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 OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' motion for partial summary judgment should be denied. First and foremost, plaintiffs seek summary judgment on a claim they do not allege in their operative complaint. Because plaintiffs' live complaint does not allege a *Shaw*-type Equal Protection/racial gerrymandering claim, they cannot seek summary judgment on such a claim. Count II of plaintiffs' complaint is by its express terms limited to an intentional discrimination/vote dilution claim—a cause of action analytically distinct from a *Shaw*-type claim. Plaintiffs' attempt to expand their pleadings through a summary judgment brief—after discovery has closed and mere months before trial—is impermissible under Fifth Circuit precedent and directly contrary to how the three-judge district court adjudicated the same issue in the recent statewide redistricting case. As this is the only purported basis for plaintiffs' summary judgment motion, the motion must be denied out of hand.

Second, even if plaintiffs had alleged a *Shaw*-type racial gerrymandering claim, the record evidence warrants judgment for *defendants*, not plaintiffs. A district-by-district analysis, in light of the undisputed evidence, plainly shows that none of the four precincts were the product of an unlawful racial gerrymander. Plaintiffs do not even contest that compliance with Section 5 of the Voting Rights Act compelled the use of race in drawing Precincts 3 and 4. The evidence demonstrates that (ultimately numbered) Precinct 2 was the second district drawn, and that its predominant motivation was the creation of a Tea Party precinct, at the request of then—Commissioner Dickey. Plaintiffs offer no evidence to show race was considered at all creating Precinct 2, and indeed the record evidence shows the opposite. Moreover, plaintiff Morse, the only resident of Precinct 2, lacks standing because she has testified she suffers no harm. Finally, the undisputed evidence shows that Precinct 1 is not an unlawful racial gerrymander. With no citation

and supporting evidence, plaintiffs baldly allege Precinct 1 was the third district drawn, and that it was intentionally drawn to be majority-minority. That is not so. First, the only record evidence on the topic shows that Precinct 1 was the final district drawn, and that it simply resulted from the placement of the lines in the other precincts. To the extent there was motivation behind it, the evidence shows it was partisan, not racial. Moreover, plaintiffs likewise lack standing to challenge Precinct 1 because the only resident, plaintiff Jacobs, denies experiencing any personal harm as a result of the plan. The *Hays* standing-by-residency presumption cannot withstand sworn testimony of a lack of Article III injury-in-fact. Plaintiffs do not come close to establishing that their claim (which they have not even alleged in their complaint) can be decided on summary judgment without a trial. Plaintiffs' motion should be denied, and summary judgment should instead be granted in favor of defendants.

COUNTER-STATEMENT OF FACTS

Defendants identify below: (1) disputed facts, (2) plaintiffs' mischaracterization of facts, and (3) additional facts omitted from plaintiffs' motion. Together, along with the facts identified by defendants in their separate motion for summary judgment, these facts establish that defendants, not plaintiffs, are entitled to summary judgment.

1. Defendants dispute plaintiffs' unsupported characterization that Mr. Angle produced demographic shade maps "to allow him to better identify and draw around pockets of high concentrations" of "Dallas's African American and Hispanic populations." Pls.' Br. at 4. To the contrary, Mr. Angle's deposition testimony was only that he "created and analyzed" such maps, Pls.' App. 20 (Angle Depo. 35:12-15), and his expert declaration includes these maps to demonstrate that Dallas County's population growth "was weighted to the southern and western regions of the county in areas largely within benchmark Precincts 3 & 4, but also extending into neighborhoods

within Precinct 2." Defs.' App. 5. No record evidence supports plaintiffs' assertion regarding the purpose and use of the maps.

2. Defendants dispute plaintiffs' contention that, by 2010, 47.9% of Dallas County citizen voting age population ("CVAP") was Anglo, Pls.' Br. at 4; the record evidence plaintiffs cite actually establishes that 45.1% of CVAP was Anglo, Pls.' App. 62; Defs.' App. 123.

3. Defendants dispute plaintiffs' contention that Mr. Angle understood the redistricting Criteria Order to *require* him to draw three precincts with non-Anglo majorities. Pls.' Br. at 6. Mr. Angle has explained that "in order to comply with the Voting Rights Act, [he] intentionally drew an effective opportunity district for African American voters and an effective opportunity district for Latino voters. [He] also intentionally drew a third district dominated by Tea Party voters. The fourth district ended up as a majority-minority district, but at no time was I instructed to draw three-majority minority districts nor did I set out to do so." Defs.' Supp. App. 1. At his deposition, Mr. Angle testified that Precinct 1's status was a majority-minority district was not an intentional feature. Pls.' App. 38-39.

4. By 2010, three of the four precincts in the then-current plan (benchmark plan) had become majority-minority in their population, as a result of natural demographic changes and growth, with only one precinct containing an Anglo majority. Pls.' App. 69.

5. Defendants dispute plaintiffs' contention that partisan goals were not a part of the mapdrawing and Plaintiffs' position at this point in the litigation is contrary to language in the Complaint that alleges a partisan intent. *Compare* Pls.' Br. at 6 *with* 2d Am. Compl., ¶¶ 4-5, ECF No. 31. Mr. Angle testified that, beyond the goals enumerated in the Criteria Order, he did not think about priority rank order with respect to "other things that were accomplished." Defs.' App.

477 (Angle Depo. 43:8-44:2). Mr. Angle explained that accommodating Republican Commissioner Dickey's stated request that a Tea Party district be created expressly motivated the drawing of what eventually became labeled Precinct 2. Defs.' App. 9-10, Defs.' Supp. App. 1. Moreover, what ultimately was numbered Precinct 1 was intended to be a Democratic district, Pls.' App. 38-39; Defs.' App. 13, as Republican Commissioner Cantrell contemporaneously acknowledged, Pls.' App. 75.

6. Defendants dispute plaintiffs' mischaracterization of the mapdrawing process as beginning with Precinct 4, and then proceeding, in order, to Precincts 3, 1, and 2 (using the ultimate numbering). Pls.' Br. 6-8. Plaintiffs cite no record evidence to support this mischaracterization—a mischaracterization that forms the central basis for their racial gerrymandering argument. Rather, as Mr. Angle stated in his expert declaration (which is undisputed anywhere in the record), he (1) began with overpopulated Precinct 4 "with the goal of retaining its geographic core in Grand Prairie, North Oak Cliff and South Irving and retaining the ability of Hispanic citizens to elect their candidate of choice," (2) "then moved population to underpopulated Precinct 1 with the goal of . . . retaining its core [benchmark geography] . . . and also endeavoring to create a strong 'conservative' or 'Tea Party' district,"[1] (3) "then moved to Precinct 3" with the aim to shed excess population, retain its geographic core, avoid retrogression under the Voting Rights Act, and "also address Voting Rights Act packing concerns," and (4) "finally addressed Precinct 2, with the goal of retaining significant portions of the current precinct while uniting neighborhoods in east Dallas and other relatively nearby communities with more urban rather than suburban identity."[2] Defs.' App. 9-10. The record evidence thus shows the sequence of drawing as the following order (using the final precinct numbering): Precinct 4, Precinct 2, Precinct 3, Precinct 1, and plaintiffs cite no record

[1] This precinct was renumbered as Precinct 2 in the final enacted plan.
[2] This precinct was renumbered as Precinct 1 in the final enacted plan.

evidence to the contrary to support their version of events.

7. Defendants dispute plaintiffs' characterization of the drawing of ultimate Precinct 2 as "Mr. Angle's overwhelmingly Anglo, after-thought, what-was-left district," Pls.' Br. at 10 n.52. The record evidence shows this was the *second* district drawn, and was intentionally drawn as a Tea Party district in accord with Republican Commissioner Dickey's request. Defs.' App. 9-10.

8. Defendants dispute plaintiffs' contention that "Mr. Angle intentionally drew [ultimate Precinct 1] . . . to be 'majority-minority[,]' a term by which Mr. Angle meant that the CCD's non-Anglo population would constitute a majority," Pls.' Br. at 7-8, and that three precincts were drawn "on the basis of race," Pls.' Br. at 8. The testimony plaintiffs cite, *see id.* at 8 n.41 (citing Pls.' App. 38-39), establishes the opposite. Mr. Angle testified:

> Q. You say in your report that what started as District 2 and what was eventually labeled as District 1, was configured as a democratic district, and under this configuration District 2 was a majority-minority district. Again, that means that its Hispanic plus African-American voting age population was more than 50 percent; correct?
>
> A. Yes.
>
> Q. Given what we discussed earlier, that last detail was an intentional feature of that district; yes?
>
> A. **No, not necessarily**.

Pls.' App. 38-39 (Angle Depo. 62:21-63:11) (emphasis added). As Mr. Angle explained in his expert declaration, District or Precinct 2 (which was eventually labeled as District or Precinct 1) was the final precinct drawn, and race was not considered in its drawing. Defs.' App. 9-10. Moreover, Mr. Angle has explained that this district, "ended up as a majority-minority district, but at no time was I instructed to draw three-majority minority districts nor did I set out to do so." Defs.' Supp. App. 1.

9. As Mr. Angle explained in his expert declaration, (ultimately numbered) Precinct 1

was not drawn based upon race, but rather was the product of the changes made to the other three precincts. Defs.' App. 19 ("The changes in the other three districts largely revealed a reconfigured Precinct [1] that met the criteria adopted by the Commissioners Court.").

10. Defendants dispute plaintiffs' mischaracterization of Mr. Hebert's statements at the May 10, 2011 public hearing as "establish[ing] . . . that . . . racial considerations had driven the drawing of the [enacted plan] . . . [and] that the Court had ordered this result through the Criteria Order." Pls.' Br. at 9. Mr. Hebert's statements speak for themselves, and *plaintiffs cite no record evidence to support their characterization*.

11. Defendants dispute plaintiffs' mischaracterization of Commissioner Price's statements as "describing the predecessor of CCD 1, CCD 3, and CCD 4 almost entirely by their demography." Pls.' Br. at 10. Commissioner Price's statements speak for themselves, and notably focus upon the political characteristics of the precincts. Pls.' App. 72 (describing what ultimately became Precinct 1 as "what we call a Democratic district, what has happened is . . . both President Obama and Governor White comfortably carried this district as well as all the Democrats running county wide in 2010").

12. Republican Commissioner Mike Cantrell, who voted against the enacted plan, expressed his view that (ultimately numbered) Precinct 1 was drawn based upon *partisan* goals:

> I do not believe that is mandated under the Voting Rights Act to create a coalition district in order to move forward under the Voting Rights Act. So, and I…This court certainly has the ability…disregarding the Voting Rights Act…if it has the legislative will to create another democratic district, it certainly has…,Roy…and I see Roy…in the audience. And I know this court is majority Democratic…When the Republicans came in, we certainly, they certainly redistricted too…the Republican districts and did exactly what we're looking at today, that doesn't mean to say that I've supported

a certain…but I certainly understand how it looks. So I just…on the record, Judge." Pls.' App. 75.

13. Commissioner Cantrell's correct understanding of the partisan intent with respect to Precinct 1 is confirmed by Mr. Angle, who stated that "[t]he newly configured precinct favors Democratic candidates. Notably, the precinct as configured significantly reflects the parts of Dallas County that made-up State House District 101, 102 and 107 that had elected Democrats to the State Legislature during the last decade." Defs.' App. 19.

14. Defendants dispute plaintiffs' mischaracterization that Mr. Angle had "devised a map entirely on the basis of the races of Dallasites." Pls.' Br. at 10. This statement cites no record evidence, and is contrary to the record evidence that only two districts were drawn in part to preserve and protect opportunities African American and Latino voters had secured in the benchmark plan, as was required at the time by Section 5 of the Voting Rights Act, another was drawn to accommodate Commissioner Dickey's request for a Tea Party district, and the fourth resulted as a Democratic district based on the remaining available geography. Defs.' App. 9-10; Pls.' App. 38-39 (Angle Depo. 62:21-63:11); Defs.' Supp. App. 1.

15. Defendants dispute plaintiffs' mischaracterization of Mr. Hebert's statement at the final public hearing, regarding the non-predominance of racial considerations, as "an attempt to explain away what the record clearly established." Pls.' Br. at 12. Mr. Hebert's comments speak for themselves, and plaintiffs cite no support for their characterization.

16. Defendants dispute plaintiffs' contention that Mr. Hebert suggested "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." Pls.' Br. at 12. *Plaintiffs cite no record evidence in support of*

this contention, and Mr. Hebert said no such thing. Rather, at the May 10, 2011 hearing, Mr. Hebert made a series of observations about the benchmark plan and the legal requirements for the new plan. Mr. Hebert correctly observed that "[u]nder the current [benchmark] map, three of the four districts are majority, minority in voting and population. That is to say, [over] the course of the decade, districts 2, 3, and 4 have a minority of Anglo voting age population." Pls.' App. 69. He also observed that, under the preclearance requirements of Section 5 of the Voting Rights Act, "we have to look at the opportunities that minority voters have under the current 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 and that's the legal term." Pls. App. 70. At no point did Mr. Hebert contend, as plaintiffs' incorrectly assert, that he viewed Section 5 as requiring the creation of three majority-minority precincts, or that under the benchmark plan minorities had achieved the ability to elect their preferred candidates in more than two districts (Precincts 3 and 4). *And again, plaintiffs offer no record evidence otherwise.*

17. To the contrary, as the Commission's Section 5 preclearance submission to the U.S. Department of Justice indicated, the Commission's analysis was that Section 5 of the Voting Rights Act required that the two existing minority opportunity precincts be maintained. Pls.' App. 93. The submission explained that the enacted plan "maintains Precinct 3 as an African American opportunity precinct," with its African American population increased from 45.6% to 47.9%. Pls.' App. 93. And "Precinct 4 which is currently represented by a Hispanic, who was the candidate of choice of minority voters in 2010, has not be retrogressed." Pls.' App. 93.

18. Defendants dispute plaintiffs' mischaracterization of Mr. Hebert's statement in the DOJ submission regarding the non-predominance of race as "empt[y]," Pls.' Br. at 14, and their

argumentative assertion, unsupported by any record evidence citation, that "[r]ace was the driving, sole, predominant factor in the crafting of every CCD in the [enacted plan]," Pls. Br. at 15 (emphasis omitted).

19. Neutral, traditional redistricting criteria played a predominant role in the mapdrawing process. Mr. Angle drew Precinct 4 with the aim of retaining its geographic core in Grand Prairie, North Oak Cliff, and South Irving, in addition to complying with Voting Rights Act. Defs.' App. 9. He drew (ultimately numbered) Precinct 2 with the aim of preserving its geographic core of Park Cities, far North Dallas, Carrollton, and Richardson, and to ensure it functioned as a Tea Party district, per the request of Anglo Republican Commissioner Dickey. Defs.' App. 10. Mr. Angle drew Precinct 3 with the aim of maintaining is geographic core in south Dallas and the suburban areas of DeSoto, Lancaster, and Balch Springs, in addition to complying with the Voting Rights Act. Defs.' App. 10. And he drew (ultimately numbered) Precinct 1 with the aim to unite neighborhoods in east Dallas and create a precinct with a more urban, rather than suburban, identify. Defs.' App. 10.

20. Neutral, non-race based alterations were made to the plan during its consideration, including revising lines to include a county office in Precinct 4, uniting all of the city of Grand Prairie in Precinct 4, and placing Commissioner Dickey's home in the newly renumbered Precinct 1. Defs.' App. 14-15.

21. The enacted plan complies with traditional districting criteria of preserving municipal boundaries, and the few city splits in the enacted plan are of large cities, such as Dallas and certain suburbs, and whose boundaries are also split in the state house and congressional

districting plans. Defs.' App. 841.

ARGUMENT

I. Plaintiffs Cannot Seek Summary Judgment on a *Shaw*-Type Racial Gerrymandering Claim Because They Failed to Allege Such a Claim in Their Live Complaint.

Plaintiffs' partial motion for summary judgment must be denied for a simple reason: they seek summary judgment on a claim they never pled in their complaint. Because Count II of plaintiffs' complaint alleges only an intentional discrimination/vote dilution Equal Protection claim, and not a *Shaw*-type racial gerrymandering claim, plaintiffs are foreclosed from seeking summary judgment on a *Shaw*-type claim, and it is far too late for plaintiffs to raise an entirely new legal claim now.

As the Fifth Circuit has held, "[t]he parties seeking relief in civil actions are normally bound to the theory or theories of relief stated in the complaint." *Andert v. Bewley*, 998 F.2d 1014; No. 92-1467, 1993 WL 277199, at *2 (5th Cir. July 21, 1993). This restriction flows from the notice requirement contained in the Federal Rules: "[a] pleading that states a claim for relief must contain . . . a short and plain statement of *the claim* showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). "Although this notice does not require pleading specific facts, the complaint must 'give the defendant fair notice of *what the . . . claim is* and the grounds upon which it rests.'" *Anderson v. U.S. Dep't of Housing & Urban Dev.*, 554 F.3d 525, 528 (5th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (emphasis added). Plaintiffs may not "broaden the scope of their pleadings through argument in dispositive motions." *Herster v. Bd. of Supervisors of La. State Univ.*, 221 F. Supp. 3d 791, 794 (M.D. La. 2016); *see also Beard v. Wolf*, No. 13-4772, 2014 WL 3687236, at *2 (E.D. La. July 23, 2014) (noting that "the pleadings cannot be expanded via an opposition memorandum"). Moreover, a plaintiff's failure to provide notice of specific causes of

action in a complaint cannot be remedied through statements contained in discovery, such as "interrogatories and requests for production" or "the nature of questioning during . . . deposition[s]." *Snider v. N.H. Ins. Co.*, No. 14-2132, 2016 WL 3278695, at *1 (E.D. La. June 15, 2016).

This rule has particular salience in the context of allegations of constitutional violations that can support numerous, analytically distinct causes of action, and specifically with respect to Equal Protection claims of intentional discrimination/vote dilution versus Equal Protection *Shaw*-type racial gerrymandering claims. That is so, because as the Supreme Court has explained, a *Shaw*-type racial gerrymandering 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 *Shaw*-type racial gerrymandering claims because their complaints framed their Fourteenth Amendment claims solely as vote dilution claims, and not as *Shaw*-type racial gerrymandering claims. *See Perez v. Abbott*, 253 F. Supp. 3d 864, 932 (W.D. Tex. 2017). The *Perez* court explained that the plaintiffs did not properly raise a *Shaw*-type racial gerrymandering 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.*

In particular, the *Perez* court concluded that the following allegation was insufficient to give

notice of a *Shaw*-type racial gerrymandering claim: "Latino and African American voters in Dallas and Tarrant Counties have been splintered and fragmented in both 2011 and 2013 to diminish their ability to effectively participate in the political process." *Id.* at 933 (quotation marks omitted). This allegation, the three-judge court concluded, did not "clearly and distinctly allege" a *Shaw*-type racial gerrymandering claim, but rather "appear[s] to support only their intentional vote dilution claim." *Id.* Moreover, the *Perez* court concluded that a plaintiff likewise failed to sufficiently plead a *Shaw*-type claim despite actually including the phrase "racial gerrymandering" in its complaint, because of the manner in which the alleged injury was phrased in the complaint: "the Court finds that MALC did not sufficiently plead a *Shaw*-type racial gerrymandering claim, and that its racial gerrymandering claims are only asserted in the context of intentional vote dilution claims." *Perez v. Abbott*, 250 F. Supp. 3d 123, 180 (W.D. Tex. 2017) (citing MALC's Advisory, *Perez v. Abbott*, No. 11-360 (W.D. Tex.), ECF No. 1306). The specific allegations the *Perez* court concluded failed to plead a *Shaw*-type claim, despite actually using the phrase "racial gerrymandering," included:

- "With the racial gerrymanders manifest in the 2011 and 2013 plans, which resulted in diminished and limited Latino and African American voting strengths, the Defendants violated Section 2 of the Voting Rights Act and the 15th and 14th Amendments."
- "Instead the minority population . . . was unnecessarily fragmented to minimize its political strength . . . ."
- "Both the [plans] . . . unnecessarily fragment[] the minority community of Killeen to minimize its political impact on Texas House elections."
- "[F]ragmentation of minority population while at the same time overpopulating Latino majority districts in Dallas County led to the failure to create at least one and possibly two additional minority opportunity districts in Dallas County . . . ."
- "In creating a district to safely re-elect Rep. Garza, the state impermissibly focused on race by targeting low turnout Latino precincts. . . . The State's intention was made all the more clear by Rep. Garza's admission that he 'wanted to get more Anglo numbers' into his district is further evidence of racial gerrymandering and evidence of racially discriminatory intent."
- "The 2011 enacted plan was also infected with discriminatory purpose . . . [evidenced by] a bizarre shape with 'deer antler' protrusions that split multiple precincts between these two

> districts. The high number of precinct splits . . . strongly indicates that the State sought to divide these voters along racial lines . . . [which is] strong evidence of racially discriminatory intent."

MALC's Advisory at 5-7 & n. 3-8, *Perez v. Abbott*, No. 11-360 (W.D. Tex.), ECF No. 1306 (quoting MALC's 3d Am. Compl. ¶¶ 10, 51, 54, 57-59, ECF No. 897). The *Perez* court concluded that none of these allegations sufficiently provided notice of a *Shaw*-type racial gerrymandering claim, but rather solely alleged an intentional discrimination/vote dilution claim.

The same is true here. Count II of plaintiffs' live complaint includes a single paragraph describing their Equal Protection claim:

> The facts alleged constitute a denial to the Plaintiffs of rights guaranteed by the Equal Protection Clause of Section 1 of the 14th Amendment to the United States Constitution. The Commissioners Court crafted the Discriminating Map and each of its four (4) component CCDs to purposefully fragment Dallas's Anglos, dispersing them among the four (4) CCDs without regard to traditional, neutral redistricting principles. The Commissioners Court designed the Discriminating Map to reduce and lesson [*sic*] Dallas's Anglos electoral opportunities significantly below the level of opportunities that would have been available under a map compliant with neutral principles. This fragmentation provides undue voting advantages to Dallas's non-Anglo, ethnic-bloc-voting majority. The Discriminating Map was intentionally crafted to allow Dallas's ethnic majority coalition to dominate the Commissioners Court beyond what their voting power and geographic distribution would otherwise suggest and to deny Dallas's Anglos the chance to meaningfully participate in the choice of any commissioner outside of CCD 2.

2d Am. Compl. ¶ 31, ECF No. 31. Just like the allegations the *Perez* court concluded pled only an intentional discrimination/vote dilution claim, and not a *Shaw*-type racial gerrymandering claim, plaintiffs' allegations in Count II are focused solely on vote dilution. The operative phrases include "purposefully fragment," "Discriminating Map," "reduce and lesson [*sic*] . . . electoral opportunities," "fragmentation [that] provides undue voting advantages," "intentionally crafted," "dominate beyond what their voting power . . . would otherwise suggest," and "deny . . . the chance to meaningfully participate." *Id.*

These allegations, like the ones analyzed by the *Perez* court, put defendants on notice solely of an intentional discrimination/vote dilution claim, and not a *Shaw*-type racial gerrymandering claim. 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." *Miller*, 515 U.S. at 911 (citation omitted). That is the sole focus of plaintiffs' Count II. Plaintiffs do *not* mention *Shaw v. Reno* or racial gerrymandering. Indeed, plaintiffs' exclusive focus on intentional discrimination/vote dilution is far more obvious than the allegations of the MALC plaintiffs in *Perez*, which were also found insufficient to provide notice of a *Shaw*-type claim. Those allegations in *Perez* twice used the phrase "racial gerrymandering," and asserted that "the state impermissibly focused on race" and "the State sought to divide these voters along racial lines," MALC's Advisory at 5-7 & n. 3-8, *Perez v. Abbott*, No. 11-360 (W.D. Tex.), ECF No. 1306. Yet read in context, the *Perez* court concluded they failed to provide the State notice of a *Shaw*-type racial gerrymandering claim because the alleged cause of action was the intentional dilution of voting power. If those allegations were insufficient, then plaintiffs' allegations in Count II in this case are far off the mark. These allegations do not "clearly and distinctly allege" a *Shaw*-type racial gerrymandering claim, *Perez*, 253 F. Supp. 3d at 933, and thus plaintiffs have not put defendants on notice of such a claim. Plaintiffs are thus "bound to the theory . . . of relief stated in the complaint," *Andert*, 1993 WL 277199, at *2, *i.e.*, an intentional discrimination/vote dilution claim.

Moreover, it is far too late to permit an expansion of the pleadings. The case has been pending for three years. Discovery has closed. Dispositive motions have been filed. And trial is scheduled to begin in just three months' time. As the *Snider* court concluded with respect to claims

the plaintiff in that case had failed to sufficiently plead, "[a]llowing Plaintiffs to expand the pleadings in this manner less than three months prior to trial would result in unfair prejudice to [Defendant]." 2016 WL 3278695, at *1. The same is true here.

Plaintiffs cannot seek summary judgment on a claim they have not pled. Because plaintiffs' motion only addresses this un-pled claim, their motion should be denied.

II. Even if Plaintiffs Had Alleged a Racial Gerrymandering Claim, the Evidence Supports Summary Judgment for Defendants, Not Plaintiffs.

Even if plaintiffs had actually included a racial gerrymandering claim in their complaint, the evidence supports entry of summary judgment in favor of *defendants*, not plaintiffs. 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 and citation omitted). The strong basis/good reasons standard purposefully allows for movement in the joints to ensure governmental bodies do not get hopelessly trapped between their obligation to consider race in order to comply with the Voting Rights Act and their obligation to ensure race did not predominate in violation of the

Constitution. Thus, "[t]hat standard *does not require* the State to show that its action was 'actually . . . necessary' to avoid a statutory violation, so that, but for its use of race, the State would have lost in court." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (emphasis added).[3]

Two provisions of the Voting Rights Act are relevant to the strong basis/good reasons analysis: Sections 2 and 5. Section 2 prohibits "vote dilution," or "the 'dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters.'" *Cooper*, 137 S. Ct. at 1464 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)). Section 5 (which applied to Dallas County at the time) required the County "to pre-clear voting changes with the Department of Justice, so as to forestall 'retrogression' in the ability of racial minorities to elect their preferred candidates." *Id.*

Plaintiffs bear a heavy burden in proving racial predominance with respect to particular districts, making a summary-judgment-stage determination that unconstitutional racial gerrymandering *has occurred* inappropriate. "A trial court has a formidable task: It must make 'a sensitive inquiry' into all 'circumstantial and direct evidence of intent' to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." *Id.* at 1473 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("*Cromartie I*")). The burden plaintiffs face is difficult because "political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, 'racial identification is highly correlated with political affiliation.'" *Id.* (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) ("*Cromartie II*")).

[3] Plaintiffs' description of the standard is incorrect; they contend that "the jurisdiction must demonstrate that it had a factual basis to conclude that, unless it drew the lines based on race, it would have been sued and lost the ensuing litigation." Pls.' Br. at 19. The Supreme Court flatly rejected that proposition in *Bethune-Hill*, a case plaintiffs cite throughout their brief. *See* Pls.' Br. at 1, 3, 17, 19, 21.

It will almost always be the case that "challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria. In general, legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so." *Bethune-Hill*, 137 S. Ct. at 799. As the Supreme Court noted in *Bethune-Hill*, the Court "has not affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles." *Id.* Where such deviations are identified, they cannot be viewed in isolation. "Racial gerrymandering claims proceed 'district-by-district,'" *id.* at 800 (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015)), and thus "[c]ourts evaluating racial predominance therefore should not divorce any portion of the lines—whatever their relationship to traditional principles—from the rest of the district," *id.* The district must be considered as a whole: "[c]oncentrating on particular portions in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target." *Id.*

The undisputed evidence proves that race did not predominate in the drawing of any of the four precincts, and to the extent race was considered, defendants had a strong basis/good reasons to think compliance with the Voting Rights Act required it. Defendants, not plaintiffs, are entitled to summary judgment.

A. Defendants Have Not Waived Their Ability to Satisfy Strict Scrutiny Because Their Answer Did Not List the Voting Rights Act as an Affirmative Defense.

Before addressing the four precincts, it is necessary to respond to plaintiffs' threshold contention that defendants were required to plead, as an "affirmative defense" in their Answer, that

they had a strong basis/good reasons to think the Voting Rights Act required the consideration of race in districting, and have waived their right to make such an argument now. *See* Pls.' Br. at 18. This is wrong.

Most obviously, defendants did not plead an affirmative defense to a *Shaw*-type racial gerrymandering claim because plaintiffs' complaint does not state a cause of action for *Shaw*-type racial gerrymandering. *See supra* Part I. Defendants thus had no reason to believe it was necessary to plead any affirmative defenses, or explain that they had good reasons to think the Voting Rights Act required the use of race in districting. And even if this Court were (somehow) to read a *Shaw*-type racial gerrymandering claim into plaintiffs' complaint, defendants should certainly be excused for missing it. *See Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) ("[U]nder Rule 8(c) we do not take a formalistic approach to determine whether an affirmative defense was waived. Rather we look at the overall context of the litigation . . . .").

Equally important, even if plaintiffs *had* pled a *Shaw*-type racial gerrymandering claim, defendants would not have been required to plead reliance on the Voting Rights Act as an "affirmative defense" in their Answer. Plaintiffs identify no case in which any court has ever concluded that reliance on the Voting Rights Act at step two of a *Shaw*-type racial gerrymandering claim is an "affirmative defense" required to be pled in an Answer under Rule 8(c), lest it be waived. *See* Pls.' Br. at 18.[4] Indeed, as plaintiffs themselves admit, strict scrutiny is often described by courts as "an element." Pls.' Br. at 1. An element of a cause of action, even one for which the burden of

[4] Plaintiffs quote the Supreme Court's use of the word "defense" in *Cooper*, but that is far too thin a reed to assert the Court was requiring that, in *Shaw*-type racial gerrymandering cases, justifications at step two of the analysis must be pled as affirmative defenses in the Answer pursuant to Rule 8(c). Rather, the most natural reading of the Court's use of the word "defense" is in the colloquial sense, as the position asserted by the defendant in the case.

proof is shifted, does not fall within the category of "affirmative defenses" governed by Rule 8(c). And even if this Court were to conclude otherwise, the lack of clarity—as indicated by the absence of any court ruling on the topic and plaintiffs' own acknowledgement—would preclude a finding of waiver for failure to plead "Voting Rights Act" in the Answer. *See Pasco*, 566 F.3d at 577 ("We have noted that a failure to plead an affirmative defense in the first response is especially excusable where the law on the topic is not clearly settled." (internal quotation marks omitted)); *id.* (noting that finding of waiver inappropriate where there is "no evidence of prejudice" to the plaintiff). Defendants have not waived their right to contend that compliance with the Voting Rights Act provided good reasons to consider race in redistricting.[5]

B. Precincts 3 and 4 Are Not Unlawful Racial Gerrymanders.

The undisputed evidence shows that Precincts 3 and 4 are not unlawful racial gerrymanders, and thus defendants, not plaintiffs, are entitled to summary judgment with respect to those precincts.

Although race neutral factors played an important role in the design of Precincts 3 and 4, such as preserving their existing geographic cores, *see* Defs.' App. 9-10, it is also true that race was necessarily considered in the drawing of Precincts 3 and 4 because compliance with the Voting Rights Act required it: Section 5 of the Voting Rights Act required that Precinct 3 be preserved as a district in which African American voters had the ability to elect their candidate of choice, and that Precinct 4 be maintained as a district in which Hispanic voters had the ability to elect their candidate of choice. Pls.' App. 93; Defs.' App. 9-10.

[5] It should not be surprising that defendants' experts did not submit reports exploring *Shaw* issues, *see* Pls.' Br. at 20-21, given that plaintiffs did not plead a *Shaw*-style racial gerrymandering claim, and thus defendants had no notice expert reports on such a claim would be needed.

Regardless of whether that consideration of race rose to the level of "predominance," the undisputed evidence shows plaintiffs easily satisfy their burden at *Shaw* step two to show they had a strong basis in evidence or good reasons to consider race. Indeed, in their motion, plaintiffs do not even suggest otherwise; their sole argument is that defendants lacked good reasons to consider race with respect to Precinct 1. *See* Pls.' Br. at 20-21.[6] Precinct 3 had elected African American voters' candidate of choice (John Wiley Price) throughout the prior decade. Pls.' App. 96. Defendants thus plainly had "good reasons" to think that Section 5 prohibited the retrogression of African American voters' ability to elect their preferred candidate in Precinct 3. Moreover, the substantially packed minority population in benchmark Precinct 3 (83.2% Black plus Hispanic, *see* Defs.' App. 5) provided good reason to think the district could be susceptible to a claim it was unlawfully "packed" with minorities and thus diluted their votes. *See, e.g.*, *Perez*, 253 F. Supp. 3d at 951 (concluding that congressional district 30—which largely overlaps with Precinct 3—was unlawfully packed with 85.9% Black plus Hispanic population). Defendants thus had good reason to reduce Precinct 3's minority population, while maintaining a Black population sufficient to avoid retrogression under Section 5.

Likewise, Defendants had good reasons to think Section 5 required that Hispanic voters retain their ability to elect their preferred candidate in Precinct 4. The 2010 election of Elba Garcia,

[6] Plaintiffs produced the person who actually drew their proposed plan, Mr. Bryan, this week for deposition. Mr. Bryan testified that he too considered it a requirement that Precincts 3 and 4 be drawn to elect African American voters' and Hispanic voters' candidates of choice. Mr. Bryan also testified on a number of other topics relevant to defendants' and plaintiffs' summary judgment motions, including that he drew plaintiffs' proposed plan solely on the basis of racial data and that he failed to follow or even be aware of the County's adopted Redistricting Criteria Order and its identification of traditional districting criteria. *See Gonzalez v. Harris Cnty.*, 601 Fed. App'x 255, 260 (5th Cir. 2015) (*per curiam*) (noting importance of adhering to county's preferred traditional districting criteria when proposing Section 2 alternative plans). Once the transcript of this deposition becomes available, defendants will submit it to the Court in a supplemental filing.

a Hispanic Democrat, over the Republican incumbent, coupled with the growing Hispanic population in the area (49.3% Hispanic in the benchmark plan, 57.9% Hispanic in enacted plan), Pls.' App. 93, 96, demonstrated that Hispanic voters had achieved their ability to elect their candidate of choice, and Section 5 prohibited retrogression. Plaintiffs do not even contend otherwise. *See* Pls.' Br. at 20-21.

The election results and demographic characteristics of Precincts 3 and 4 plainly provided defendants strong evidence and good reasons to believe that Section 5 of the Voting Rights Act required that race be considered in order to avoid retrogression. Plaintiffs do not contend otherwise, and thus defendants are entitled to summary judgment with respect to these two precincts.

C. Precinct 2 Is Not an Unlawful Racial Gerrymander.

The undisputed evidence proves that (ultimately numbered) Precinct 2 is not an unlawful racial gerrymander. Race did not predominate in the drawing of Precinct 2 because race was not considered in its drawing. Rather, the undisputed evidence shows that Precinct 2 was deliberately drawn in order to elect a candidate preferred by Tea Party voters based upon the request of Republican Commissioner Dickey. Defs.' App. 9-10. Plaintiffs' motion cites no evidence whatsoever that race was considered in the drawing if Precinct 2, *see* Pls.' Br. at 16, nor could they. Plaintiffs' sole argument for racial predominance is that the Criteria Order prioritized compliance with the Voting Rights Act, Pls.' Br. at 17, and because *other* precincts were drawn to comply with that law, those district lines necessarily affected Precinct 2's lines, *id.* at 16. But plaintiffs cite no case law (and there is none) establishing that when Section 5 requires race to be considered in the drawing of a district, its neighboring districts somehow become unlawful racial gerrymanders simply by virtue of their shared borders. Defendants never viewed Precinct 2 as one affected or protected

by the Voting Rights Act, and it was not drawn by reference to the race of its voters. Defs.' App. 9-10. Plaintiffs acknowledge as much, noting that the precinct was described in the public hearings "by its partisan affiliation," Pls.' Br. at 10 n.52, and not by its racial characteristics.

Plaintiffs could not contend otherwise, given their own expert's testimony. In his report, Dr. Morrison identified sixteen purported city splits as his sole support for his assertion that race predominated in redistricting. Defs.' App. 805-06. But he used the wrong map in identifying those splits, Defs.' App. 836-43, and at his deposition acknowledged uncertainty as to the splits, noted that he is not even relying on his analysis anymore and is not finished with it, did not know whether any of the purported splits even affected the Anglo community (the large majority of Precinct 2's population), and concluded that his entire analysis (once done) may show the splits *had nothing to do with race*. Defs.' App. 202, 204-05. Plaintiffs cannot show even a few boundary segments of Precinct 2 were drawn based upon race, let alone that race was "the predominant motive for the design of the district as a whole." *Bethune-Hill*, 137 S. Ct. at 800. Indeed, the undisputed evidence shows the only true splits are unrelated to race. Defs.' 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). The Supreme Court has observed it has never found a *Shaw* violation in the absence of departures from traditional districting criteria and that it would be "difficult" for plaintiffs to make such a case. *See Bethune-Hill*, 137 S. Ct. at 799. Plaintiffs point to nothing in the record that suggests Precinct 2 should depart from this trend in the Supreme Court's *Shaw* cases. Having admitted they have yet to identify a "real obvious, apparently statistical footprint of intent to pack Anglos," App. 205, and having failed to dispute the evidence of partisan intent cited by defendants, plaintiffs have not met their heavy burden to show that race predominated in

the drawing of Precinct 2. Indeed, the undisputed record evidence demonstrates that politics and geography, not race, predominated in the design of Precinct 2, and thus defendants, not plaintiffs, are entitled to summary judgment with respect to Precinct 2.[7] Defs.' App. 9-10.

In any event, plaintiffs lack standing to allege that Precinct 2 is a *Shaw*-type racial gerrymander. Although a voter who lives in a district generally has standing to challenge it, *see United States v. Hays*, 515 U.S. 737, 744-45 (1995), that presumption cannot withstand sworn testimony that the plaintiff suffers no injury-in-fact. In *Hays*, the Supreme Court noted that a resident of a challenged district "*may* suffer the special representational harms racial classifications can cause in the voting context." *Id.* at 745 (emphasis added). Here, plaintiff Morse is the only plaintiff who resides in Precinct 2, *see* Pls.' Br. at 15. But Ms. Morse testified under oath 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 with the Court as a whole. Defs.' App. 711, 713, 715-18, 720. By her own admission she suffers no injury sufficient to establish Article III standing. *Hays*'s presumption is not un-rebuttable. If a plaintiff testifies under oath that she, in fact, suffers no injury, the law cannot ignore that and nonetheless presume the presence of an injury-in-fact sufficient to satisfy constitutional standing requirements.

D. Precinct 1 is Not an Unlawful Racial Gerrymander.

The undisputed evidence proves that (ultimately numbered) Precinct 1 is also not an

[7] In *Cooper*, the Court noted that evidence of departures from traditional redistricting criteria—such as respecting city boundaries—"loses much of its value when the [defendant] asserts partisanship as a defense." 137 S. Ct. at 1473. If that is so when there actually *is* evidence of such departures, the evidence is meaningless here, where plaintiffs have not even shown any true departures, and have admitted that any city splits may not have been based upon race at all. Plaintiffs fall far short of meeting their burden, particularly at summary judgment.

unlawful *Shaw*-type racial gerrymander. To mount their attack against Precinct 1, plaintiffs make up—out of whole cloth—a process and timeline for the mapdrawing that is flatly contradicted by the undisputed record evidence. Plaintiffs' contend that Precinct 1 was the third to be drawn (following Precincts 4 and 3), and that Mr. Angle "intentionally drew it . . . to be majority-minority." Pls.' Br. at 7. Then, plaintiffs contend that Precinct 2—the Republican district—was the final to be drawn. Pls.' Br. at 8. This version of events, although critical to their argument, finds no support in the record evidence whatsoever.

Plaintiffs switched the order of the drawing process, with no citation to any evidence supporting their revisionist storytelling. The undisputed record evidence shows that Precinct 1 was the *final* precinct drawn, Defs.' App. 10, and that its boundaries were largely dictated by the geography that remained after other three precincts were drawn—precincts that, as discussed above, plainly were not impermissible racial gerrymanders. Defs.' App. 19 ("The changes in the other three districts largely revealed a reconfigured Precinct [1] that met the criteria adopted by the Commissioners Court."). To the extent there was any motivation behind the drawing of Precinct 1, the undisputed record evidence proves that partisanship, and not race, was the motivating factor. *See, e.g.*, Defs.' App. 19; Pls.' App. 72, 75. Plaintiffs themselves admit as much. Defs.' 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."). The Commissioners likewise noted the partisan intent, including Republican Commissioner Cantrell, who suggested Precinct 1

was motivated by a desire to create an additional Democratic district, and that such a desire by the majority party was within their legitimate power. Pls.' App. 75. And contrary to plaintiffs' unsupported assertion, the deposition testimony they cite for the proposition that Mr. Angle intentionally drew Precinct 1 as majority-minority says the opposite; Mr. Angle responded "no" when asked whether he intentionally created Precinct 1 as a majority-minority district. Pls.' App. 38-39 (Angle Depo. 62:21-63:11). Plaintiffs cannot obtain summary judgment on the basis of unsupported assertions directly contradicted by the record evidence. *See Rogers v. Bromac Title Servs., LLC*, 755 F.3d 347, 350 (5th Cir. 2014) (holding that "unsupported assertions" and "conclusional allegations" are not competent summary judgment evidence). The sequence of events is critical to conducting a district-by-district analysis, as this Court must do. As Mr. Angle has explained, Precinct 1 did not result from any conscious race-based decisions, but rather was merely the remaining geographic territory after he drew the two protected Voting Rights Act districts and the politically-motivated Tea Party district. Defs.' App. 19; Defs.' Supp. App. 1. Plaintiffs have not met their burden to show the predominance of race in the drawing of Precinct 1.

Moreover, plaintiffs also lack standing to challenge Precinct 1 as a *Shaw*-type racial gerrymander because the resident plaintiff on whom they rely, *see* Pls.' Br. at 15, Mr. Jacobs, has testified he suffers no injury in fact whatsoever. Mr. Jacobs testified that his sole reason for voting against Commissioner Daniel was her affiliation as a Democrat, Defs.' App. 743-44 (Jacobs Depo. 13:15-16; 14:6-10), and he could not think of a single issue with which he and Commissioner Daniel disagree, Defs.' App. 744 (Jacobs Depo. 14:11-14). Indeed, if Ms. Daniel affiliated as a Republican, Mr. Jacobs would support her, Defs.' App. 751 (Jacobs Depo. 42:22-25), he cannot name any service or something the County had denied, Defs.' App. 744-45 (Jacobs Depo. 17:25-18:3), and cannot

name anything he would have liked to see the Court do differently if he could elect a different candidate, Defs.' App. 746 (Jacobs Depo. 22:7-14). Critically, when asked to describe any harm he personally suffers as a result of the enacted plan, Mr. Jacobs could not do so. Defs.' App. 746 (Jacobs Depo. 24:1-7). A plaintiff who, under oath, testifies that he lacks any personalized harm from a redistricting plan has no Article III standing, and the *Hays* residency presumption cannot prevail where the sworn testimony completely rebuts it.

* * *

Plaintiffs' motion should be denied outright for seeking summary judgment on a cause of action that is not alleged in the complaint. This case is far clearer on that score than the various plaintiffs' allegations the three-judge district court in *Perez* found insufficient to raise a *Shaw*-type racial gerrymandering claim. Fifth Circuit precedent prohibits the type of expansion of the pleadings plaintiffs have attempted here, and defendants would be unfairly prejudiced by plaintiffs being permitted to expand their pleadings at this late stage of the litigation.

But even if plaintiffs had alleged a *Shaw*-type racial gerrymandering claim, defendants, not plaintiffs, are entitled to summary judgment. Plaintiffs do not dispute that defendants had good reasons to consult racial data in drawing Precincts 3 and 4 to avoid retrogression under Section 5 of the Voting Rights Act. Nor do plaintiffs cite any record evidence whatsoever to show that Precinct 2 was drawn based upon race; rather, the evidence shows it was motivated by a desire to create a Tea Party district, and plaintiffs' own expert has admitted they lack any evidence otherwise. Plaintiffs' entire argument rests on a two-part fabrication: (1) that Precinct 1 was drawn third (in fact the evidence is it was the last precinct drawn), and (2) its majority-minority status was intentional (in fact the evidence shows otherwise). The evidence shows there was no unlawful *Shaw*-type racial

gerrymander. Moreover, plaintiffs' testimony shows they lack standing to sue.

A conclusion that a redistricting plan was unlawfully racially gerrymandered can only come following the "formidable task" of a "'sensitive inquiry' into all 'circumstantial and direct evidence of intent' to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." *Cooper*, 137 S. Ct. at 1473 (quoting *Cromartie I*, 526 U.S. at 546). Summary judgment *finding* a racial gerrymandering violation (as opposed to the opposite conclusion) should be exceedingly rare, given this heavy burden and the sensitivity of the Court's analysis. Plaintiffs' motion falls *far* short.

CONCLUSION

Plaintiffs' motion for partial summary judgment should be denied and summary judgment should be granted in favor of defendants.

Dated this 22nd day of December, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd 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*