to decrease Precinct 3's population, maintain its geographic core, and address concerns the district had become packed with racial and language minority voters—a Voting Rights Act concern, and retained its ability to elect black voters' candidates of choice (and thus prevent

Section 5 retrogression). App. 10. Finally, he worked to retain much of Precinct 2's core territory while uniting neighborhoods in east Dallas and other more urban communities. App. 10. Mr. Angle testified that he believed race was considered only to the extent permitted by law. App. 487. These facts are not in dispute and do not support a finding of intentional discrimination against Anglo voters.

Indeed, plaintiff's expert Dr. Morrison has testified that he is not confident in his expert report's description of city splits in the map, given that he *analyzed the wrong map*, App. 202, does not rely on his own analysis, App. 202, does not know if the splits (incorrect as they are) even affect the Anglo community, App. 204-05, and does not "rule out the possibility that [his] entire analysis [regarding city splits], when it's finally completed and [he] gets all the numbers right, may end up showing there is no real obvious, apparent statistical footprint of intent to pack Anglos. In which case, my conclusion is *I guess it wasn't done here*, but the demographic data show it was accomplished." App. 205 (emphasis added). Moreover, plaintiffs' own proposed map maintains Precinct 1 at over 65% Anglo, only 4.6% less Anglo than the Enacted Plan and well over the threshold Mr. Morrison identified as demonstrating packing of Anglos. App. 804, 810. And plaintiffs' proposed map also packs the combined Black and Latino population of Precinct 3 by increasing it from 66.6% to 75.2% combined CVAP. App. 810. Dr. Morrison's admission that he has no evidence of discriminatory purpose, coupled with the record evidence demonstrating the Enacted Plan was passed with the purpose of complying with neutral redistricting criteria, defeats plaintiffs' allegation of intentional vote dilution.

Moreover, the *Arlington Heights* factors likewise demonstrate the absence of discriminatory purpose. The "starting point" of the *Arlington Heights* analysis is whether "the impact of the official

action whether it bears more heavily on one race than another," *Bossier Parish*, 520 U.S. at 489, and the undisputed evidence shows that is not so with respect to Dallas County Anglos. As discussed above, Anglos are proportionally represented on the Court. *See supra* Part II.C; *Perez*, 253 F. Supp. 3d at 957 (noting that proportionality is relevant to determining whether intentional vote dilution occurred). And that proportionality maintains its salience even if plaintiffs contend the Enacted Plan excludes some Anglo neighborhoods from Anglo-majority districts. In *De Grandy*, the Supreme Court rejected the contention that claims of fragmenting and packing demonstrated actionable vote dilution despite substantial proportionality. The Court reasoned that such an argument

> boil[s] down to findings that several of [the challenged plan's] district lines separate portions of Hispanic neighborhoods, while another district line draws several Hispanic neighborhoods into a single district. This, however, would be to say only that lines could have been drawn elsewhere, nothing more. But some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size. Attaching the labels 'packing' and 'fragmenting' to these phenomena, without more, does not make the result vote dilution when the minority group enjoys substantial proportionality.

De Grandy, 512 U.S. at 1015-16. The same is true here.[6]

In addition to plaintiffs' inability to show they lack proportional representation, plaintiffs themselves have testified they have not been harmed or affected by any action of the Court on account of being Anglo, and thus there is no discriminatory effect. *E.g.*, App. 713, 715 (testimony of plaintiff Morse that she is unaware of ever seeking any service or information from Dallas County

[6] Plaintiffs make much of the size of the Anglo population in Enacted Plan Precinct 2. But their own proposed redraw reduces its Anglo CVAP by only 4.6 points, App. 804, 810, plaintiffs acknowledge that Anglos are concentrated in northern Dallas County, App. 206, and plaintiffs' expert Dr. Morrison has testified his analysis—when he belatedly conducts it—might well show the *absence* of intentional packing and cracking, App. 205. Thus, the fact that *some* Anglos are excluded from Enacted Plan Precinct 2, while many are included, is "virtually inevitable and . . . . [a]ttaching the labels 'packing' and 'fragmenting' . . . does not make the result vote dilution when [Anglos] enjoy[] substantial proportionality." *De Grandy*, 512 U.S. at 1015-16.

in which county was unresponsive or unhelpful); App. 744-46 (testimony of plaintiff Jacobs that he has never been denied any request or service from the County, that he cannot think of anything he wished the Court had done differently, has never contacted his commissioner, but that his neighbors had regarding a pothole, which was subsequently fixed); App. 746 (testimony of plaintiff Jacobs that the Enacted Plan causes him no harm).

Likewise, the evidence shows there is a history of discrimination in Dallas County against Blacks and Latinos, not Anglo voters, App. 711-20; App. 751-52 (testimony of plaintiff Jacobs); and plaintiffs have testified that they have not experienced discrimination in voting or on account of being Anglo. App. 688 (testimony of plaintiff Schroer); App. 713 (testimony of plaintiff Morse); App. 742, 747-48 (testimony of plaintiff Jacobs). And the only procedural deviation (switching district numbers) *benefitted* an Anglo Republican commissioner. App. 129, 530-31. The evidence shows that the *Arlington Heights* factors do not support a finding of discriminatory intent. Additionally, even if they showed otherwise, it is undisputed, as discussed above, that there are no discriminatory effects against Anglo voters or the Plaintiffs. Plaintiffs have not identified any disagreements with decisions of the Court or any unresponsiveness to their needs on account of being Anglo. *See supra*. Defendants are therefore entitled to summary judgment on plaintiffs' Fourteenth Amendment intentional vote dilution claim.

B. Plaintiffs' Complaint Does Not Allege a Racial Gerrymandering Claim.

Plaintiffs' live complaint does not allege a racial gerrymandering claim. Nowhere in the Complaints' "Claims for Relief" do Plaintiffs mention "racial gerrymandering" or "*Shaw v. Reno*." Rather, Plaintiffs' Fourteenth Amendment claim is presented exclusively as an intentional vote dilution claim, complaining that it allegedly "purposefully fragment[s] Dallas's Anglos . . . [and thus

is] designed . . . to reduce and less[e]n Dallas's Anglos' electoral opportunities significantly below the level of opportunities that would have been available under a map compliant with neutral principles." 2d Am. Compl. ¶ 31, ECF No. 31.

> As the Supreme Court has made clear, a racial gerrymandering/*Shaw* claim is
>
> > analytically distinct from a vote dilution claim. Whereas a vote dilution claim alleges that the [government] has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the [government] has used race as a basis for separating voters into districts.

Miller v. Johnson, 515 U.S. 900, 911 (1995) (internal quotation marks and citations omitted). The three-judge district court considering Texas's congressional and state house redistricting plans recently concluded that several plaintiffs' complaints failed to state racial gerrymandering/*Shaw* claims because their complaints similarly framed their Fourteenth Amendment claims solely as vote dilution claims, as Plaintiffs have done here, and not as racial gerrymandering/*Shaw* claims. *See Perez*, 253 F. Supp. 3d at 932. There, the three-judge court explained that the plaintiff did not properly raise a *Shaw* claim because "the racial gerrymandering language was omitted from their live complaint . . . . The Fourteenth Amendment claims are couched only in terms of intentional discrimination and vote dilution." *Id.* The same is true here.[7]

[7] This issue has also been briefed in the context of plaintiffs' disqualification motion. In their reply brief, plaintiffs contend that as part of the dismissal motion papers, they had "expressly briefed the presence of [a] *Shaw*-style claim in their then-live complaint, and the Court accepted that argument in denying the Defendants' motion." ECF No. 84 at 10 (numbered page 7 on plaintiffs' brief). Contrary to plaintiffs' assertion, this Court's Order denying defendants' motion to dismiss said nothing about racial gerrymandering or any purported *Shaw*-style claim. Rather, consistent with defendants' contention that Count II of plaintiffs' complaint raises only an intentional vote dilution claim, this Court summarized plaintiffs' claim as follows: "[i]n sum, plaintiffs allege that Anglos who reside in Dallas County are denied the opportunity to elect candidates of their choice to the Commissioners Court by being packed into one Commissioner district and isolated (fragmented)

C. Even if Plaintiffs Had Alleged a Racial Gerrymandering Claim, Defendants Would Be Entitled to Summary Judgment.

Even if plaintiffs had alleged a racial gerrymandering claim, defendants would still be entitled to summary judgment. Courts considering racial gerrymandering claims must engage in a two-step analysis, first asking whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," and if so, asking second whether the legislature has satisfied its burden to prove that the "race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017) (internal quotation marks and citation omitted). The Supreme Court "has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965." *Id.* at 1464. "When a State invokes the VRA to justify race-based districting, . . . 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. That 'strong basis' (or 'good reasons') standard gives States breathing room to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Id.* (emphasis in original) (internal quotation marks omitted).

At the outset, as discussed above, *see supra* note 1, the only conceivable plaintiff who could have standing for a racial gerrymandering claim is Ms. Morse—the only plaintiff still a party to the suit who resides in Enacted Plan Precinct 2. But Ms. Morse testified under oath that she suffers no injury and her only complaint is that she thinks her commissioner (who she could not identify) is insufficiently conservative, despite being unaware of any issue on which she disagrees with him, or

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among the other three Commissioner districts." Order, ECF No. 27 at 1-2. That describes a vote dilution claim, not a *Shaw*-type racial gerrymandering claim. The two are different and must be pleaded as such. *See Perez*, 253 F. Supp. 3d at 932; Fed. R. Civ. P. 8(a)(2).

the Court as a whole. App. 711, 713, 715-18, 720. She suffers no injury in fact by her own admission cognizable under a racial gerrymandering theory.

In any event, the undisputed evidence shows that plaintiffs fail at step one—race did not predominate because the Court did not "'subordinate[]' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id.* (internal quotation marks omitted). First, a simple glance at the map shows it has none of the suspicious visual features such as contorted districts that have concerned courts in other cases. Second, the evidence shows that the Court adopted Redistricting Criteria that only include racial considerations with respect to ensuring compliance with Sections 2 and 5 of the VRA. App. 476, 480-81, 487, 512. The remainder of the criteria were traditional redistricting criteria, such as respect for voting tabulation districts, political and geographic boundaries, and ensuring compactness and contiguity. App. 512. Mr. Angle, the mapdrawer, testified that he adhered to these criteria to the best of his ability. App. 476. Moreover, plaintiffs admit that *partisanship*, and not race, drove the decisionmaking. App. 785 (plaintiff Harding testifying: Q. "So in your view this map was drawn to protect the wishes of Hispanic and Black voters?" A. "I believe this map was drawn to favor the Democratic party which is most often represented by Blacks and Hispanics." Q. "Okay. So you would agree that the plan was drawn to favor minorities?" A. "I didn't say that. I think this map was drawn to favor the Democrat party which is most often voted into office by minorities.").

Plaintiffs' expert Dr. Morrison opined that "[t]hose who crafted the [Enacted Plan] subordinated traditional districting criteria by placing predominant emphasis on race." App. 805. His only support, however, was his purported identification of sixteen city splits. App. 805-06. But he used the wrong map in identifying those splits, App. 836-43, and at his deposition acknowledged

uncertainty as to the splits, noted that he is not relying on his analysis and is not finished with it, did not know whether any of the purported splits even affected the Anglo community, and concluded that his entire analysis (once done) may show the splits had nothing to do with race. App. 202, 204-05. Indeed, they do not, as the (undisputed) evidence shows. App. 841 (noting that the map's splits involve the City of Dallas or large suburban communities that are likewise split in the state legislative and congressional districting maps). In the end, defendants have proffered undisputed evidence to show that race did not predominate, but rather neutral criteria did; plaintiffs have no contrary evidence and summary judgment is thus warranted.

Moreover, even if race were found to predominate, defendants would have had "good reason" for their decisionmaking: complying with Sections 2 and 5 of the Voting Rights Act, both of which were in full effect when the challenged plan was adopted in 2011. Dallas County Latinos and blacks had achieved the ability to elect their preferred candidates as commissioners, and defendants thus had "good reason" to believe Section 5 required avoiding retrogression. *See Beer v. United States*, 425 U.S. 130 (1976). And the extremely high concentration of blacks and Latinos in District 3 gave defendants "good reason" to believe it could constitute packing in violation of Section 2. App. 851-52 (noting Black/Latino population was reduced from 83.2% to 72.7%).

Even if plaintiffs had alleged a racial gerrymandering claim (and they have not), the undisputed evidence requires summary judgment be granted in favor of defendants.

IV. Defendants Are Entitled to Summary Judgment on Plaintiffs' Alternative Equal Protection Claim (Count III).

Plaintiffs are entitled to summary judgment on Count III of plaintiffs' complaint, which alleges that, should the Court conclude that "Dallas's Anglo minority isn't a protected class under Section 2 of the Voting Rights Act, the Voting Rights Act denies Dallas's Anglo minority the equal

protection of the law guaranteed by the [Fourteenth] Amendment." 2d Am. Compl. ¶ 33, ECF No. 31.

This claim is foreclosed by binding precedent. First, the Fifth Circuit has made clear that Section 2 applies to protect any minority group, including white voters where they constitute a minority. *See United States v. Brown*, 561 F.3d 420 (5th Cir. 2009) (affirming district court's finding of Section 2 violation against white voters in majority-Black Mississippi county). Moreover, the Supreme Court and Fifth Circuit have long made clear the elements of a Section 2 claim. *See, e.g. Gingles*, 478 U.S. at 49-51; *Clark*, 88 F.3d at 1395. The mere fact that plaintiffs here do not *satisfy* those elements does not make Section 2 unconstitutional, facially or as applied to them. The *Gingles* framework applies equally to all races, and cannot therefore plausibly constitute an Equal Protection violation. The Supreme Court has long applied the *Gingles* framework to minority vote dilution claims, has assumed compliance with it constitutes a compelling government interest, *see Cooper*, 137 S. Ct. at 1464, and has acknowledged its continuing place in protecting minority voting rights, *see Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013) ("Section 2 is permanent, applies nationwide, and is not at issue in this case."); *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (summarily affirming lower court decision upholding constitutionality of Section 2). Plaintiffs' 'Hail Mary pass' at Section 2 should be rejected because it is foreclosed by longstanding and binding precedent. There is no doubt as to the Section 2's constitutionality.

CONCLUSION

For the foregoing reasons, defendants should be granted summary judgment in their favor respecting all of plaintiffs' claims for relief.

Dated this 1st day of December, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December 2017, a true and correct copy of the foregoing was served by the Court's Electronic Case Filing System on all counsel of record.

By: */s/ Chad W. Dunn*