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

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

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The plaintiffs in the above-captioned action (the "Plaintiffs") submit this brief in support of their contemporaneously filed Motion for Summary Judgment (the "Plaintiffs' MSJ").

I. SUMMARY

The Plaintiffs seek summary judgment on their first claim asserted under the 14th Amendment (the "First Equal Protection Claim"), which asserts that that all four (4) Commissioners Court districts (each a "Commissioners Court District" or "CCD") that the Dallas County Commissioners Court enacted in 2011 as part of the map it approved on June 10, 2011 (the "Enacted Plan" or the "EP") are unconstitutional. While they must prove standing as well, the sole element of the First Equal Protection Claim on which the Plaintiffs bear the burden of proof is whether race was the predominant factor motivating the Defendants to place a significant number of voters within or without a particular challenged district.[1] In order for a challenged district to survive, despite racial considerations having predominated, it would need to survive strict scrutiny.[2] Although strict scrutiny analysis has occasionally been described as an element, the Supreme Court has established that it is a "defense" on which the Defendants bear the burden of proof.[3]

[1] *Cooper v. Harris*, 581 U.S. ___, ___; 137 S.Ct. 1455, 1463 (2017) (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

[2] *Id*. (citing *Bethune-Hill v. Va. St. Bd. of Elections*, 580 U.S. ___, ___; 137 S.Ct. 788, 800-01 (2017) ("if race did predominate, it is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied.").

[3] *Cooper*, 581 U.S. at ___; 137 S.Ct. at 1464 and 1469.

II. LEGAL STANDARDS

Courts should grant summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[4] The proper inquiry is whether any genuine, material fact issues could be resolved in favor of either party, so requiring resolution at trial.[5] The movant bears "the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believe[d] demonstrate[d] the absence of a genuine issue of material fact."[6] Thus, "a moving party may meet its initial burden of establishing that there is no genuine issue by pointing out 'the absence of evidence supporting the nonmoving party's case.'"[7] Where a movant makes a proper showing, the burden of proof shifts to the non-movant to come forward with evidence showing a genuine issue for trial.[8] To meet that burden, a respondent must designate specific facts in the record showing ongoing, material issues remain for resolution by trial; neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the respondent's burden.[9]

Faced with claims like the First Equal Protection Claim, courts must verify a plaintiff's standing to challenge a district and, if they have it, must determine if "race was the predominant factor motivating [a] legislature's decision to place a significant number of voters within or without a particular district."[10] In determining standing, the "Supreme Court has held that

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[4] Fed. R. Civ. P. 56(c); *LTV Ed. Sys., Inc. v. Bell*, 862 F.2d 1168, 1172 (5th Cir. 1989).
[5] *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986).
[6] *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). *See also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909 (5th Cir. 1992); *Russ v. International Paper Co.*, 943 F.2d 589, 592 (5th Cir. 1991).
[7] *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994), *citing Skotak v. Tenneco Resins, Inc.*, 953 F.2d at 913).
[8] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
[9] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).
[10] *Miller*, 515 U.S. at 916.

residents of a district allegedly the product of racial gerrymandering have standing to challenge the district."[11] A government allowed race to predominate, for these purposes, if race was the "dominant and controlling rationale" for the lines of a district and served as "the criterion that, in the [government]'s view, could not be compromised[,]" leaving "race neutral criterion" to "c[o]me into play only after race-based decision[s] had been made."[12] In determining predominance, courts examine "the actual considerations that provided the essential basis for the lines drawn, not post-hoc justifications the legislature in theory could have used but in reality did not."[13] Courts may determine actual legislative motivations by reference to "either circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose."[14]

III. UNCONTESTED FACTS

Following the 2010 census, Dallas set about redistricting its CCDs.

It began that process in earnest on March 15, 2011, by retaining as its outside redistricting counsel the Law Office of J. Gerald Hebert, PC.[15] Dallas engaged Mr. Hebert pursuant to the Attorney Fee Contract attached to Engagement Order;[16] the Attorney Fee Contract disclosed that Mr. Hebert would perform the anticipated work with co-counsel Rolando

[11] *Hays v. Louisiana*, 936 F.Supp. 360, 366 (W.D. La. 1996) (citing *Hays v. Louisiana*, 515 U.S. 737, ___; 115 S.Ct. 2431, 2436 (1995)).
[12] *Bethune-Hill*, 580 U.S. at ___; 137 S.Ct. at 798.
[13] *Bethune-Hill*, 580 U.S. at ___; 137 S.Ct. at 799.
[14] *Id*. at 798 (citing *Miller*, 515 U.S. at 916).
[15] A copy of the relevant pages of Court Order 2011-509 (the "Engagement Order") is attached as Exhibit "A" at APP 1 - APP 3.
[16] Engagement Order at APP 1.

L. Rios,[17] and that they would rely on Matt Angle, of Angle Strategies, "an expert on North Texas geography and demographics" to actually draw the new CCDs.[18]

Mr. Angle undertook this project as a veteran of many local political campaigns and related redistricting fights,[19] who had concluded from his years of experience in Dallas politics that Dallas's Anglo population generally prefers different candidates than do either Dallas's African American or Hispanic populations.[20] To begin his work under the Engagement Order on what would become the EP, Mr. Angle reviewed data for Dallas County from the 2000 and 2010 censuses, including the 2010 ethnic breakdown of Dallas County's population at the then-current precinct level, even producing "demographic shade maps" for Dallas's African American and Hispanic populations, to allow him to better identify and draw around pockets of high concentrations of each.[21] That data reflected that, by 2010, Dallas's Anglo population had fallen dramatically;[22] by 2010, only 47.9% of Dallas's citizens of voting age ("CVAP") were Anglos.[23]

Before obtaining any feedback from the Commissioners on the topic, Mr. Angle conferred with Mr. Hebert concerning "redistricting criteria … and the variety of options that should be

[17] Engagement Order at APP 2.
[18] Engagement Order at APP 3.
[19] A copy of the cover page, relevant excerpt, and certification from the transcript of Mr. Angle's deposition in this case (the "Angle Transcript") is attached as Exhibit "B" at APP 4 – APP 40. For testimony concerning his experience in campaigns and redistricting battles, Angle Transcript at APP 6 – APP 17.
[20] Angle Transcript at APP 18 – APP 19.
[21] A copy of Mr. Angle's Initial Expert Report (the "Angle Report"), which disclosed the production of these maps at this stage of the redistricting process, is attached as Exhibit "C". The maps themselves appear in the Angle Report at APP 46. Mr. Angle discusses his use of the "demographic shade maps" in redistricting the CCDs in the Angle Transcript, at APP 20.
[22] Angle Report at APP 42 – APP 43.
[23] A copy of the cover page, relevant excerpt, and certification from the transcript of Allan Lichtman's deposition as an expert of the Defendants in this case (the "Lichtman Transcript") is attached as Exhibit "D" at APP 60 – APP 64. At APP 62 – 63] ("Q: …your report starts by noting that minorities comprised 63.7 percent of the voting age population and 54.9 percent of the CVAP of Dallas County…. You state that 'minorities in Dallas County comprise a population majority by [any]measure. A: That's correct. Q: I need some help here. What do you mean by 'minorities?' A: Anyone who's not Anglo.").

presented to the Commissioners Court."[24] When Mr. Hebert and Mr. Angle met with the Commissioners at their April 12, 2011 executive session, Mr. Hebert made a presentation to the Court concerning what "appropriate redistricting criteria" would "ensure that the final map complied with the Voting Rights Act [(the "VRA")] and US Constitution[.]"[25] Before that meeting concluded, the Commissioners Court had instructed their counsel to prepare formal redistricting criteria for their consideration.[26]

Subsequently, Dallas's lawyers prepared formal redistricting criteria, which the Court adopted by order on April 26, 2011.[27] Through that Criteria Order, the Commissioners Court established a hierarchy of goals for the crafting of CCDs that "shall be complied with in the following order of priority."[28] The Criteria Order required, first, that all CCDs meet the one-man, one-vote principal; second only to that requirement, the Criteria Order required that "[p]lans shall be constructed to comply with all provisions of the [VRA] in order to avoid legal liability. Specifically, plans should meet all requirements of Section 5 of the [VRA] prohibiting the retrogression of racial and language minorities and Section 2 of the [VRA] requiring the configuration of [CCDs] that provide racial and language minorities the opportunity to elect their candidate of choice where their populations are sufficiently large and compact."[29] The Criteria Order subordinated all other criteria, stated or not, to these two (2) goals.

[24] Angle Report at APP 49.
[25] Angle Report at APP 49, Angle Transcript at APP 21 – APP 22.
[26] Angle Report at APP 49, Angle Transcript at APP 23.
[27] A copy of Court Order 2011-775 (the "Criteria Order") is attached as Exhibit "E" at APP 65 - APP 66.
[28] Criteria Order at APP 66.
[29] Criteria Order at APP 66.

As he prepared potential maps, Mr. Angle understood that complying with the Criteria Order was an important aspect of his job and he "did [his] best to do so."[30] As he prepared potential maps, he understood the Criteria Order to require him to draw them to include at least three (3) CCDs with non-Anglo majorities that could be expected to perform for either Hispanics, African Americans, or Hispanics and African Americans acting together.[31] He understood the Criteria Order to include no partisan aims or goals among the criteria he was to use in crafting CCDs.[32] More, despite their numbers in Dallas, Mr. Angle expressly understood the Criteria Order *not* to include Anglos among the racial minorities entitled to an opportunity to elect their preferred candidates where their populations were sufficiently large and compact.[33]

Mr. Angle produced all four maps the Commissioners Court would ever consider on the basis of those understandings.[34] He started each map by crafting a version of CCD 4 with a Hispanic majority; Mr. Angle's express intent in drawing only iterations of CCD 4 that had a Hispanic majority was to assure that CCD 4 would elect only candidates preferred by CCD 4's Hispanic community.[35] The EP's CCD 4 would eventually realize this end, with fully 52.1% of its Voting Age Population ("VAP") being Hispanic under the 2010 census.[36] Mr. Angle crafted EP CCD 4 to have a combined African American and Hispanic VAP of 66.7%, which left him

[30] Angle Transcript at APP 24.
[31] Angle Transcript at APP 29 – APP 30.
[32] Angle Transcript at APP 30 – APP 31 (Q: "…I'm asking you whether any other goals that are out there were as central to what you were asked to do, as what you were ordered to do here. The Witness: Any other goal that was achieved was achieved in the map, was done in addition to these…. Q: Okay. And would have been a lower priority of yours in drawing a map to comply with these criteria? A: I'm not sure I thought about it in those terms. I knew these seven things needed to be complied with, I did my best to do so. If there were other things that were accomplished, then I didn't think of it in terms of a ranking."
[33] Angle Transcript at APP 27 – APP 28.
[34] Angle Transcript at APP 25 – APP 26 and APP 31.
[35] Angle Report at APP 49; Angle Transcript at APP 31.
[36] Angle Report at APP 57; Angle Transcript at APP 31.

confident that, even if Dallas Hispanics had lower citizenship and turnout rates than Dallas's population in other groups, Hispanics would be able to nominate their preferred candidate in any potential CCD 4 primary, while still assuring that CCD 4's Anglo minority (26.8% of VAP) would be unable to elect its preferred candidate in any conceivable general election – indeed, Mr. Angle testified that "all" of these demographic details of CCD 4 "mattered" to how he drew it.[37]

For each potential map, Mr. Angle then proceeded to draw a version of CCD 3 that retained a large enough African American population to assure that it could elect that community's preferred candidate to the Commissioners Court.[38] The EP's CCD 3 would eventually have a 2010 census VAP that was 46.9% African American.[39] Mr. Angle was unconcerned that this was a minority of the total VAP for the CCD, because he had crafted EP CCD 3 to have a combined African American and Hispanic VAP of 68.1% -- Mr. Angle believed that African American VAP was large enough to assure that CCD 3's African American community would be able to nominate its preferred candidate in any potential CCD 3 primary, while still assuring that CCD 3's Anglo minority (28.9% of VAP) would be unable to elect its preferred candidate in any conceivable general election – again, Mr. Angle testified that "all" of the demographic information for CCD 3 "mattered" to how he drew it.[40]

Next, in crafting each potential map, Mr. Angle drew versions of what started as CCD 2, but was eventually relabled CCD 1 in the EP. Mr. Angle intentionally drew that CCD, too, to be "majority-minority[,]" a term by which Mr. Angle meant that the CCD's non-Anglo population

[37] Angle Transcript at APP 32 – APP 34.
[38] Angle Transcript at APP 34.
[39] Angle Report at APP 57; Angle Transcript at APP 35.
[40] Angle Transcript at APP 35 – APP 37.

would constitute a majority.[41] Again, Mr. Angle confirmed that "the population makeup of all these districts mattered" to how he crafted them, necessarily including the smallness of the Anglo minority's share of CCD 1's VAP.[42]

What was left in each of Mr. Angle's proposed maps after drawing those three (3) CCDs on the basis of race was the CCD that became EP CCD 2. In its final form, that CCD would have a VAP that was 64% Anglo.[43]

At its May 3, 2011 executive session, the Commissioners Court discussed the four (4) potential maps Mr. Angle had prepared.[44] After considering the merits of each, the Commissioners Court decided in that executive session to present only one map, the predecessor to the EP, to the public for consideration.[45]

The Commissioners Court then provided noticed of and held a series of three (3) public hearings related to the redistricting of the CCDs on May 10, 2011, May 17, 2011, and May 21, 2011.[46] The portion of the May 10, 2011 hearing dedicated to redistricting began with Mr. Hebert explaining what Dallas County understood it had to do in crafting a new map of Commissioners Court districts. He stated that:

> Under the [previous decade's] map, three of the four districts are majority[-]minority in voting [age] population. That is to say, on the course of the decade, [CCD] 2, [CCD] 3 and [CCD] 4 have a

[41] Angle Transcript at APP 38 – APP 39.
[42] Angle Transcript at APP 37.
[43] For EP CCD 2's Anglo VAP percentage, see Angle Report at APP 57.
[44] Angle Transcript at APP 37.
[45] Angle Report at APP 54.
[46] A copy of the digital recordings of each hearing produced by the Defendants is included on the flash drive included with the Chambers Copy of this brief as Exhibit "F" at APP 67 and will be provided to the Defendants upon request. Certifications of transcription and transcripts of the relevant portions of those recordings are attached as Exhibit "G", Exhibit "H", and Exhibit "I".

> minority of Anglo voting age population…. [O]ne of the key requirements of the Voting Rights Act is that we obtain approval … from the US Department of Justice…. [W]hat that means is we have to go to the Justice Department … to show the Justice Department that this map … that the Commissioners Court has adopted … does not make minority voters worse off than they were under the old plan…. [W]e have to look at the opportunities that minority voters have under the [previous decade's] map and then we have to compare those opportunities under the proposed map. We can't have any slippage or backsliding or what's called retrogression…. [47]

Accordingly, from the very beginning of the public process, Mr. Hebert (speaking on behalf of Dallas as a whole and explaining its work) established both that: (a) Dallas did not view its Anglo minority as a "minority" with any rights protected by the Constitution or VRA; and (b) racial considerations had driven the drawing of the EP. He continued to note that the Court had ordered this result through the Criteria Order.

After this introduction, Commissioner John Wiley Price moved that the EP's predecessor be considered, highlighting that it "reflects the demography of this county and the traditional voting patterns in this county[;]" its "racial makeup, the political behavior."[48] After his motion was promptly seconded by Commissioner Elba Garcia, and approved by the Commissioners

[47] May 10, 2011 Transcript at APP 69 - APP 70.
[48] May 10, 2011 Transcript at APP 71.

Court, Commissioner Price further extolled what he liked about the EP's predecessor,[49] describing the predecessor of CCD 1, CCD 3, and CCD 4 almost entirely by their demography. Commissioner Garcia, for her part, explained that it "just made sense … to create an opportunity district, another district … an opportunity for another African American and Latino to get elected to the Commissioners Court and that is what we're seeing in the new map as" the predecessor to EP CCD 1.[50]

At the following hearing, Mr. Hebert again succinctly spoke for Dallas County as a whole, introducing the proposed map with the claim that it "or slight variations of" it would "reflect best the racial and political behavior of Dallas County as it exists today."[51] Despite the linguistic oddity of "racial … behavior[,]" Mr. Hebert's meaning was made clear by the sentences that followed: "[CCD] 3 will reliably continue to elect an African American candidate of choice…. [CCD] 4 will reliably elect the candidate of choice of Latino voters. [The predecessor to CCD 1] is a new district that is now majority-minority and will reflect obviously the demographic changes in the last decade."[52] "Behavior" had nothing to do with it – Mr. Hebert correctly identified exactly what Mr. Angle had done: devised a map entirely on the basis of the races of Dallasites.

At the final hearing held on what-would-become the EP, Mr. Hebert again explained how the Criteria Order required the drawing of a map with the racial characteristics of that under discussion.[53] He stressed that the Criteria Order had "prioritized in terms of compliance" the

[49] May 10, 2011 Transcript at APP 72 - APP 74.
[50] May 10, 2011 Transcript at APP 75 - APP 76.
[51] May 17, 2011 Transcript at APP 78.
[52] May 17, 2011 Transcript at APP 78. Mr. Hebert described only Mr. Angle's overwhelmingly Anglo, after-thought, what-was-left district, which became CCD 2, by its partisan affiliation.
[53] May 21, 2011 Transcript at APP 80.

goals to be met in any map, "[t]he most important … being , first, that the district shall be equal in population within the requirements of the one person one vote rule" and, second "that the plans should comply with the [VRA], all provisions of it, including section 5 preclearance, as well as section 2 of the [VRA,] which requires the configuration of districts if possible that provide minority voters with an effective opportunity to elect candidates of their choice[.]" He specified, as did the Criteria Order, that any other considerations were subsidiary to these.[54]

However, the three most interesting pieces of the final hearing were still to come.

First, Judge Clay Jenkins raised feedback he had received from a community leader in Lake Highlands, who could not attend any of the Commissioners Court's hearings, but was troubled by the proposed map's carving up of both that historic neighborhood and its neighbors around White Rock Lake.[55] Judge Jenkins asked if it would be possible to keep either neighborhood whole in one district, even if they could not share the same district.[56] Immediately, both Commissioner Garcia and Commissioner Price instructed Judge Jenkins that this was impossible, because, as Commissioner Price put it, "it will give retrogression."[57] Mr. Hebert promised to look into whether that was, in fact, the case,[58] before Commissioner Price reiterated that "given the demographic will of both that and political will and the demographic, of this … it's almost an impossibility to talk about doing that without conceding retrogression." Judge Jenkins responded "[…w]hich I will not, I will not vote for."[59]

[54] May 21, 2011 Transcript at APP 81.
[55] May 21, 2011 Transcript at APP 82.
[56] *Id.*
[57] *Id.*
[58] May 21, 2011 Transcript at APP 83.
[59] May 21, 2011 Transcript at APP 84.

Next, Jeff Turner, an Anglo Dallasite, rose to highlight that the record established at the Commissioners Court's previous hearings had clearly established that they had violated the Constitution, by making race the predominant factor in the crafting of the CCDs.[60] He accurately quoted Commissioner Price and Commissioner Garcia's statements concerning the racial attributes of the CCDs at the May 10, 2011 hearing, "gently warn[ing]" the Commissioners Court that they should "expect a lawsuit."[61]

Mr. Turner's testimony triggered Mr. Hebert to attempt to explain away what the record clearly established.[62] Mr. Hebert explained that "as we have gone through this process, we have [acted] consistent with the criteria that [the Commissioners Court] had adopted." He claimed, for the first time (without support from or reference to the Criteria Order), that "this process has been driven as all redistrictings are, largely by political dynamics…." But then he continued with an exception that, given the contents of the Criteria Order, utterly swallowed the rule: "Racial considerations have not played any predominant or driving force role in the creation of the districts, ***except in so far as we attempted to avoid retrogression and have tried to draw districts that fairly reflect the demographic community*** as well as the political community ***that's emerged over the last ten years***." Given Mr. Hebert's statements at the previous hearings that he interpreted "retrogression" and §2 and §5 of the VRA to require that three (3) of the four (4) CCDs be defined by their non-Anglo majorities, this statement literally means the opposite of its introduction – *all* of the boundaries of all four (4) CCDs fall into the purported exception.

[60] May 21, 2011 Transcript at APP 85 -86.
[61] May 21, 2011 Transcript at APP 85.
[62] May 21, 2011 Transcript at APP 86 – APP 87.

On June 7, 2011, the Commissioners Court passed the EP on a 3-1 vote.[63] The Adoption Order documents that the Commissioners Court acted through the affirmative votes of Judge Jenkins, Commissioner Price, and Commissioner Garcia.[64]

As a result, it is unsurprising that, following Dallas's passage of the EP, when Mr. Hebert sought preclearance of the EP from the Department of Justice on behalf of the County, once more, plain, racial politics took center stage.[65] The submission openly reports at Paragraph N that the EP "maintains two current minority opportunity precincts and creates a new minority opportunity precinct in" CCD 1.[66] It continues to specify that the EP "maintains [CCD 3] as an African American opportunity precinct[;]" continues to allow CCD 4 to elect a "Hispanic, who was the candidate of choice of minority voters[;]" and carved out, in CCD 1 "a new minority opportunity precinct" with "a Hispanic population of 48%" that was "68.4% Black plus Hispanic." Each description focuses exclusively on race and each statement focuses on the ability of the non-Anglo Dallas majority to elect who it prefers, regardless of what candidates Dallas's Anglo minority might choose. The attached Statement of Change is even clearer on the intentional racial impact of the EP:

> [The last decade's] Precinct 1 is currently dominated by Anglos and has consistently voted for Republican candidates for the last decade. [The last decade's] Precinct 2 …was also drawn as an Anglo dominated Precinct configured to elect a Republican

[63] A copy of the relevant pages of the Court Order adopting the EP (the "Adoption Order") is attached as Exhibit "J" at APP 88 - APP 91.
[64] *Id.* at APP 89.
[65] A copy of the relevant pages from Dallas's preclearance submission (including the "Statement of Change" attached to it as its own Exhibit C) is attached as Exhibit "K" (the "DOJ Submission") at APP 92 - APP 97.
[66] DOJ Submission at APP 93.

> candidate…. [The last decade's] Precinct 3 is 45.6 African American and was configured in 2001 to elect the candidate of choice of African American voters … and has done so throughout the last decade. [The last decade's] Precinct 4 was originally configured in 2001 to elect an Anglo Republican. However, population growth through the decade has made the Precinct 49.3% Hispanic and 16.9% African American. In 2010, voters in Precinct 4 elected a Hispanic Democrat….
>
> …members of the Commissioners Court considered the creation of a second Hispanic opportunity precinct[, but] discovered that too much Hispanic population had to be taken from [CCD 4, potentially] put[ting] Hispanics in [CCD] 4 at risk of losing the ability to elect the candidate of their choice and no such maps were produced by the Commissioners Court.
>
> …The Court decided that a new district could be configured [to be] 48.0% Hispanic and 21.2% Black. Minority voters will have the opportunity to elect their candidate of choice in the Democratic primary and in the general election."[67]

As at the final hearing on the EP, Mr. Hebert maintains emptily in Dallas's DOJ Submission that "[w]hile population data by race and ethnicity was considered by the Commissioners Court, racial considerations were never the [sole] or [predominant]

[67] DOJ Submission at APP 96 – APP 97.

consideration. Instead, the Commissioners Court drew [the CCDs] to adhere to the traditional redistricting criteria they adopted[.]"[68] However, since the Criteria Order prioritized results defined by race over any other criteria, this statement, too, was empty, if not false. Race *was* the driving, sole, predominant factor in the crafting of every CCD in the EP.

Gregory Jacobs lives in CCD 1.[69] Holly Morse lives in CCD 2.[70] Johannes Peter Schroer lives in CCD 3.[71] Anne Harding lives in CCD 4.[72]

IV. ARGUMENT

A. PLAINTIFFS' HAVE STANDING TO CHALLENGE ALL FOUR (4) CCDS

There is no dispute that one of the Plaintiffs lives in each of the CCDs. Accordingly, the Plaintiffs have standing to pursue their First Equal Protection Claim that each district was predominantly drawn on the basis of race, in violation of the U.S. Constitution.[73]

B. PLAINTIFFS' HAVE DEMONSTRATED THAT RACE PREDOMINATED OVER TRADITIONAL REDISTRICTING CRITERIA

The 14th Amendment to the Constitution protects Americans from intentional racial discrimination.[74] Specifically, deliberate racial gerrymandering violates the 14th Amendment.[75] Where "race was the predominant factor motivating [the] decision to place a significant number

[68] DOJ Submission at APP 97.
[69] A redacted copy of Mr. Jacobs' Texas Driver's License is attached as Exhibit "L" at APP 98. A copy of Mr. Jacobs' current Voter Registration Certificate is attached as Exhibit "M" at APP 99.
[70] A redacted copy of Ms. Morse's Texas Driver's License is attached as Exhibit "N" at APP 100. A copy of Ms. Morse's current Voter Registration Certificate is attached as Exhibit "O" at APP 101.
[71] A redacted copy of Mr. Schroer's Texas Driver's License is attached as Exhibit "R" at APP 104. A copy of Mr. Schroer's current Voter Registration Certificate is attached as Exhibit "S" at APP 105.
[72] A redacted copy of Ms. Harding's Texas Driver's License is attached as Exhibit "P" at APP 102. A copy of Ms. Harding's current Voter Registration Certificate is attached as Exhibit "Q" at APP 103.
[73] *Hays v. Louisiana*, 936 F.Supp. at 366 (citing *Hays v. Louisiana*, 115 S.Ct. at 2436).
[74] *Washington v. Davis*, 426 U.S. 229, 239 (1976).
[75] *Shaw v. Reno*, 509 U.S. 630, 640 (1993).

of voters within or without a particular district[,]" a Court must invalidate that district.[76] Courts determine actual legislative motivations by reference to "either circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose."[77] Since the Court's inquiry into legislative purpose determines facts,[78] like in any other case, summary judgment is proper if there is no "genuine question of material fact as to the intent" to allow race to predominate.[79]

Here, there is no genuine, factual dispute as to the place of race in drawing the EP. Time and again, from the inception of the process through Dallas's request for preclearance from DOJ, the Defendants documented that race was the primary motivating factor in the crafting of every CCD in the EP. The Criteria Order expressly required what its authors called compliance with the VRA; Mr. Hebert clarified, on the record, that Dallas believed the VRA to require the drawing of three (3) out of Dallas's four (4) CCDs on the basis of race – just as a matter of logic, if you draw all but one (1) CCD on the basis of race, you also drew the last on the basis race. Mr. Angle, who actually drew the EP, testified that he drew three (3) of Dallas's four (4) CCDs on the basis of race, confirming that the demographic numbers of Anglos, Hispanics, and African Americans "mattered" to how he drew all the CCDs in the EP. At the hearings on the EP, all three (3) members of the Commissioners Court who eventually voted for its passage made clear that their support was contingent on the racial features of the EP. Even when (at the May 21, 2011 hearing or in the DOJ submission) the Defendants half-heartedly contemporaneously

[76] *Miller*, 515 U.S. at 916.
[77] *Bethune*-Hill, 580 U.S. at ___; 137 S.Ct. at 798 (citing *Miller*, 515 U.S. at 916).
[78] *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999).
[79] *Prejean v. Foster*, 277 F.3d 504, 509 (5th Cir. 2000).

denied the predominant role race had played in the crafting of the CCDs, they did so with the admission that the Criteria Order required racial considerations to outweigh any others.

Nor do the occasional references to party in the record present a factual issue. The Criteria Order expressly prioritizes its listed criterion and places all of them above any other concerns. The Criteria Order makes no reference at all to partisan preferences. Accordingly, in enacting the Criteria Order, Dallas forbade any partisan interests to override its use of racial considerations to (allegedly) comply with Federal law. And, as Mr. Angle testified, when he actually drew the CCDs in the EP, he did not focus on parties, it was the racial numbers within each CCD that "mattered."

C. STRICT SCRUTINY CANNOT BE MET

Where, as in this case, Plaintiffs establish that racial concerns predominated over all others in the crafting of electoral districts, the burden shifts to the Defendant to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling state interest."[80] The Defendants cannot meet this burden in this case, because they have not pled any affirmative defense to the First Equal Protection Claim, never pleading that any compelling public interest of Dallas County justified its use of racial classifications to draw the CCDs in the EP.[81] Such an argument is an affirmative defense, which much be pled, with proper evidentiary support to meet the defendant jurisdiction's burden of proof, in order to prevail.[82] Having neither pled such a

[80] *Bethune-Hill*, 580 U.S. at ___; 137 S.Ct. at 800-01 (*citing Miller,* 515 U.S. at 920).
[81] The Defendants current, live answer in this litigation is their Answer to Plaintiffs Second Amended Complaint (the "Live Answer"). Dkt. 32. A copy of the Live Answer is attached as Exhibit "T" at APP 106 - APP 112.
[82] *Cooper*, 581 U.S. at ___; 137 S.Ct. at 1464 and 1469.

defense, nor offered any evidence in the record to support it, the Defendants cannot satisfy strict scrutiny.

1) Defendants Never Pled a VRA Defense

Like any other affirmative defense, compliance with the VRA must be plead in an answer to be advanced later.[83] The Defendants never plead *any* defense to the First Equal Protection Claim.[84] They failed to do so despite affirmatively knowing that the Plaintiffs had asserted the First Equal Protection Claim in this litigation: the Defendants actually argued in their First Amended Motion to Dismiss that the Plaintiffs had insufficiently pled "a *Shaw* claim" that "race rather than politics predominantly explains" the boundaries of the CCDs,[85] only to see the Plaintiffs expressly brief the presence of that *Shaw*-style claim in their then-live complaint,[86] and the Court accept that argument in denying the Defendants' motion.[87]

The Defendants have waived the right to present an argument that they could satisfy strict scrutiny.

[83] "Ordinarily, under … the Civil Rules, a defense is lost if it is not included in the answer[.]" *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004) (citing 5A C. Wright & A. Miller, Federal Practice and Procedure § 1347, p. 184 (2d ed. 1990)); Fed. R. Civ. P. 8, 12(b).

[84] See Live Answer, at APP 106 – APP 112.

[85] Dkt. 20, p. 13. A copy of the cover page of the First Amended Motion to Dismiss and of page 13 of that document is attached as Exhibit "U" at APP 113 - APP 114.

[86] Dkt. 25, pp. 17-22. A copy of the cover page of the Plaintiffs' Response to Defendants' First Amended Motion to Dismiss and Brief in Support Thereof and of pages 17-22 of that document are attached as Exhibit "V" at APP 115 - APP 121.

[87] Dkt. 27, p. 3. A copy of the Court's Memorandum Opinion and Order is attached as Exhibit "W" at APP 122 - APP 124.

2) No Defendant Expert Testimony or Other Evidence Supports a VRA Defense

Even if the Defendants had not waived the right to argue that the VRA compelled their use of race in crafting the CCDs, there would still be no material factual issue concerning the Defendants' failure to meet strict scrutiny, because the record includes no evidence, whatsoever, that would have allowed them to reasonably believe that the VRA compelled any such thing.

To satisfy strict scrutiny, a jurisdiction must show that it made use of race in a narrowly tailored fashion in service of a compelling governmental interest.[88] The Supreme Court has never held that compliance with the VRA *is* a compelling government interest sufficient to meet strict scrutiny.[89] When the Supreme Court has *assumed* that VRA concerns *could* meet strict scrutiny, it stated that, in order to make the argument, a government would need to demonstrate "a strong basis in evidence in support of the (race-based) choice that it has made."[90] Specifically, the Supreme Court has stated that a jurisdiction must show that it had "good reason to believe" the use of race was required to comply with the VRA.[91] It may not simply assert that the VRA must have had such an impact; the jurisdiction must demonstrate that it had a factual basis to conclude that, unless it drew lines based on race, it would have been sued and lost the ensuing litigation.[92]

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[88] *Cooper*, 581 U.S. at ___; 137 S.Ct. at 1469; *Bethune-Hill*, 580 U.S. ___; 137 S.Ct. at 800-01.

[89] *Bethune-Hill*, 580 U.S. ___; 137 S.Ct. at 801. *Cooper* left *Bethune-Hill*'s statement of the law on this accurate, despite the plurality's analysis of an asserted strict scrutiny defense, as it did not find that any compelling state interest had been demonstrated. *Cooper*, 581 U.S. at ___; 137 S.Ct. at 1469-72.

[90] *Bethune-Hill*, 580 U.S. ___; 137 S.Ct. at 801; *citing Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ___, ____ (2017).

[91] *Id.*

[92] *Cooper*, 581 U.S. at ___; 137 S.Ct. at 1471 ("To have a strong basis in evidence to conclude that §2 demands such race-based steps, the [jurisdiction] must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures.") (citing *Thornburg v. Gingles,* 478 U.S. 30).

The record is devoid of any such evidence. The Defendants can point to no indication in the record that a claim to force the enactment of the EP would have been tenable, if Dallas had not enacted it. Indeed, there is no evidence of any expert examining whether any *Gingles* factor would have applied to compel the drawing of any CCD included in the EP, not contemporaneously in 2011, and not as a part of this litigation. Similarly, the Defendants have provided no evidence of any kind suggesting that, as of 2011, the African American and Hispanic communities of EP CCD 1 had demonstrated a sufficient history of "cohesion" to satisfy *Gingles* 2 and compel the drawing of a coalition district for those communities. The Defendants have provided no evidence of any kind suggesting that, as of 2011, any of the groups within the bloc-voting majority coalition governing Dallas could have satisfied *Gingles* 3 and proven that, barring unusual circumstances, it was unable to elect its preferred candidate to the Commissioners Court, due to the successful blocking vote of an opposing ethnic majority.[93] Nor have they provided any evidence of any kind that any member of Dallas's African American or Hispanic communities could have shown, in 2011, that a map including a second Anglo opportunity district would have failed to afford them the opportunity to elect a roughly proportional number of Commissioners to their community's share of Dallas's CVAP.

Similarly, while the record is replete with references to § 5 preclearance, the Defendants neither produced any evidence that anyone contemporaneously performed any analysis of what it required as they crafted and passed the EP, nor had any expert in this case assess any factor

[93] Indeed, there is ample evidence to the contrary in the record. For example: May 10, 2011 Transcript at APP 73 ("It's not a coincidence that Democratic candidates began winning county wide on a consistent basis as Hispanic and African American residents became a comfortable majority in this county. In 2006, and 2008 and 2010, every Democratic candidate running for county wide won regardless of whether they were the incumbent or challenger.")

relevant to its applicability to the EP. Binding authority would require them to have done so, as the Defendants in *Bethune-Hill* produced evidence that § 5 required them to craft a district based on race, to avoid "the effect of diminishing the ability of [members of a relevant minority group] to elect their preferred candidates of choice[.]"[94] The Defendants did nothing of the kind, instead producing evidence that, while the predecessor to EP CCD 1 acquired a non-Anglo VAP majority by 2010, that predecessor CCD had not become a "performing" one for African Americans, Hispanics, or both before the EP's passage.[95] Even assuming that § 5 could have applied to protect the voting strength of groups that were parts of Dallas's bloc-voting, empowered, ethnic majority,[96] since § 5 required jurisdictions only to protect "the opportunities that minority voters have under the [previous decade's] map [from] any slippage or backsliding or what's called retrogression[,]"[97] without requiring the creation of *new* opportunities for those groups, it could not have required the drawing of EP CCD 1 as a coalition district to be dominated by Hispanics and African Americans.

[94] *Bethune-Hill, supra* at 801 (noting that defendants evidence showed "half a dozen" meetings of the map's author with an incumbent representing the district at issue, at which they sought, together, to determine how to narrowly tailor that district on the basis of race to avoid retrogression).

[95] For example, see May 10, 2011 Transcript at APP 74 ("Numbers in [the predecessor to EP CCD 1], obviously an example of minority population growth undermined by the configuration of the district, minority Democrats whose populations are increasing in the Southern and western parts of the district, are overcome by highest stronger Republican neighborhoods in the north part, in the … of the district."). *Cf.* Dallas's DOJ Submission at APP 96 (stating that EP CCD 1's predecessor "under the benchmark map was also drawn as an Anglo dominated Precinct configured to elect a Republican candidate. [CCD 1's predecessor] saw significant demographic change from 2001 to 2010 and is now a majority minority Precinct. [That predecessor CCD] is currently represented by Commissioner Mike Cantrell, an Anglo Republican.").

[96] The Defendants do not concede that § 5 would have such an impact in a jurisdiction with an Anglo minority, and expressly reserve their right to argue that any interpretation of it as having such an impact would have been unconstitutional legal error, rather than a good-faith basis for a use of race by the Defendants in crafting and passing the EP.

[97] May 10, 2011 Transcript at APP 69.

Nor does the inclusion of Dallas County's submission to DOJ of the EP for preclearance in the record alter any of this. That submission asked DOJ only to approve the EP,[98] not to provide an advisory opinion concerning whether any other map would also have been approved: Dallas County is not entitled to an inference that, just because one map obtained pre-clearance, any other map would not have.

V. CONCLUSION

All Dallasites, including each of the Plaintiffs, were placed into the CCDs on the basis of their race. First on paper (in the Criteria Order); then in practice (as Mr. Angle took proverbial pen to paper); and, finally, in law (as *all* the members of the Commissioners Court who supported the EP voted to pass the Adoption Order due to its racial features), Dallas allowed race to predominate over all other factors in making the CCDs a reality. And the Defendants have not pled, or provided the slightest modicum of evidence to prove, that they can satisfy strict scrutiny. Accordingly, the Court must grant summary judgment declaring the EP and each of its four (4) CCDs unconstitutional.

[98] DOJ Submission at APP 94.

Dated December 1, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 1, 2017, I served a copy of this Plaintiffs' Motion for Summary Judgment on all other counsel of record by electronic filing through the Court's CM/ECF system.

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