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' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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I. Standard of Review.

Defendants are entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Once defendants, as the moving party, have met their "initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Id.* A factual dispute exists only "when *both* parties have submitted *evidence* of contradictory facts. *We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.*" *Badon v. R J R Nabisco Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (quotation marks omitted) (emphasis in original).

II. Plaintiffs Lack Standing Because They Suffer No Injury, and Any Purported Injury is Not Redressable.

Plaintiffs lack standing. To have standing, plaintiffs "must establish that [they] ha[ve] a personal stake in the alleged dispute, and that the alleged injury suffered is particularized as to [them]." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quotation marks omitted). Likewise, they must prove redressability, that "it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit." *Sprint Commcn's Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008) (internal quotation marks omitted). At the summary judgment stage, plaintiffs must set forth "by affidavit or other evidence specific facts" to carry their burden to show standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted).

Although living in a challenged district, and being a member of a purportedly diluted class of voters, might trigger a presumption of standing, that presumption is not un-rebuttable. In *United States v. Hays*, 515 U.S. 737 (1995), the Supreme Court noted that "[d]emonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context," *id.* at 744, but 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). But where a plaintiff, in a deposition, testifies as to the absence of any harm, as plaintiffs have done here, *see* Defs.' Br. at 21-23, then there is no injury-in-fact. Residency and membership of the purportedly diluted class of voters is thus *necessary* to the establish standing for *Shaw*-type racial gerrymandering and Section 2 claims, but it is not *sufficient*—at least not where the record evidence proves the absence of any particularized harm, as it does here. Defendants have provided the Court evidence that plaintiffs suffer no particularized harm, and plaintiffs only response is to repeat plaintiffs' residency and ethnic identity. *See* Pls.' Br. at 5, 7. That is insufficient; faced with evidence they in fact suffer no harm, plaintiffs must come forward with "specific facts," *Lujan*, 504 U.S. at 561 (quotation marks omitted), showing the presence of a particularized harm in response to defendants' evidence, *see, e.g.*, *Badon*, 224 F.3d at 394.

Most remarkably, plaintiffs do not even acknowledge in their brief defendants' argument and supporting evidence that plaintiffs also lack standing because they cannot show redressability. *See* Defs.' Br. at 23 (citing evidence that plaintiffs' proposed plan would likely elect Democrats to all four districts, and thus plaintiffs' purported injury—the lack of two Anglo Republican districts—could not be redressed by their requested relief). Plaintiffs' sole contention related to standing is that they suffer injury by virtue of their residency and ethnic identity. *See* Pls.' Br. at 6-7. There is no mention

of redressability, or any contrary evidence showing that Democrats would *not* win all four of plaintiffs' proposed precincts. Because plaintiffs have not "come forward with evidence establishing . . . [a] challenged element[] of [their] case for which [they] will bear the burden of proof at trial," *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), defendants are entitled to summary judgment on all claims. *See also Bookman v. Shubzda*, 945 F. Supp. 999, 1002 (N.D. Tex. 1996) (explaining that, upon failure to respond, "[t]he court would be permitted . . . to accept defendants' evidence as undisputed. A summary judgment nonmovant who does not respond to the motion is relegated to her unsworn pleadings, which do not constitute summary judgment evidence"); *Terry Graham, Jr. v. Dallas Area Rapid Transit*, No. 3:14-cv-4401-L, 2017 WL 6621576, at *7 (N.D. Tex. Dec. 28, 2017) (applying *Shubzda* rule to failure to respond to some, but not all, summary judgment arguments).

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

A. Plaintiffs Offer No Evidence Showing Dallas County Anglos Are Politically Cohesive, and thus Fail *Gingles* Prong 2.

Defendants are entitled to summary judgment on plaintiffs' Section 2 claim (Count I) because the undisputed evidence establishes they cannot satisfy *Gingles* prong 2—Dallas County Anglo voters are not politically cohesive. As defendants explained in their opening brief, undisputed expert analysis in the record of Dallas County Anglo voting behavior shows that 23% of Dallas County Anglos support Democrats, 35% support mainstream Republicans, and 42% support Tea-Party affiliated candidates. Defs.' Br at 26; Defs.' App. 320. Moreover, the record evidence shows that the particular Anglo voters plaintiffs propose to move into a new Anglo-majority precinct, which they contend Section 2 requires, are the *least* cohesive among Dallas County Anglos—the subset of

Anglo voters upon which plaintiffs' two-district math relies are disproportionately Democratic. *See* Defs.' Br. at 27; Defs.' App. 854, 859.

This undisputed expert analysis is supported by lay testimony: plaintiffs' own attorney, Elizabeth Alvarez, has testified that Dallas County Republicans are ideologically divided regarding their support for Tea Party candidates. *See* Defs.' Br. at 4, 26; Defs.' App. 376 (Ms. Alvarez testifying that "there are ideological lines within both parties and the Tea Party. There is a Tea Party coalition and a non-Tea Party coalition") *id.* at 377 (Ms. Alvarez testifying that there are "different wings of the [R]epublican [P]arty who differ on ideological basis" and that Republican Party divide is "politically based" and not race-based). Plaintiffs' witness Jeff Turner, founder of the Dallas County Tea Party movement, agrees that Anglos split among Democrats, Tea Party members, and non-Tea Party Republicans. Defs.' Br. at 4, 26; Defs.' App. 301. This evidence is fatal to plaintiffs' Section 2 claim.

Plaintiffs offer no contrary evidence. Rather, they contend that because their expert's analysis shows that Anglo voters preferred the Republican candidate over the Democratic candidate in six Commissioners Court *general elections* and three County Judge *general elections* over the past decade, Anglos are politically cohesive. Pls.' Br. at 8-9. This misses the point entirely. First, plaintiffs offer no evidence to dispute the fact that, countywide, 23% of Anglos prefer Democratic candidates, and thus that subset is not cohesive with the remaining Anglos. *See* Pls.' Br. at 8-9. Nor do they respond to the more damning evidence that the specific Anglos they propose to include in a new Anglo-majority Section 2 district are even *more* Democratic, and thus the relevant Anglo population at issue here is even *less* cohesive than it is countywide. *See Topalian*, 954 F.2d at 1131 (noting that non-movant must offer contrary evidence to avoid summary judgment). Second, the analysis

plaintiffs cite says nothing about the political divide among Dallas County Anglo Republican voters between Tea Party and non-Tea Party candidates. The nine general elections plaintiffs cite cannot speak to this divide. By largely confining their analysis to general elections in which there were no contested Republican primaries, plaintiffs offer "no obvious benchmark," *LULAC v. Perry*, 548 U.S. 399, 444 (2006), to assess political cohesion among Anglo Republicans. *See also Perez v. Abbott*, __ F.3d __, No. 11-cv-360, 2017 WL 3495922, at *23 (W.D. Tex. Aug. 15, 2017), *stayed pending appeal*, __ S. Ct. __, 2017 WL 4014835 (U.S. Sept. 12, 2017) (Mem.) (noting Supreme Court and Fifth Circuit case law establishing relevance of analyzing primary election voting behavior in determining political cohesion). The bulk of the evidence plaintiffs cite in response thus provides no response at all to defendants' evidence that 35% of Dallas County Anglos prefer mainstream Republicans and 42% support Tea Party candidates. Indeed, defendants' expert Mr. Hood concedes that the largest Anglo group—Tea Party supporters—are only a *plurality*, *see* Pls.' Response App. 36, hardly sufficient to prove *Gingles* prong 2 cohesion.

The only Republican primary elections analyzed by Mr. Hood, and cited by plaintiffs, *see* Pls.' Br. at 8-9, were the 2012 Republican primary for Precinct 1 and the 2016 primary for Precinct 3. *See* Pls.' Response App. 37. But both are majority-minority in citizen voting age population ("CVAP") and have small Anglo population, *see* Defs.' App. 810; Mr. Hood does not identify whether these contests involved a Tea-Party/mainstream divide; and Mr. Hood did not limit his analysis to the portions of Precincts 1 and 3 that overlap with the geographic territory plaintiffs propose is required by Section 2 to be included in their proposed new majority-Anglo district. *See* Pls.' Response App. 36-38. These elections thus likewise do not rebut the evidence offered by defendants of non-cohesion among the Anglo voters countywide and in particular among those

Anglos specifically the subject of plaintiffs' Section 2 claim. Thus, there is no genuine issue of material fact as to the non-cohesion of Anglo voters, and plaintiffs' failure to respond to defendants' evidence requires entry of summary judgment.

Finally, plaintiffs' attempt to explain away the testimony of Ms. Alvarez and Mr. Turner is misplaced. *See* Pls.' Br. at 8 n.37. Plaintiffs contend Mr. Turner "merely agreed that there are Anglos in each" of Democrats, Tea Party supporters, and mainstream Republicans, and not that there were three factions of Anglo voters. *Id.* This is a distinction without a difference—unless what plaintiffs mean to contend is that there are *more* than three factions—a position that would demonstrate even less cohesion. With respect to Ms. Alvarez,[1] plaintiffs seek to avoid her testimony by suggesting her testimony was about the ideological divide among Republicans, not Anglos. *Id.* This too makes no sense—plaintiffs' entire case, and request for relief, relies upon the notion that Anglos are largely Republicans (and Republicans are largely Anglos). Nothing in Ms. Alvarez's testimony suggests that the Republican ideological divide is limited to non-Anglo Republicans—rather she testified that Anglo Republicans did not demonstrate anti-Hispanic bias in voting, but rather voted based upon ideology. *See* Defs.' App. 378 (testifying regarding defeat of Republican primary candidate with Hispanic surname). Plaintiffs offer no record evidence, testimony or otherwise, to contradict their own witness and attorney's sworn testimony regarding the lack of cohesion.

[1] Plaintiffs' objection to Ms. Alvarez's testimony as "irrelevant, cumulative, and available from other sources," Pls.' Br. at 8 n.37, should be overruled. Ms. Alvarez has provided sworn testimony in federal court regarding the lack of political cohesion among Republican voters in Dallas County. That could not be *more* relevant to this case. Moreover, if plaintiffs contend that her testimony is cumulative or available elsewhere, then they necessarily admit that the record evidence already demonstrates Republican voters are not politically cohesive because they split between Tea Party and non-Tea Party candidates. Plaintiffs' cite no authority or rule of evidence supporting their objection to defendants' reliance upon Ms. Alvarez's sworn testimony, the bulk of which is judicially noticeable. *See Perez v. Abbott*, No. 11-360 (W.D. Tex.), ECF No. 1514-2 at 7. Plaintiffs cannot shield themselves from Ms. Alvarez's 2017 testimony undermining their case by belatedly noticing her appearance as an attorney in this matter.

B. Defendants Are Entitled to Summary Judgment Because the Undisputed Evidence Proves that Politics, Not Race, Drives Anglo Voting Behavior.

Defendants are entitled to summary judgment because the record evidence shows that politics, not race, drives Anglo voting behavior in Dallas County. The *en banc* Fifth Circuit has held that to be actionable under Section 2, racially polarized voting must be "legally significant," *i.e.*, Section 2 "extend[s] only to defeats experienced by voters 'on account of race or color.'" *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*). Under binding circuit precedent, Section 2 must not be removed "from its racial tether," and "illegal vote dilution" must not be fused with "political defeat." *Id.* Thus, Section 2 is not satisfied by polarized voting attributable to "partisan affiliation, not race." *Id.*

As defendants have shown, *see* Defs.' Br. at 28, the record evidence shows that politics, not race, explain Dallas County Anglos' voting behavior. Ms. Alvarez has testified explicitly as such, *see* Defs.' App. 377, the plaintiffs themselves have testified that their votes are solely partisan or ideological, Defs.' App. 711, 713, 733-34, 746, 751, and that partisanship, not race, drove the challenged Enacted Plan's design, Defs.' App. 785.

Plaintiffs respond by inviting this Court not to "sheepishly follow the language of *Clements*." Pls.' Br. at 10. But this Court is not at liberty to decline to follow *Clements*, as plaintiffs remarkably suggest. "Fifth Circuit precedent 'remains binding until the Supreme Court provides contrary guidance.'" *Smith v. Johnson*, 440 F.3d 262, 264 (5th Cir. 2006) (quoting *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir. 2006)). That rule has even greater force with respect to *en banc* decisions, such as *Clements*. The Court has no authority to disregard the plain holding of *Clements*.

Moreover, plaintiffs' effort to rewrite *Clements*, *see* Pls.' Br. at 10, should be rejected. After holding that Section 2 is not satisfied by polarized voting attributable to "partisan affiliation, not

race," *Clements*, 999 F.2d at 850, the *en banc* court declined to decide whether plaintiffs had the burden to *affirmatively* prove the absence of partisanship, rather than race, as the cause, *id.* at 859-60. Such a decision was not necessary in *Clements* because in that case the evidence showed partisanship was the cause. *Id.* at 860. So there is no question that binding, *en banc* Fifth Circuit precedent precludes a finding of Section 2 liability where partisanship, not race, explains bloc voting; the open question is over whose burden it is to make that case.[2]

It does not matter whose burden it would or should be, having been confronted with such evidence, plaintiffs are obligated to respond with contrary evidence in order to avoid summary judgment. *See Topalian*, 954 F.2d at 1131. Just as in *Clements*, the record evidence proffered by defendants in this case—the sworn testimony of Ms. Alvarez and the plaintiffs—is that partisanship, and not race, explains Dallas County Anglo voting behavior. Plaintiffs have failed to counter those facts, and their effort to obscure the plain meaning of the testimony defendants have proffered is misplaced.

First, plaintiffs contend that their own deposition testimony does not "reflect the voting motivations of Anglos as a whole or relate, even in passing, to how Anglos-as-a-group vote in elections to the Commissioners Court." Pls.' Br. at 11, n.51. But plaintiffs do not offer any actual evidence to that effect, or any facts that "Anglos-as-a-group" vote any differently than plaintiffs and Ms. Alvarez have testified, they merely offer argument in a footnote of their brief. That is not enough. Plaintiffs

[2] Plaintiffs contend defendants have waived their ability to show that partisanship, and not race, explains Anglo voting behavior, because they say it is an affirmative defense that was not pled in the Answer. *See* Pls.' Br. at 11. Not so. The *en banc* Fifth Circuit has expressly left that question unanswered, although it has said "powerful argument[s]" suggest it is an *element*, not a defense. *Clements*, 999 F.2d at 859. Given that, defendants hardly can be deemed to have waived it as a defense. *See Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) ("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)).

cannot avoid summary judgment on the basis of "conclusory allegations" or "unsubstantiated assertions," and the Court cannot, "*in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.*" *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quotation marks omitted) (emphasis in original). And even if plaintiffs *had* produced evidence that they were unique among Dallas County Anglos, by casting their votes solely based upon partisanship (rather than race), then all they would have proven is that they lack standing to sue under Section 2 as *Clements* has interpreted it. *See Raines*, 521 U.S. at 818 (noting plaintiff must experience a particularized injury that could be redressed by the requested relief in order to have standing to sue).

Second, plaintiffs seek to muddle their own straightforward deposition testimony in order to manufacture a factual dispute where none exists. Mr. Jacobs did not, as plaintiffs' contend, testify that partisan affiliation "serv[es] only as a metric" for whether Anglos in Dallas County can choose their preferred candidates. *See* Pls.' Br. at 11 n.51. Rather, on the very page of Mr. Jacobs testimony cited by plaintiffs, Defs.' App. 754, he testified that "the aim is for the group to be able to choose Republicans in our context." Likewise, plaintiffs offer nothing to dispute Mr. Jacobs' testimony that he votes for Commissioners on the basis of partisanship and "nothing else," Defs.' App. 751, a fact that precludes Section 2 relief under *Clements*. Indeed, Mr. Jacobs testified that he was not unique among Anglos Republicans in voting solely based on party: "[A]utomatically, I don't vote for Democrats, and I know a lot of my friends just automatically – *a lot of white people* – I go all kinds of places, and I hear comments all the time. So I know what the overall reactions are." Defs.' App. 754 (emphasis added). With respect to Ms. Morse, plaintiffs somehow contend she *actually* testified that she wants "the chance to have 'your person elected,' *without regard to the ideology of such a candidate*." Pls.' Br. at 11 n.51 (quoting Defs.' App. 712) (emphasis added). She said no such thing.

Rather, when asked to explain what she meant, she explained that her candidate of choice would be "more of a conservative choice," Defs.' App. 713, than the existing Anglo Republican incumbent (underscoring the lack of Anglo cohesion). The italicized portion from plaintiffs' brief is made up of whole cloth, and not actually based upon any record evidence.

Finally, plaintiffs contend that Ms. Alvarez's testimony "says *nothing* concerning the preferences of Anglos as a group," Pls. Br. at 11 n.51 (emphasis in original), because she was testifying about Republicans, not Anglos specifically. That is far too thin a reed. Plaintiffs' own allegations depend upon racial polarization between Anglos and non-Anglos, *see* 2d Am. Compl. ¶¶ 12-13, ECF No. 31, and Ms. Alvarez made clear that her testimony about ideological divisions within the Republican Party *included* Anglo Republicans. *See* Defs.' App. 378 (Ms. Alvarez testifying, with respect to Republican primary elections, that "if Ava Guzman seems to be doing fine, that it would be inaccurate to assert that Hispanic losing to a white person has something to do with Anti-Hispanic sentiment and more to do with the fact that the voters of that year overwhelmingly chose to oscillate with Tea Party individuals in the primary. *Just an ideological preference*" (emphasis added)). Plaintiffs' professed confusion as to whether that includes Anglos is an unsupported, conclusory allegation, contradicted by the facts and their own complaint, and insufficient to defeat summary judgment.

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

The record evidence precludes a finding that the totality of the circumstances warrant Section 2 relief. As defendants explained in their opening brief, plaintiffs' complaint only alleges the presence of four of the nine "Senate Factors," Defs.' Br. at 29-30; 2d Am. Compl. ¶ 29, ECF

No. 31, and thus they have forfeited any right to argue the presence of the remaining five,[3] including one of "the two most important," *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991), "the extent to which members of the minority group have been elected to public office in the jurisdiction," *Fairley v. Hattiesburg*, 584 F.3d 660, 672 (5th Cir. 2009).[4] Moreover, by failing to respond to defendants' contention that these five factors have been forfeited, plaintiffs have now waived their right to contend those factors were not forfeited. "[F]ailure to brief an argument in the district court waives that argument in that court." *Magee v. Life Ins. Co. of N. Am.*, 261 F. Supp. 2d 738, 748 n.10 (S.D. Tex. 2003) (holding legal argument advanced by summary judgment movant but not addressed in opposition brief waived). None of these factors support plaintiffs' case anyway. *See* Defs.' Br. at 30. And as defendants proved, a factual dispute exists as to only *one* of the factors—whether there have been subtle or over racial appeals in campaigns—a result insufficient, as a matter of law, to support Section 2 liability. *See* Defs.' Br. at 32-35; *see Fairley*, 584 F.3d at 673 (finding a single factor insufficient to establish Section 2 liability).

Plaintiffs contend that defendants "omit [a factor] that the [Fifth] Circuit has held to be relevant—intent." Pls.' Br. at 12. But *plaintiffs* omitted this factor from their complaint. Plaintiffs' live complaint does not allege an *intentional* vote dilution claim under Section 2, but rather merely

[3] Plaintiffs raise Factor 8—whether the plan's policy purpose is tenuous—in their opposition brief, *see* Pls.' Br. at 13 & n.58, but they did not allege this factor in their complaint, and it is thus forfeited. In any event, plaintiffs' contention that the redistricting followed *no policy*, Pls.' Br. at 13 n.58, is belied by the record evidence that the process was conducted in accord with an adopted policy that required compliance with the law and adherence to traditional redistricting factors. *See* Defs.' App. 9-10, 476, 480-81, 512.

[4] Plaintiffs repeatedly confuse this Senate Factor, which by its plain text looks to whether members of the racial minority group have been elected (regardless of whether voters of that racial group prefer that candidate), with the *Gingles* precondition analysis, which focuses on the minority groups candidate of choice, whatever his or her race. *See, e.g.*, Pls.' Br. at 12-13. The totality of the circumstances analysis is distinct from the three prong *Gingles* precondition analysis. *See Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

a Section 2 *results* claim. *See* 2d Am. Compl. ¶ 26, ECF No. 31 ("The facts alleged demonstrate the imposition of standards, practices, or procedures that *result* in a denial or abridgement . . . in violation of Section 2 of the Voting Rights Act.") (emphasis added). As defendants have already noted, *see* Defs.' Br. at 23 n.2, this allegation does not encompass a Section 2 intent claim—a claim that is distinct from a Section 2 results claim. *See McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046 (5th Cir. 1984). Such a claim would have to be actually pled in the complaint. *See Perez v. Abbott*, 253 F. Supp. 3d 864, 939 & n.95 (W.D. Tex. 2017) (analyzing plaintiffs' complaints to determine whether they raised both Section 2 results and intent claims); *id.* at 942 ("Because intent is not an element of results-only claims and results-only claims are usually easier to prove, few voters have asserted intentional vote dilution claims since § 2 of the VRA was amended . . . ."). Plaintiffs did not do so, and may not attempt to raise a Section 2 intent claim in their summary judgment opposition brief. *See Herster v. Bd. of Supervisors of La. State Univ.*, 221 F. Supp. 3d 791, 794 (M.D. La. 2016) (holding that plaintiffs may not "broaden the scope of their pleadings through argument in dispositive motions").

Plaintiffs take issue with defendants' disregard of Mr. Hood's claim that voting is racially polarized because Anglo voters support Republican candidates in Commissioner Court general elections, Pls.' Br. at 12, but as discussed above, the undisputed evidence shows that Dallas County Anglo voters' polarized voting is motivated by *partisanship*, and not *race*, and is thus not legally significant. *See supra* Part III.B. Mr. Hood's analysis is thus irrelevant. And plaintiffs disregard the fact that their own sworn deposition testimony shows the Commissioners Court is not unresponsive to their needs, *see* Defs.' Br. at 34, instead pointing to evidence that the County recruits diverse employees and "has not undertaken any special efforts to recruit Anglo employees," Pls.' Br. at 13

n.59, to contend a factual dispute exists. That is hardly sufficient to create a genuine factual dispute where the plaintiffs themselves have disclaimed any suggestion the County is unresponsive to their needs.

Finally, as defendants proved in their opening brief, Dallas County Anglo voters are proportionally represented on the Court, and thus plaintiffs cannot prevail on their Section 2 claim. *See Johnson v. De Grandy*, 512 U.S. 997, 1014-15 (1994); Defs.' Br. at 30-32. Plaintiffs' response is without merit. First, plaintiffs again contend that because Anglos constitute 36% of Dallas County's voting age population ("VAP"), they are entitled to 50% of the Commission seats. Pls.' Br. at 14. But there are only four Commission seats by function of the state constitution; 36% is closer to 25% than it is to 50%. And the flip side of plaintiff's contention is that non-Anglo voters should be underrepresented by 14 percentage points (controlling 50% of the seats despite constituting 64% of the VAP) in order to prevent Anglo voters from being underrepresented by 9 percentage points. That result, it should not have to be said, cannot plausibly flow from the Voting Rights Act. Next, plaintiffs contend that VAP is an impermissible measure of proportionality, despite the Supreme Court's use of that measure in *De Grandy*. *See* Pls.' Br. at 14. But the Supreme Court has never retreated from its *De Grandy* analysis, nor suggested that proportionality must be measured based upon citizenship numbers. Indeed, the Court explained that the choice whether to use citizenship data was not a "magic parameter" to the proportionality analysis. *De Grandy*, 512 U.S. at 1017 n.14. Plaintiffs' citation to *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023-25 (5th Cir. 2009) is misplaced. *See* Pls.' Br. at 14. *Reyes*'s CVAP requirement is expressly limited to "the first *Gingles* requirement," 586 F.3d at 1023, because that prong looks to whether the population can form "a compact voting majority," *id.* (quotation marks omitted). *Reyes* says nothing about whether CVAP

is an appropriate—let alone required—metric for considering *De Grandy*'s distinct proportional representation requirement.

As defendants have explained, the Supreme Court has subsequently suggested that where *representational* interests are being assessed, as is the case under the *De Grandy* rule, citizenship is not the most appropriate consideration, because "as the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016)[5]; *cf. Fairley*, 584 F.3d at 674 (rejecting use of voter registration figures for proportionality analysis).

In any event, whether total population, VAP, or CVAP is used, Dallas County Anglos are proportionally represented. Defs.' Br. at 32 n. 5. Plaintiffs' only argument otherwise is that Anglos' CVAP number should not be discounted to exclude Democratic Anglos. *See* Pls.' Br. at 15. Even if CVAP were an appropriate measure of proportionality (it is not), it would make scant sense to conclude that Anglo Republicans have a right to 50% of the Commission seats when Anglo Republicans constitute only 34.7% of the CVAP. *See* Defs.' Br. at 32 n.5. 34.7% is closer to 25% than it is to 50%. Plaintiffs cannot rely upon Anglo Democrats to boost their CVAP number on the one hand, but then refuse to consider elected Anglo Democrats as part of the proportionality analysis. Such a ploy would lead to *disproportionate* representation, turning *De Grandy* on its head. Anglo Republicans are not entitled to a 15- point representational windfall.

[5] It is true that *Evenwel* did not *mandate* the use of total population (that question was not before the Court), but the Court spent paragraphs highlighting the benefits and propriety of its use rather than voter-based measures. 136 S. Ct. at 1129-1133.

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

A. Defendants Do Not Even Contest Summary Judgment on Intentional Vote Dilution.

Defendants are entitled to summary judgment on Count II of plaintiffs' complaint for a simple reason: plaintiffs do not contend otherwise. Defendants moved for summary judgment on plaintiffs' intentional vote dilution/Equal Protection claim, citing substantial evidence and including an expert declaration demonstrating why plaintiffs could not show intentional vote dilution in violation of the Equal Protection Clause, including because the *Arlington Heights* factors were not satisfied and because plaintiff's own expert admitted he had no such evidence of intent. *See* Defs.' Br. at 35-40. Plaintiffs do not even acknowledge this argument in their opposition brief, nor do they dispute any of the evidence defendants cite in support of their motion. *See* Pls.' Br. at 16-21. As such, the Court should accept the evidence defendants have offered as undisputed, and grant defendants summary judgment with respect to plaintiffs' intentional vote dilution/Equal Protection claim. *See Shubzda*, 945 F. Supp. at 1002 (explaining that, upon failure to respond, "[t]he court would be permitted . . . to accept defendants' evidence as undisputed. A summary judgment nonmovant who does not respond to the motion is relegated to her unsworn pleadings, which do not constitute summary judgment evidence."); *Terry Graham, Jr.*, 2017 WL 6621576, at *7 (applying *Shubzda* rule to failure to respond to some, but not all, summary judgment arguments); *Magee*, 261 F. Supp. 2d at 748 n.10 (holding legal argument advanced by summary judgment movant but not addressed in opposition brief waived); *Topalian*, 954 F.2d at1131 (holding that nonmovant must come forward with contradictory evidence to avoid entry of summary judgment).

Indeed, it is apparent that plaintiffs have entirely abandoned the legal claim they actually pled in Count II of their complaint—intentional vote dilution—in favor of one that did not plead—*Shaw*-type racial gerrymandering. Plaintiffs' opposition brief focuses exclusively on the latter, and frames Count II as solely being a *Shaw*-type racial gerrymandering claim. *See* Pls.' Br. at 16-21. The Court should not permit that amendment-by-summary-judgment-brief tactic, as discussed in the briefing on these motions (and again, below). But for the moment, plaintiffs' gambit means that defendants are entitled to summary judgment on an intentional vote dilution/Equal Protection theory, because plaintiffs neither acknowledge defendants' argument, nor offer any evidence to show a disputed material fact exists as to an intentional vote dilution/Equal Protection claim.

B. Plaintiffs Have Not Pled a *Shaw*-Type Racial Gerrymandering Claim.

Plaintiffs have not pled a *Shaw*-type racial gerrymandering claim, as defendants explained in their opening brief, *see* Defs.' Br. at 40-41, and in their opposition brief to plaintiff's motion for summary judgment, *see* Defs.' Opp. to Pls.' Summ. J. Mot. at 10-15, ECF No. 95. Rather, Count II of plaintiffs' complaint exclusively—and explicitly—alleges only an intentional vote dilution claim; a claim plaintiffs have now entirely abandoned.

Plaintiffs contend otherwise because their complaint *once* uses the phrase "race was the predominant factor," 2d Am. Compl. ¶ 17, ECF No. 31, and in Count II of their Complaint they "restate and incorporate by reference all allegations in paragraphs 1-23, above," *id.* ¶ 30. This, plaintiffs say, *see* Pls.' Br. at 17-18, suffices to allege a *Shaw*-type racial gerrymandering claim, because plaintiffs contend that is the type of pleading the three-judge district court approved with respect to the LRTF plaintiff in *Perez*. Plaintiffs are mistaken, both because case law establishes that method

of pleading is insufficient under the Federal Rules to provide adequate notice, and because the LRTF plaintiff's complaint in *Perez* was nothing like plaintiffs' here.

A plaintiff may not rely upon incorporation of prior *factual* allegations in a complaint to give notice that they are alleging an *additional legal claim* (under the auspice of a single Count) beyond the elements of the claim actually described in the Count. In *Bell v. Dallas County*, No. 3:08-cv-1834-K, 2011 WL 3874904 (N.D. Tex. Aug. 30, 2011), the plaintiff specified a "cause of action" for "Family and Medical Leave Act Discrimination," *id.* at *2. Claims under the Family and Medical Leave Act ("FMLA") can be brought under both theories of interference and retaliation. *Id.* at *1. Under the FMLA Cause of Action in the complaint, the *Bell* court noted that the plaintiff used words associated with a retaliation claim, rather than an interference claim. *Id.* at *2. The plaintiff contended that his incorporation by reference of earlier factual allegations sufficed to allege an interference claim, but the court disagreed:

> [H]is complaint does not identify an interference claim as a cause of action, nor does it track the language of FMLA's interference provisions in his only cause of action that mentions the FMLA. Mr. Bell also responded to the County's challenges by arguing these factual allegations had been incorporated by reference into his overarching FMLA claim. . . . Such an incorporation is not a "short and plain statement of the claim," Fed. R. Civ. P. 8(a)(2), which can be expected to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."

Id. at *2 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (second ellipsis in original)).

The court reached the same conclusion in *Baker v. Great Northern Energy, Inc.*, 64 F. Supp. 3d 965 (N.D. Tex. 2014). In that case, the plaintiff stated a "Claim for Relief" titled "Misrepresentation" that was followed by allegations of an "intent to deceive, manipulate or defraud." *Id.* at 977-78 (quotation marks omitted). The plaintiff contended that this sufficed to state a cause of action for negligent misrepresentation, rather than merely intentional

misrepresentation, because of "the paragraph under the Complaint's 'misrepresentation' heading that 'incorporates the allegations made' in all previous paragraphs of the Complaint." *Id.* at 979. The court rejected this argument. "Generally, this sort of 'incorporated by reference' pleading—employed by plaintiffs to add claims not explicitly alleged in their complaint—does not suffice under the federal rules." Likewise, the court in *Amazon Tours, Inc. v. Quest Global Angling Adventures LLC*, No. Civ. A. 303CV2551M, 2004 WL 1788078 (N.D. Tex. June 30, 2004) reached the same conclusion. There, the plaintiff's complaint included a count alleging "Conspiracy," but the subsequent factual allegations were limited to conspiracy to convert:

> Under the count alleging conspiracy, the Complaint alleges facts concerning conspiracy to convert, but not facts concerning conspiracy as to the other torts. While the count incorporates by reference the allegations underlying all of Plaintiff's claims, the Court is of the view that the Complaint nevertheless fails to provide Defendants with fair notice of any conspiracy claim related to Plaintiffs' other tort claims.

Id. at *4 (footnote omitted); *cf.* Fed. R. Civ. P. 10(b) ("A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.").

This case is no different. Under "CLAIMS FOR RELIEF," the second count of plaintiff's complaint has the header "Equal Protection." The count has two paragraphs, one incorporating the previous allegations by reference, and another long paragraph replete with specific allegations that pertain only to an intentional vote dilution claim, and not to the analytically distinct *Shaw*-type racial gerrymandering claim. *See* 2d Am. Compl. ¶ 31; *see* Defs.' Opp. to Pls.' Summ. J. Mot. at 10-15. This is precisely the type of pleading that was rejected by the *Bell*, *Baker*, and *Amazon Tours* courts. Although incorporation by reference may be used to add specific factual allegations to buttress a count that has actually been pled under the Claims for Relief, *see* Fed. R. Civ. P. 10(c), it may not

be used to shoehorn two distinct legal claims into a single count whose own paragraph(s) are plainly limited to a single legal claim.

Plaintiffs are wrong to say their complaint "[b]eat for beat . . . matches exactly" the LRTF plaintiff's complaint that the *Perez* court found to adequately allege a *Shaw*-type racial gerrymandering claim. *See* Pls.' Br. at 18. Under the heading "Facts," LRTF's complaint includes seven factual allegations about race predominating in various districts, which it carefully notes as separate allegations from its vote dilution allegations. *See* Pls.' Response App. 93 (¶ 37), 94 (¶ 41), 95 (¶ 42), 97 (¶ 53), 98 (¶ 56), 99 (¶ 67), 100 (¶ 78). Under "CAUSES OF ACTION," Count I is labeled "Equal Protection Clause of the 14th Amendment to the U.S. Constitution," and is followed by two *short* paragraphs. The first incorporated the previous factual allegations, and the second states that "Plans C185, H283, *and the alterations made to HD 90* in Plan H358 discriminate against Plaintiffs on the basis of race and national origin in violation of the 14th Amendment to the U.S. Constitution." Pls.' Response App. 101 (¶¶ 81-82) (emphasis added).

LRTF's complaint is of no help to plaintiffs here. First, the State did not contest whether LRTF's incorporation-by-reference was adequate. *See Perez v. Abbott*, 253 F. Supp. 3d at 931 ("[T]he State disputes that any party other than the Task Force has specifically pleaded *Shaw*-type racial gerrymandering claims."). As such, the Court had no reason to examine LRTF's pleading, or whether it was consistent with the precedent in *Bell*, *Baker*, or *Amazon Tours*. Second, paragraph 82 of LRTF's complaint does not contain *fifteen lines of text*—all unique to a vote dilution claim—like plaintiffs' claim does here. *Compare* 2d Am. Compl. ¶ 31, ECF No. 31 *with* Pls.' Response App. 101. By including so much detail and verbiage specific to an intentional vote dilution claim, plaintiffs here made explicitly clear that Count I was a claim for relief for intentional vote dilution,

and gave defendants absolutely no reason to believe they *also* alleged a *Shaw*-type racial gerrymandering claim. LRTF's complaint, on the other hand, did not mire its Cause of Action counts with intentional vote dilution allegations while excluding any *Shaw*-type allegations. Indeed, to the extent LRTF expanded upon its allegations under Count I at all, it described one of its *Shaw*-type racial gerrymandering claims, *i.e.*, that HD 90 had improper "alterations." *Compare* Pls.' Response App. 94 (¶ 41) ("The configuration of HD 90 . . . uses race as a predominant factor to allocate Latino voters into and out of HD 90."), *with id.* at 101 (¶ 82) ("[T]he alterations made to HD 90 . . . discriminate against Plaintiffs . . . ."). Despite including fifteen lines of text in their Count II allegations, plaintiffs here did not include a single word that signaled a *Shaw*-type racial gerrymandering claim. It cannot be that plaintiffs' *most important* claim—and the only one on which they think they are due summary judgment—was worth *zero* specific words or lines of mention in their Claims for Relief, while the claim to which they devoted fifteen lines of text has now disappeared from their case as if it never existed. Plaintiffs' complaint did not give defendants notice of a *Shaw*-type racial gerrymandering claim, and it bears no resemblance to the context in which LRTF raised its *Shaw* claim in its *Perez*.[6]

Rather, as defendants explained in their brief opposing plaintiffs' summary judgment motion, plaintiffs' complaint is more similar to MALC's complaint from the *Perez* case, which the court found insufficient to state a *Shaw*-type racial gerrymandering claim. *See* Defs.' Opp. to Pls.'

[6] This lack of notice is reflected in defendants' choice of expert analysis. Defendants' retained Dr. Lichtman to prepare a report about whether the Enacted Plan constituted unconstitutional intentional vote dilution. They did not retain an expert to assess whether the Enacted Plan was a racial gerrymander. Nor would they have had any reason to think they should take a different course. This illustrates the extreme prejudice defendants would face if plaintiffs are permitted to amend their complaint via their summary judgment briefing to assert a claim un-pled in the complaint, after the close of discovery, and a mere three months from trial.

Summ. J. Mot. at 12-15, ECF No. 95. In its fact section, MALC alleged that "racial gerrymanders [were] manifest" in the plans, that a representative's admission that "he 'wanted to get more Anglo numbers' into his district is further evidence of racial gerrymandering," and that "the State sought to divide these voters along racial lines." *See id.* at 12-13. But despite using these *Shaw*-like phrases, the *Perez* three-judge court concluded that MALC's "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). That is so because MALC included so much additional allegations around these phrases that were exclusive to vote dilution claims. The same is true here. Although plaintiffs once mentioned racial predominance, the context of their complaint—fifteen lines of text devoted to vote dilution and nothing in Count II devoted to *Shaw*-type racial gerrymandering—makes plaintiffs' complaint like MALC's, not LRTF's. Sometimes less is more. Plaintiffs have not pled a *Shaw*-type racial gerrymandering claim, and may not do so now. *See Andert v. Brewley*, 998 F.2d 1014, No. 92-1467, 1993 WL 277199, at *2 (5th Cir. July 21, 1993); *Snider v. N.H. Ins. Co.*, No. 14-2132, 2016 WL 3278695, at *1 (E.D. La. June 15, 2016).

C. Even if Plaintiffs Had Pled a *Shaw* Claim, Defendants Would Be Entitled to Summary Judgment.

Even if plaintiffs had pled a *Shaw*-type racial gerrymandering claim, defendants would be entitled to summary judgment. As plaintiffs note in their opposition brief, this issue has been briefed in the context of their separate motion for summary judgment, and defendants incorporate their arguments in opposition to plaintiffs' motion here. Critically, plaintiffs do not even contest that Precincts 3 and 4 were required to be drawn with race as a consideration in order to comply with Section 5 of the Voting Rights Act, quibbling only with the alleged use of race in drawing (ultimately numbered) Precinct 1. *See* Pls.' Mot. for Summ. J. at 20-21, ECF No. 95. And their own

mapdrawer testified he was of the view an African American and Latino district were required to be drawn.[7] In any event, the undisputed evidence shows that (ultimately numbered) Precinct 1 was *not* drawn on the basis of race; rather it was the final precinct drawn and merely resulted from the other three districts line drawing, which was done to accommodate Section 5 (Precincts 3 and 4) and Commissioner Dickey's[8] request for a Tea Party District (Precinct 2). *See* Defs.' App 19; Defs.' Supp. App. 1. And plaintiffs themselves acknowledge Precinct 2 was drawn with the purpose of electing a Tea Party candidate, Pls.' Mot. for Summ. J. at 10 n.52, and the undisputed evidence shows the same, Defs.' App. 9-10.[9]

In their reply brief in support of their summary judgment motion, plaintiffs contend that that Mr. Angle's deposition testimony actually supports their version of events as to the order in which the precincts were drawn. Pls.' Reply Br. at 7 & n.25, ECF No. 102. Not true. Plaintiffs' counsel chose to *ask his deposition questions* about the precincts out of order. *See* Pls.' App. 34. The ordering of plaintiffs' counsel's deposition questions—question that were not even phrased to suggest they implied anything about the order in which the drawing occurred, *see* Pls.' App. 34—is not *evidence* capable of establishing a material fact. Rather, the only record evidence on the point, Defs.'

[7] Once the transcript of this deposition becomes available, defendants will file it with as supplemental notice with the Court.

[8] Plaintiff's hearsay objection to Ms. Dickey's statement, *see* Pls.' Reply Br. at 11-12, ECF No. 102, should be overruled. Defendants are not offering Ms. Dickey's statement for its truth, but rather to show Mr. Angle's state of mind when he heard her statement, *i.e.*, that he drew a Tea Party district in response to her statement. As such, it is not hearsay.

[9] Plaintiffs repeat their contention that defendants have waived their right to defend Precincts 3 and 4 on the basis of the Voting Rights Act. As defendants explain in their opposition to plaintiffs' summary judgment motion, *see* Defs.' Opp. to Pls.' Summ J. Mot. at 17-19, ECF No. 95, that is not so. First, defendants did not include any such defense because plaintiffs did not allege such a claim. Second, it is not at all obvious, as plaintiffs have admitted, whether strict scrutiny in this context is an element or a claim, and thus defendants could not have waived their right to the argument. And plaintiffs suffer no prejudice from it being raised.

App. 9-10, is that Precinct 1 was drawn last, and merely resulted from the two Section 5 districts and the Tea Party district.

Plaintiffs also object to Mr. Angle's deposition errata sheet, in which he clarified that he intentionally drew an effective African American opportunity district, an effective Latino opportunity district, and a Tea Party district, and that the fourth district that resulted was majority-minority, but not by intent. *See* Defs.' Supp. App. 1; Pls.' Reply Br. 8-11, ECF No. 102. Plaintiffs' objection is misplaced. First, Rule 30(e) provides that a deponent may review a deposition transcript and "if there are changes in form or substance, . . . sign a statement listing the changes and the reasons for making them." Fed. R. Civ. P. 30(e). Plaintiffs disregard this plain text, citing instead to inapposite case law about later submitted affidavits. Pls.' Reply Br. at 10. But Rule 30(e)'s plain text permits Mr. Angle's correction. *See Reilly v. TXU Corp.*, 230 F.R.D. 486, 490-91 (N.D. Tex. 2005) (noting that a broad interpretation of Rule 30(e) is consistent with its "plain language" and that it "furthers the purpose of the discovery process—to allow the parties to elicit the true facts of a case before trial"). Moreover, the Rule expressly permits substantive changes made within thirty days of receipt of the transcript; plaintiffs cannot cut Rule 30(e)'s timeline short merely by filing their summary judgment motion. *See id.* at 491 n.3 (reviewing cases about errata sheets submitted during summary judgment process and stating "[t]he language of Rule 30(e) does not contemplate different standards of review of deposition changes at different stages of the proceedings").

More critically, plaintiffs claim in their reply brief that they have quoted "the entirety of the discussion" from Mr. Angle's deposition, Pls.' Reply Br. at 8, ECF No. 102, <u>but that is false</u>. In fact, the purposefully omitted, from the middle of their quoted text, the most important statement. Plaintiffs' counsel asked the following question:

> Q. Mr. Hebert testified publicly on May 10th, 2011, that since three out of the four of the previous decade [*sic*] districts were majority-minority in their 2010 voting age populations, there couldn't be any backsliding, and that the new districts would have to be at least that favorable. What do you understand the phrase 'majority-minority' to mean?

Pls.' Reply Br. at 9, ECF NO. 102. Plaintiffs' reply brief *omits* what followed:

> MR. DUNN: Objection to the basis that you're trying to recall testimony from the witness that results from Mr. Hebert's private conversation. *But the witness can assume the representation of Mr. Hebert's public comment, if that's sufficient to answer the question, go ahead and do so, without conceding that is the representation that Mr. Hebert made.*

Defs.' App. 478 (emphasis added). As it turns out, like plaintiffs' counsel's hide-the-ball reordering of the deposition questions discussed above, plaintiffs' counsel's characterization of Mr. Hebert's public testimony was flat wrong: Mr. Hebert correctly observed the fact that by 2010, three of the four benchmark districts had naturally become majority-minority. Pls.' App. 69. Then Mr. Hebert *correctly* recited for the Commission the legal task for complying with Section 5: "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 a legal term." Pls.' App. 70. Mr. Hebert never said that minorities had attained *effective opportunities* in all three of the benchmark majority-minority districts; he didn't give a number at all—he simply stated what the analytical task was. And defendants' preclearance submission was clear that only *two* precincts (Precincts 3 and 4) were treated as Section 5 ability to elect districts that were required to be maintained. Pls.' App. 93.

Contrary to plaintiffs' argument in their reply brief, it should therefore be completely clear why Mr. Angle may have misinterpreted the subsequent questions. First, plaintiff's counsel had misrepresented the public record to Mr. Angle. Second, Mr. Angle's counsel, Mr. Dunn, preserved an objection on the record to plaintiffs' counsel's characterization of Mr. Hebert's statement, but

informed Mr. Angle that he could "assume the representation of Mr. Hebert's public comment . . . without conceding that is the representation Mr. Hebert made." Defs.' App. 478. This is hardly a sham attempt to change testimony, but rather a good faith effort—fully endorsed by Rule 30(e)—to ensure the record is correct.

V. Defendants Are Entitled to Summary Judgment on Count III of Plaintiffs' Complaint.

As defendants explained in their opening brief, Count III of plaintiffs' complaint is foreclosed by binding precedent, including Fifth Circuit precedent making clear that white voters can raise Section 2 claims, establishing the elements of Section 2 claims, affirming that Section 2 remains in effect nationwide, and summarily affirming the constitutionality of Section 2. *See* Defs.' Br. at 45 (citing cases).

Plaintiffs state that they *agree with defendants*, but do not trust that defendants actually believe this. *See* Pls.' Br. at 22-23. This makes no sense. To be clear, defendants do not argue that white voters are *precluded* from alleging Section 2 claims. They merely allege that *these plaintiffs* fail to satisfy the elements of a Section 2 claim. Because there is no dispute as to the constitutionality of Section 2, defendants are entitled to summary judgment on Count III of plaintiffs' complaint.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment should be granted.

Dated this 5th day of January 2018.

Respectfully submitted,

BRAZIL & DUNN
/s/ Chad W. Dunn

Chad W. Dunn
SBN 24036507
4201 Cypress Creek Pkwy., Suite 530 Houston, Texas77068
Telephone: (281) 580-6310
chad@brazilanddunn.com

J. Gerald Hebert (*Pro Hac Vice*)
VA Bar No. 38432
J. Gerald Hebert, PC
191 Somervelle Street, #405
Alexandria, VA 22304
(703) 628-4673
hebert@voterlaw.com

Rolando Leo Rios
SBN: 16935900
Law Office of Rolando L. Rios
115 E. Travis, Suite 1645
San Antonio, Texas 78205 Telephone: (210) 222-2102
Facsimile: (210) 222-2898
rrios@rolandorioslaw.com

Peter L. Harlan
SBN: 9011300
Dallas County District Attorney's Office
Frank Crowley Courts Building 133 N.
Riverfront Blvd., 11th Floor Suite C4-2LB 19
Dallas Texas 75207
Telephone: (214) 653-3690
Facsimile: (214) 653-2899
pharlan@dallascounty.org

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January 2018, 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*