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

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

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

U.S. Supreme Court

U.S. Courts of Appeals

VRA Three-Judge-Paneled United States Trial Courts

U.S. District Courts

State Supreme Courts

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

The Plaintiffs submit this reply brief in support of their Motion for Summary Judgment (the "Plaintiffs' MSJ").[1]

I. SUMMATION

In the Plaintiffs' MSJ, the Plaintiffs documented how the record evidence establishes that the Defendants allowed race to predominate over all traditional redistricting criteria in crafting both the map subject to challenge in this litigation (the "Enacted Plan" or the "EP"), and all four of the Commissioners Court Districts within it (the "CCDs" and each a "CCD"). On this basis, the Plaintiffs asked the Court to grant summary judgment for them on their first-advanced constitutional claim (the "First Equal Protection Claim").

In their response to the Plaintiffs' MSJ (the "Response"), the Defendants: (a) again argue, wrongly, that the Plaintiffs' never pled a *Shaw*-style constitutional claim in this action;[2] (b) again advance arguments against the Plaintiffs' standing to pursue the First Equal Protection Claim totally at odds with binding authority;[3] (c) misstate the relevant law governing such an action, primarily by mischaracterizing their burden in advancing a defense to the First Equal Protection Claim that they never pled (so waived); and (d) mischaracterize the uncontested record to allege both that it leaves the Plaintiffs unentitled to judgment, and to argue that Defendants have met their burden of proving the applicability of their waived defense for some CCDs.[4]

None of that creates a genuine, material issue of fact. The law and record are clear: the

---

[1] Dkt. 88.

[2] *Shaw v. Reno*, 509 U.S. 630 (1993).

[3] The Plaintiffs have already briefed this issue in both the Plaintiffs' MSJ Brief (Dkt. 89) and in their Brief in Support of their Response to Defendants Motion for Summary Judgment (Dkt.98). As the Response adds no new argument against the Plaintiffs' clearly-established standing, merely repeating the Defendants' fabrication of a test utterly foreign to *Shaw*-style constitutional claims, the Plaintiffs do not address standing, again, in this Reply. Instead, they incorporate their previous briefing of the issue into this Reply, by reference.

[4] Dkt. 95.

Defendants' blustering notwithstanding, the Court can and should grant summary judgment for the Plaintiffs on the First Equal Protection Claim.

II. ARGUMENT

The Court should grant the Plaintiffs summary judgment on the First Equal Protection Claim, because: (a) the First Equal Protection claim asserts a *Shaw*-style claim; (b) the Plaintiffs have met their burden of proving the factual predicate for that claim; and (c) the Defendants have neither advanced a legal counter-argument, nor produced any admissible evidence giving rise to the kind of material factual issue that would justify delaying such a ruling.

The relevant law is both clear and clearly misstated in the Response. The Defendants' own authority demonstrates the sufficiency of the Plaintiffs' pleadings to advance the First Equal Protection Claim. The Defendants' inability to accept Supreme Court precedent and the clear language of Federal Rule of Civil Procedure 8 ("Rule 8") does not spare them the result of their waiver of any affirmative defense. Their willful misreading of *Bethune-Hill* and *Cooper* transforms neither case's holding into a shield for jurisdictions relying on the advice of counsel.[5]

Nor have the Defendants identified data that justify a denial of summary judgment. Simply put, the admissible evidence before the Court includes *nothing* that either: (a) calls into question the predominance of race in the crafting of the CCDs; or (b) meets the burden the Defendants would face under strict scrutiny, had they not waived the chance to try to satisfy it.

A. FIRST EQUAL PROTECTION CLAIM INCLUDES A *SHAW*-STYLE CONSTITUTIONAL CLAIM

In the Response, the Defendants contend that the Plaintiffs never pled that race

[5] *Bethune-Hill v. Va. St. Bd. of Elections*, 580 U.S. ___; 137 S.Ct. 788 (2017); *Cooper v. Harris*, 581 U.S. ___; 137 S.Ct. 1455 (2017).

predominated in the crafting of the EP's four CCDs.[6] This argument is no more valid now than when the Defendants advanced it in their own summary judgment motion.[7] As the Plaintiffs previously briefed (and incorporate by reference, herein), the Defendants' argument ignores the text of exactly the case they rely on as their authority for this contention.[8] The 3-judge panel in *Perez* held that a complaint making, beat-for-beat, the same allegations the Plaintiffs made in this litigation "clearly pleaded a *Shaw*-type racial gerrymandering claim."[9] The Defendants' comparison of other language in the Plaintiffs' live complaint to allegations advanced by other parties in *Perez* is irrelevant. There is no grey area: the Plaintiffs pled a *Shaw*-style claim.

B. ADMISSIBLE EVIDENCE ESTABLISHING THAT RACE PREDOMINATED IS UNCONTESTED

1. Actual Meaning of "Predominance" in This Context

The Defendants admit in the Response that the Plaintiffs' burden in litigating a *Shaw*-style claim is solely to prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district,"[10] but they ignore the definition of "predominance" the Supreme Court has established for this context: race predominated if it was the "dominant and controlling rationale" for the lines drawn and served as "the criterion that, in the [government]'s view, could not be compromised[,]" leaving "race neutral criterion" to "c[o]me into play only after race-based decision[s] had been made."[11]

2. Propriety of Summary Judgment on Issue of Predominance

The Response insists that a material fact issue arises from the Court's need to carefully weigh opposing circumstantial evidence concerning preponderance. While there are cases where

---

[6] Response, pp. 10-15.
[7] Dkt. 93, pp. 40-41.
[8] Dkt. pp. 16-18.
[9] *Perez v. Abbott*, 253 F.Supp.3d 864, 930-33 (Tex. W.D. 2017).
[10] Response, p. 15 (quoting *Cooper*, 137 S.Ct. at 1463-64).
[11] *Bethune-Hill*, 137 S.Ct. at 798.

predominance could only be determined from a comparison of all the circumstantial evidence;[12] where clear evidence demonstrates that racial considerations predominated, courts grant summary judgment.[13] The "formidable task" of weighing circumstantial evidence elsewhere has no bearing in a case where direct evidence conclusively establishes that racial considerations were the "dominant and controlling" "criteri[a] that … could not be compromised[.]"

3. Uncontested Proof of Racial Predominance

a. Defendants' Renewed Admission that Race Predominated in Crafting CCDs 3 and 4

The Response flatly admits that race was "the criterion that … could not be compromised" in the crafting of CCDs 3 and 4, saying: "race was necessarily considered in the drawing of [CCDs] 3 and 4 because compliance with the Voting Rights Act [(the "VRA")] required it[.]"[14] Under *Cooper*, that's what it means for race to have been the predominant criteria. Unless: (i) the Defendants are entitled to pursue an affirmative defense; (ii) that affirmative defense applies; and (iii) the Defendants meet their burden of proving it, these CCDs are unconstitutional.

b. Admissions of Centrality of Race to Crafting of CCDs 1 and 2

The Defendants have not challenged, and cannot challenge, the text of the Criteria Order (as defined in the Plaintiffs' MSJ), which, as the Response notes, speaks for itself. Dallas established the set of goals for the crafting of CCDs that "shall be complied with in the following order of priority."[15] Dallas expressly ordered "the configuration of [CCDs] that provide racial

[12] *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).
[13] *Navajo Nation v. San Juan County*, 162 F.Supp.3d 1162, 1165, 1172, and 1183 (D. Utah 2016); *Diaz v. Silver*, 978 F.Supp. 96, 117 (E.D.N.Y. 1997).
[14] Response, p. 19.
[15] Criteria Order at Plaintiffs' MSJ Appendix, APP 66.

and language minorities the opportunity to elect their candidate of choice where their populations are sufficiently large and compact" to outrank all factors other than population equalization.

The Defendants have not challenged, and cannot legitimately challenge,[16] Mr. Hebert's testimony clarifying, on behalf of Dallas, that:

1. This criterion required Dallas to "look at the opportunities that minority voters have under the [previous decade's] map and then we have to compare those opportunities under the proposed map. We can't have any slippage or backsliding or what's called retrogression…."[17]
2. The relevant metrics included that "three of the four districts" in the previous decade's plan were "majority[-]minority in voting [age] population [("VAP")]. That is to say, on the course of the decade, [CCD] 2, [CCD] 3 and [CCD] 4 have a minority of Anglo voting age population…."[18]
3. Dallas viewed the criterion to be satisfied, because: "[CCD] 3 will reliably continue to elect an African American candidate of choice[, CCD] 4 will reliably elect the candidate of choice of Latino voters[, and the predecessor to CCD 1] is a new district that is now majority-minority and will reflect obviously the demographic changes in the last decade."[19]

If the express terms of the Criteria Order affirmatively subordinated all other *listed* considerations (except compliance with the 1-man-1-vote principle) to this race-based criterion,

[16] While the Defendants admit that these statements "speak for themselves[,]" they nonetheless seek in the Response to recharacterize them to avoid their plain meaning. The Plaintiffs note that they filed their Cross-Motion to Disqualify J. Gerald Hebert from Taking an Active Role Before the Court in the Presentation of this Matter (Dkt. 80) in the, now clearly justified, expectation that the Defendants would take exactly this tact.
[17] May 10, 2011 Transcript at Plaintiffs' MSJ Appendix, APP 69 - APP 70.
[18] *Id*.
[19] May 17, 2011 Transcript at Plaintiffs' MSJ Appendix, APP 78.

then it should go without saying that the Criteria Order necessarily subordinated any *unlisted* considerations even further. And the Criteria Order included no language authorizing consideration of the partisan impact of the EP, much less prioritizing it ahead of racial factors.

The Defendants have not challenged, and cannot challenge, Mr. Angle's testimony that "the population makeup of all these districts mattered" to how he crafted them.[20] They have not challenged, and cannot challenge, that the demographics that "mattered" included giving CCD 2 a VAP that was 64% Anglo.[21] They have not challenged, and cannot challenge, that the demographics that "mattered" included giving CCD 1 a 32.9% Anglo VAP and a VAP that was 62.1% African-American-or-Hispanic.[22]

The Defendants have not challenged, and cannot challenge, Mr. Hebert's admission in Dallas's DOJ submission that "…members of the Commissioners Court considered the creation of a second Hispanic opportunity precinct[, but] discovered that too much Hispanic population had to be taken from [CCD 4, potentially] put[ting] Hispanics in [CCD] 4 at risk of losing the ability to elect the candidate of their choice[.]" They have not challenged, and cannot challenge, the same document's admission that Dallas responded by deciding "that a new district[, CCD 1,] could be configured [to be] 48.0% Hispanic and 21.2% Black[,]" so giving "[m]inority voters … the opportunity to elect their candidate of choice…."[23] This language is plain. It clearly sets out the baldly racial genesis of CCD 1, demonstrating the racial factors the Commissioners Court began with in crafting CCD 1, as well as the reasoning behind their eventual begrudging acceptance of the actual racially-driven result.

[20] Angle Transcript at Plaintiffs' MSJ Appendix, APP 37.
[21] For EP CCD 2's Anglo VAP percentage, see Angle Report at Plaintiffs' MSJ Appendix, APP 57.
[22] For EP CCD 1's racial VAP percentage, see *Id*.
[23] DOJ Submission at Plaintiffs' MSJ Appendix, APP 96 – APP 97.

Finally, they cannot avoid the simple logical necessity that if CCD 1, CCD 3, and CCD 4 were crafted on the basis of race, then the creation of the remaining district, CCD 2, must have also been driven by race. When the Response asserts that there is no case law recognizing this syllogism, they are (again) wrong. In *Navajo Nation*, the court faced a similar fact pattern: a racially gerrymandered county commission map, which targeted a minority race and packed it overwhelmingly into a single district; the *Navajo Nation* court found that racial considerations predominated in the drawing of the packed district and recognized that "[t]he County Commission in this case is composed of only three election districts[,]" with the unconstitutional one "bordering the other two."[24] "Under these circumstances, unlike in statewide schemes, racially gerrymandering a single district is functionally equivalent to racially gerrymandering the scheme as a whole. Indeed [the unconstitutional district] cannot be redrawn without necessarily impacting at least one, and more likely both, of the" remaining districts. Accordingly, the court found that the unconstitutional racial gerrymander of one district "requires a remedy directed to the entire districting scheme."

c. Irrelevance of Ordering, Given Uncontested Admissions

Instead of addressing these points, the Defendants spend much of the Response carping over the difference between the order in which Mr. Angle swore to have drawn the CCDs in his expert report and the order identified in the Plaintiffs' MSJ. The Plaintiffs contend that the Plaintiffs' MSJ ordering is exactly the ordering Mr. Angle testified to in his deposition.[25] But even if they are wrong, the difference is immaterial: whatever the order in which Mr. Angle drew these districts, "the population makeup of all these districts mattered" to how he crafted them,

[24] *Navajo Nation*, 162 F.Supp.3d at 1183 n. 126.
[25] For Mr. Angle starting with CCD 4, see Angle Transcript at Plaintiffs' MSJ Appendix, APP 31. For Mr. Angle next drawing CCD 3, see *Id*. at APP 34. For Mr. Angle continuing to CCD 1, see *Id.* at APP 38 – APP 39.

and partisanship was not a topic the Commissioners Court allowed him to let override racial considerations.[26] Accordingly, it does not matter whether the Plaintiffs correctly understood Mr. Angle to testify to a different order at his deposition than the one he wrote in his expert report. That dispute does not reach any fact material to this litigation.

d. Inadmissibility of Sham Errata

i. Attempted Reversal of Testimony

Beyond their belaboring of the order in which Mr. Angle drew the CCDs, the Defendants attempt to create a fact issue concerning racial predominance by submitting with the Response an Errata Sheet for Matt Angle's deposition transcript (the "Angle Errata"), executed on December 11, 2017, while the Plaintiffs' MSJ was pending.[27] The Angle Errata makes only one relevant alteration to Mr. Angle's testimony, changing the single word "yes" to the single word "no" at page 49, line 21 of Mr. Angle's deposition transcript. Mr. Angle purportedly justifies this change because he "misinterpreted the question and believed [the Plaintiffs'] counsel was asking if following the redistricting criteria *resulted* in three majority-minority districts in the 2011 plan[,]" rather than asking if he *understood* the Criteria Order to *require* the drawing of 3 such districts.[28]

For context, the Plaintiffs highlight the entirety of the discussion of the Criteria Order's second provision, starting on page 46 of Mr. Angle's deposition transcript.[29] The relevant portion reads as follows:

> Q: …[i]n trying to comply with that instruction, what did you understand it to mean?

[26] *See* Plaintiffs' MSJ Appendix, at APP 39 ("Q: … we've agreed the Court ordered you to comply with these criteria, yes? A: Correct. Q: And that partisanship isn't on it? A: That's correct.").
[27] A copy of the Angle Errata was submitted with the Response's Appendix at APP 1 – APP 2. Dkt. 96.
[28] *Id*. (emphasis added).
[29] Defendants' MSJ Appendix, at APP 478 – APP 479.

A: Well, again, it was to … configure to make sure that the – that African-American and Hispanic and other protected classes were covered, and, again, under the guidance of counsel.

Q: Mr. Hebert testified publicly on May 10th, 2011, that since three out of the four of the previous decade['s] 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?

…THE WITNESS: "Majority-minority" would be that the African-American, Hispanics, and other minorities make up more than 50 percent of the population.

…Q: What do you understand racial and language minorities to mean?

A: Black, Hispanic, and other language minorities.

Q: Thank you. Did you understand that criterion to require the drawing of at least three districts with a majority-minority voting age population?

A: What I understood it to mean was that we were to avoid retrogression, as it was defined to me.

Q: Okay. That didn't answer my question. I'm going to ask it again. We can do this either of two ways. You can tell me what you thought "retrogression" meant in this context, or you can tell me whether you understood that that criterion required the drawing of three majority-minority, as you just defined the term, Commissioners Court districts?

…THE WITNESS: Can you repeat the question?

…Q: Okay. Did you understand criterion number 2 to require the drawing of at least three majority-minority Commissioners Court districts measured by voting age population?

A: Yes.

Q: Since you raised the issue of retrogression, what did you understand that to mean?

…THE WITNESS: I would believe it to be a map that would have lessened the [ability] of black and Hispanic voters to elect their candidate of choice.

> …Q: Okay. I think this is clear, but I just want to make sure. What racial and language minorities did you try to assure the opportunity to elect their candidates of choice wherever they were significantly large and compact?
>
> A: African-Americans and Hispanics.
>
> Q: And in how many districts did you determine that was possible?
>
> A: Three.

ii. Plaintiffs' Objection to Consideration of Sham Reversal

The Plaintiffs object to the Court's consideration of this portion of the Angle Errata. Courts have developed the Sham Issue of Fact Doctrine expressly to deal with this kind of illegitimate reversal of sworn testimony to contest a summary judgment motion. Originally developed to address sham testimony presented in affidavits, the doctrine recognizes that a "party cannot 'defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony."[30] Courts have extended the doctrine to also address the manufacturing of false issues-of-fact while a summary judgment motion is pending through the reversal of deposition testimony through a "correction" to a transcript.[31]

A court may only allow a party to reverse deposition testimony while a summary judgment motion is pending, "if there are *sufficient reasons given for the change in testimony*, if the proposed change in testimony reflects the original testimony, [or if] 'other circumstances

[30] *Rolls-Royce Corp. v. HEROS, Inc.*, 2010 U.S. Dist. LEXIS 119381, *18 (N.D. Tex. 2010, Fitzwater, J.) (citing *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996) (citing, in turn, *Thurman v. Sears, Roebuch & Co.*, 952 F.2d 128, 137 n.23 (5th Cir. 1992); *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984))).

[31] *EBS, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 267-70 (3rd Cir. 2010) ("a party may not generate from whole cloth a genuine issue of material fact … simply by retailoring sworn deposition testimony to his or her satisfaction [through submission of an errata sheet, without] sufficient justification."); *Trout v. FirstEnergy Gen. Corp.*, 338 Fed. Appx. 560, 565 (6th Cir. 2009) (party "not entitled to benefit from her corrected deposition testimony[,]" because, "[i]f that were the case, one could merely answer the questions with no thought at all[], then return home and plan artful responses… A deposition is not a take home examination."); *Thorn v. Sunstrand Aero. Corp.*, 207 F.3d 383, 389 (7th Cir. 1999) ("…by analogy to the cases which hold that a subsequent affidavit may not be used to contradict the witness's deposition … a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in transcription, such as dropping a 'not.'"); *Magee v. Securitas Sec. Servs. USA, Inc.*, 2016 U.S. Dist. LEXIS 112256, *17-*18 (S.D. Miss. 2016) (rejecting reversal of material deposition testimony proposed when summary judgment motion was pending).

satisfy the court that amendment should be permitted."[32] Purported reasons for the change are sufficient only if they provide "a plausible explanation for the conflict."[33]

Mr. Angle's contends that, despite several pages of lead-up, all focused on his understanding of what the Criteria Order *required him to do*, he nonetheless "misinterpreted the question and believed [the Plaintiffs'] counsel was asking if following the redistricting criteria *resulted* in three majority-minority districts in the 2011 plan." (emphasis added). He says this, despite the fact that: (a) the testimony he would now take back triggered the asking of exactly the follow-up question he now claims to have believed he had just answered -- how many such districts he eventually determined it was possible to draw; and (b) neither he, nor his counsel objected to that follow-up question having been previously asked and answered.

Mr. Angle's explanation is implausible. The Angle Errata attempts a strategic reversal of sworn testimony, while the Plaintiffs' MSJ is pending, in order to create a material issue of fact. The Court should refuse to reward that bad-faith abuse of Federal Rule of Civil Procedure 30, and exclude the Angle Errata from consideration in the record.

e. No Other Showing of Sufficient Evidence to Give Rise to Genuine Issue of Material Fact Concerning CCD 2

The only other issue the Defendants raise in contesting whether race predominated in the crafting of CCD 2 is their assertion that partisanship, not race, played the dominant role. As set out above, the Criteria Order *barred* partisanship from overriding racial considerations.

Even if it hadn't, the Defendants cite *no admissible evidence* that this was the case – instead relying solely on Mr. Angle's contention that former Commissioner Dickey "expressed a

[32] *Hackett v. UPS*, 2017 U.S. Dist. LEXIS 131260, *11-*12 (S.D. Tex. 2017) (emphasis added).
[33] *Baer v. Chase*, 392 F.3d 609, 624 (3rd Cir. 2004) ("[A] party may not create a material issue of fact to defeat summary judgment" through reversal of "his or her own sworn testimony without demonstrating a plausible explanation for the conflict.")

desire that there be a 'conservative' or 'Tea Party' district[.]"[34] The Plaintiffs object to the Court considering this assertion -- it is plain hearsay: an out-of-court statement, of another, advanced by Mr. Angle for the truth of the matter asserted.[35] Accordingly, Federal Rules of Evidence 801 and 802 bar the admission into evidence of Mr. Angle's contention of what Ms. Dickey once said.[36] Without that, the Response raises no remaining disputes concerning the centrality of race to the design of CCD 2 (nor does the record, as the Defendants never produced any other evidence that Ms. Dickey made any such request).

f. No Other Showing of Sufficient Evidence to Give Rise to Genuine Issue of Material Fact Concerning CCD 1

The only other issue the Defendants raise in contesting whether race predominated in the crafting of CCD 1 are statements of Commissioners Price and Cantrell, allegedly reflecting partisan intent. Again, the Criteria Order *barred* partisanship from overriding racial considerations. Even if it had not, the cited quotations do not prove (or even suggest) that party, rather than race, drove the crafting of CCD 1.

At the first hearing on what became the EP, Commissioner Price, indeed, described what became CCD 1 as "a safely, what we call a Democratic district[.]"[37] But this statement did not stand alone. It wasn't even a full sentence, instead completing the thought that began: "Precinct 2 of this configuration has a Hispanic population at 50% and an African American population, combined, with over 71% and while it's a safely, what we call a Democratic district…."[38]

---

[34] Defendants' MSJ Appendix, at pp. 9-10. See also, Response Appendix, p. 1.
[35] Federal Rules of Evidence 801.
[36] Federal Rules of Evidence 703 does not change this result, because this portion of Mr. Angle's sworn testimony, while included in an expert report, is not expert testimony. It is part of an allegedly factual recital of what Mr. Angle did *prior* to his engagement as an expert in this litigation, rather than an opinion offered by Mr. Angle, as an expert, on the basis of any identifiable data, analyzed according to identifiable principles or methods.
[37] Plaintiffs' MSJ Appendix, APP 72.
[38] *Id.*

Nothing in this statement suggests that party, rather than race, drove the crafting of CCD 1. Nothing in this statement contradicts the Criteria Order's prioritizing of racial concerns over partisan ones. Nothing in it negates the DOJ submission's clear statement that the Commissioners Court hoped to turn CCD 1 into a Hispanic majority district, and settled for a Hispanic and African American coalition district only out of necessity. No, Commissioner Price merely states he is also aware of a partisan impact from the district as drawn. That's not enough: a "plaintiff succeeds … even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones."[39]

Commissioner Cantrell's statement works similarly. The Defendants again interpret a partial statement, stripped of its predicate, as an admission that CCD 1 was driven by "partisan goals[.]" But the full statement is no such admission. Here is the full statement the Defendants chose to excerpt:

> You know when you look at the ideal precinct numbers, 592,035, of all the precincts, [CCD 1's predecessor] was … at least [half] white, by population of anyone, is maybe 1.6 percentage, 9,691 actual residents in that particular configuration. I believe, and certainly that there is a way, well, let me say this, under the current configuration, the new numbers in the census[,] it shows that is a 42.7% Anglo, 32.6% Hispanic, and 17.9% Black and a total of 50. The number that I see before this one shows 50.0% but it's actually 50.1% Black and Hispanic. I do think there is a way to draw the map where you have a higher percentage of Black and Hispanic population that makes it a marginal district with regards to Democrat vs. Republican, but you could also add in, some population to that, that's why I voted no. 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

[39] *Cooper*, 137 S.Ct. at 1464 n. 1 (citing *Bush v. Vera*, 517 U.S. 952, 968-70 (1996) (holding that race predominated when a legislature spread "the Black population" among districts to "protect[ ] Democratic incumbents); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("use of race as a proxy" for "political interest[s]" is "prohibited")).

> 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."[40]

The Defendants offer no explanation of why Commissioner Cantrell began his statement with a recitation of the demography of the benchmark district CCD 1 replaced. They also offer no explanation of why he opined that "I do not believe that [it] is mandated under the Voting Rights Act to create a coalition district in order to move forward under the Voting Rights Act" – an inclusion that only makes sense against the backdrop, clearly established by Commissioner Cantrell's demographic recitation and Mr. Hebert's introduction of the proposed map, that CCD 1 was drawn on the basis of race to assure the control of CCD 1 by an ethnic coalition of African Americans and Hispanics. Instead, the Defendants focus on Commissioner Cantrell's closing statement that the Commissioners Court's partisan majority had the power to pass the EP over his opposition, regardless of the wrongness of their legal argument or their admitted use of race to create CCD 1.

Again, nothing in Commissioner Cantrell's statement suggests that party, rather than race, drove the crafting of CCD 1. Nothing in it contradicts the Criteria Order's prioritizing of racial concerns over partisan ones. Nothing in it negates the DOJ submission's clear statement that the Commissioners Court hoped to turn CCD 1 into a Hispanic majority district, and settled for a Hispanic and African American coalition district only out of necessity. Commissioner Cantrell's admission that he lacked the votes to stop the majority from acting is nothing more than that: a concession to reality, not an explanation of others' motives.

[40] Plaintiffs' MSJ Appendix, APP 74 – APP 75.

C. DEFENDANTS WAIVED CHANCE TO TRY TO SATISFY STRICT SCRUTINY

The Defendants misstate the law governing how strict-scrutiny functions. They assert that a government's justification of an otherwise unconstitutional use of race as one narrowly-tailored to meet a compelling governmental interest is not an affirmative defense, going so far as to claim: (a) an "absence of any court ruling on the topic[;]" (b) that they should be excused for ignoring the settled law concerning Rule 8, since it's just "formalism[;]" and (c) that the Plaintiffs would suffer no prejudice from the Defendants raising a "good cause" defense at this stage of litigation. The first is wrong, ignoring both (recent, on-point) Supreme Court authority, written off as colloquialism, and clear-law defining an affirmative defense; the second demeans the Federal Rules of Civil Procedure, without analysis or justification; the third is asserted in passing without explanation and is clearly self-refuting, given the late stage of this case.

"Under Rule 8(c)(1), a party must affirmatively state any avoidance or affirmative defense, or it waives the defense."[41] While "Rule 8(c)(1) identifies certain affirmative defenses," "the list is not exhaustive."[42] When "defendants … do not merely attack or rebut one or more of the prima facie elements of [a] claim[, but r]ather … assert matters of confession and avoidance" (meaning that "they acknowledge that all of the elements of [the] claim are met, but they assert exemptions from liability"), such arguments "are affirmative defenses that must be pleaded, as Rule 8(c)(1) requires."[43]

When the Response alleges that the Defendants had "good reason" to believe that the VRA compelled their use of race to craft some of the CCDs in the EP, it "do[es] not … attack or

[41] *Sun River Energy, Inc. v. McMillan*, 2014 U.S. Dist. LEXIS 135086, *8-*9 (N.D. Tex. 2014, Fitzwater, J.) (citing *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999)).
[42] *Sun River Energy, Inc.*, 2014 U.S. Dist. LEXIS at *9 (internal citations omitted).
[43] *Id*. at *10.

rebut" the predominance of race; instead, it raises a "matter[] of confession and avoidance" in order to exempt Dallas from liability for the Constitutional violation. Accordingly, it is unsurprising that Justice Kagan described *exactly* this argument as a "defense" on which governments hold "[t]he burden"[44] – that exactly squares with the traditional definition of "affirmative defenses."[45] Given this context, the Defendants' contention that Justice Kagan used the term "defense" "in the colloquial sense[,]" apparently because she is unaware that "defense" is a term of art, is shockingly dismissive. Justice Kagan should be presumed to have meant exactly what she wrote, both because *she is a Supreme Court Justice*, and because her description is entirely consistent with long-settled law.

"Ordinarily, under … the Civil Rules, a[n affirmative] defense is lost if it is not included in the answer[.]"[46] The Defendants contend that, despite the clear language of Rule 8, they should be forgiven their waiver of affirmative defenses, because such failure is "excusable" "in a first response" where there is "no evidence of prejudice.[47] Further, they contend this is justified, because, allegedly, "the law on the topic" of affirmative defenses is "not clearly settled."

---

[44] For description as a defense, see *Cooper*, 137 S. Ct. at 1469 and 1473; for allocation of burden on this "defense[,]" see 1464.

[45] See also, *Veith v. Jubelirer*, 541 U.S. 267, 297 n.10 (2004, Scalia, J.) (recognizing as creating an "affirmative defense[,]" despite dissent's avoidance of the term, the dissent's proposed rule assigning defendant burden following plaintiff-challenging-redistricting's initial evidentiary showing); *Rocky Mt. Christian Church v. Bd. of County Comm'rs*, 605 F.3d 1081 (10th Cir. 2010) (analyzing whether an "affirmative defense" such as the "strict scrutiny defense" applies to a claim for violation of the Religious Land Use and Institutionalized Persons Act, as it would to a claim under the First Amendment); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 851 (Cal. 1997) (holding that when plaintiff makes required showing on constitutional claim, "[o]nly then does the burden shift to the [government] to plead and prove 'as an affirmative defense, that the [otherwise unconstitutional action] is justified[.]'") (internal citation omitted).

[46] *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004) (citing 5A C. Wright & A. Miller, Federal Practice and Procedure § 1347, p. 184 (2d ed. 1990)); Fed. R. Civ. P. 8.

[47] Response, pp. 18-19 (citing *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009)).

Pasco instructs differently. According to the *Pasco* court, "[a]n affirmative defense is not waived" only "if the defendant 'raised the issue at a pragmatically sufficient time[.]"[48] The Defendants fail to disclose that, in *Pasco*, the Court found the affirmative defense to have been raised "at a pragmatically sufficient time[,]" in part, because the defendants asserted it "two months before discovery was due and six months before the pretrial conference."[49] Here, the deadline for parties to amend their pleadings passed more than 100 days ago (in September 2017), discovery closed more than a month ago (in November 2017), and the Court is scheduled to hold a pre-trial conference in only four (4) months. They similarly fail to disclose the other factor the *Pasco* court found salient to the timeliness of the *Pasco* defendant's raising of its defense – that "the delay resulted from the lengthy procedural history of this case (including numerous stays, which totaled twenty-nine months while the first two appeals were pending)."[50] Here, no comparable procedural justification exists for the Defendants' failure to raise the possibility of a "good reason" defense over the nearly three-years since this case was filed.

The Defendants simply did not assert an affirmative defense, without any legitimate justification.[51] The Defendants delayed their disclosure of an intent to pursue an affirmative defense for years, only disclosing it on the eve of trial. This delay obviously prejudices the Plaintiffs' ability to challenge the Defendants' assertions at trial (if there is one).

---

[48] *Id*.
[49] *Id*.
[50] *Id.*
[51] The Defendants' contention that the "law on the topic" is "not clearly settled" does not qualify. *Sun River Energy, Inc.*, 2014 U.S. Dist. LEXIS at *12 (holding that a failure to plead affirmative defenses (or seek leave to do so) "by the court-ordered deadline" due to a mistaken belief that "what they raised were, in fact, [not] affirmative defenses" "constitutes mere inadvertence, which is 'tantamount to no explanation at all[.]'"). Legal error does not justify leniency.

D. EVEN IF DEFENDANTS HAD NOT WAIVED CHANCE TO TRY TO SATISFY STRICT SCRUTINY, THEY HAVE PRODUCED NO EVIDENCE TO MEET THEIR BURDEN IN SATISFYING IT

1. To the Extent in Play: Actual Law Governing the Affirmative Defense

After ignoring the applicable rule for what Plaintiffs must show to prevail on the First Equal Protection Claim and conjuring an argument that they are still entitled to pursue an affirmative defense they never pled, the Defendants misstate the law governing that defense. They cite to *Bethune-Hill* to contend that they may have had "good reason" to use race as the predominant factor in drawing the CCDs, without showing that such use "was 'actually necessary' to avoid a statutory violation, so that, but for its use of race, the [government] would have lost in court."[52] According to the Defendants, this means that "the Plaintiffs' description" of the applicable legal standard "is incorrect" as the Supreme Court allegedly rejected the argument 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."

But the Plaintiffs have not argued that the Defendants must have been *right* in 2011 to conclude that the VRA would compel the drawing of the existing CCDs; the Plaintiffs have argued that binding authority requires the Defendants to have relied on *some actual evidence* for their conclusion that it could have.[53] And in making this argument, the Plaintiffs have accurately stated the Supreme Court's holding in *Cooper*, released two months after *Bethune Hill* and further clarifying its holding. In *Cooper*, Justice Kagan held that "[i]f a [government] has good

[52] *Bethune-Hill*, 137 S.Ct. at 801.

[53] The Plaintiffs also argued in their initial brief that: (a) the Supreme Court has never held VRA compliance to qualify as a compelling interest sufficient to satisfy strict scrutiny; and (b) purported compliance with the VRA *cannot* satisfy strict scrutiny, as an unconstitutional plan cannot have been legitimately required by statute. Without prejudice to these arguments, in the body of this brief, the Plaintiffs describe the legal rules the Supreme Court has proscribed for what a defendant must prove to advance a VRA defense, when it has assumed the propriety of that defense.

reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that §2 requires [the use of race in drawing districts]. But if not, then not."[54] She continued to hold that a government would only have such "good reason to believe" that the VRA "demands such race-based steps" if the government "carefully evaluate[d] whether a plaintiff could establish the *Gingles* preconditions[.]"[55] She scrutinized the record for evidence that the relevant government *had* considered, before enacting the districts at issue, actual data to support its conclusion that each of the *Gingles* factors could have been satisfied; while repeating *Bethune-Hill*'s conclusion that the government need not be right, Justice Kagan continued to hold that "neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'etre* is a legal mistake."[56]

The Plaintiffs accurately reflected the Supreme Court's last holding: a government relying on the affirmative defense that the-VRA-made-them-do-it must show that, before acting, they analyzed actual evidence *for each element* of the VRA's relevant provision(s) in concluding that the VRA might do so.

2. Plaintiffs Have Contested That the VRA Could Justify Defendants' Use of Race in Crafting CCDs 3 and 4

According to the Response, the Plaintiffs "do not suggest" that the Defendants lacked "good reason" to believe that §5 of the VRA required the race-based drawing of CCDs 3 and 4. This is flatly wrong: the Plaintiffs' MSJ brief expressly denied that "§5 would have such an impact in a jurisdiction with an Anglo minority," reserving the Plaintiffs' "right to argue that any

[54] *Cooper*, 137 S. Ct. at 1470.
[55] *Cooper*, 137 S. Ct. at 1471.
[56] *Cooper*, 137 S. Ct. at 1472 (emphasis in original).

interpretation of it as having such an impact would have been unconstitutional legal error, rather than a good-faith basis for a use of race by the Defendants in crafting and passing the EP."[57]

And it would be legal error. The Supreme Court has been clear that "a racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect … whether or not the reason for the racial classification is benign or the purpose remedial."[58] It has been equally clear that the Equal Protection Clause does not protect the number of districts racial majorities get from a redistricting.[59] As *Cooper* teaches, "a racial gerrymander whose … *raison d'etre* is a legal mistake" is unconstitutional. To the extent the Defendants claim that CCDs 3 and 4 are legal because the VRA required the government elected by Dallas's majority-racial-coalition to use race in crafting CCDs for it to control, they admit legal error and cannot prevail.

3. Total Lack of Relevant Evidence to Support Waived Defense

More, the Plaintiffs' MSJ explicitly argued that "the Defendants neither produced any evidence that anyone contemporaneously performed any analysis of what [the VRA] required as they crafted and passed the EP, nor had any expert in this case assess any factor relevant to its applicability to the EP."[60] Remarkably, even in the Response, the Defendants fail to produce any such evidence.

Specifically, while the Defendants baldly assert in the Response that CCD 3 "had elected African American voters' candidate of choice (John Wiley Price) throughout the prior decade" and that the "2010 election of Elba Garcia, a Hispanic Democrat, over the Republican

[57] Plaintiffs' MSJ, p. 21, n. 96; see also n. 55, *supra*.
[58] *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996).
[59] *Sinkfield v. Kelley*, 531 U.S. 28, 28 (2000) (citing *U.S. v. Hays*, 515 U.S. 737, 746 (1995)).
[60] Plaintiffs' MSJ, pp. 20-21.

incumbent, coupled with the growing Hispanic population in the area … demonstrated that Hispanic voters had achieved their ability to elect their candidate of choice[,]" in each case they cite only to Dallas's DOJ pre-clearance submission in support of that contention.[61] But the DOJ submission includes no analysis of whose votes elected either Commissioner and no evidence that Dallas ever considered any such evidence in determining whether the relevant districts in the benchmark map, indeed, allowed either the African American or Hispanic communities the chance to elect their preferred candidates. Dallas's lawyer Gerald Hebert saying so to DOJ is not evidence of Dallas "carefully evaluat[ing] whether" the legal predicate was satisfied for §5 to apply to protect CCD 3 as an African American opportunity district or CCD 4 as a Hispanic one.

4. Irrelevance of "Packing" Datum in CCD 3, Because of Lack of Evidence of Satisfaction of Rest of *Gingles* Pre-Conditions and Utter Absence of Proof of "Narrow Tailoring" of Remedy Pursued by Defendants

Nor is the Defendants' argument that CCD 3 was "packed" with African Americans and Hispanics sufficient to satisfy strict scrutiny. "Packing" is a §2 concept, not a §5 one, and, as the Plaintiffs' MSJ highlights, the "Defendants have provided no evidence of any kind suggesting that, as of 2011, any" Dallas African American or Hispanic "could have satisfied *Gingles* 3 and proven that, barring unusual circumstances, [he or she] was unable to elect [his or her community's] preferred candidate to the Commissioners Court, due to the successful blocking vote of an opposing ethnic majority."[62] The Response continues the pattern, again failing to address in any way whether Dallas ever considered any evidence that could support (as *Cooper* requires) a conclusion that any African American or Hispanic residing within CCD 3 could meet

[61] Response, p. 20.
[62] Plaintiffs' MSJ, p.20.

that *Gingles* pre-condition. Without any such evidence of the Commissioners Court considering such data, the "packed" demography cited by the Defendants is legally meaningless.

Additionally, even if it were potentially sufficient to establish a "good reason" for Dallas to have used race in drawing the EP, it would still fail to justify the drawing of any eventual CCD in the EP, because the Defendants have produced no evidence of any kind that the drawing of any CCD was "narrowly tailored" to fix the alleged "packing" of CCD 3 in the benchmark plan. Without such evidence, Dallas's "unpacking" argument cannot satisfy strict scrutiny.

IV. CONCLUSION AND PRAYER

The Plaintiffs plainly asserted, in the First Equal Protection Claim, a *Shaw*-style claim for relief. The admissible evidence is undisputed and conclusively proves their entitlement to relief on that claim. The Response raises no genuine issue of material fact. It advances no legitimate legal arguments. Accordingly, it poses no obstacle to the Court's entry of summary judgment for the Plaintiffs on the First Equal Protection Claim. The Plaintiffs ask the Court to enter such judgment on that basis at this time.

Dated January 5, 2018

Respectfully submitted,

The Equal Voting Rights Institute
P.O. Box 12207
Dallas, Texas 75225
danmorenoff@equalvotingrights.org
www.equalvotingrights.org

/s/ Daniel I. Morenoff
Daniel I. Morenoff
Texas Bar No. 24032760
The Morenoff Firm, PLLC
P.O. Box 12347
Dallas, Texas 75225
Telephone: (214) 504-1835
Fax: (214) 504-2633
dan.morenoff@morenoff-firm.com
www.morenoff-firm.com

-AND-

Elizabeth D. Alvarez
Texas Bar No. 24071942
Law Office of Elizabeth Alvarez
555 Republic Drive Ste 200
Plano, Tx 75074
Telephone: (972) 422-9152
Facsimile: (972) 767-3655
E-mail: Elizabeth@alvareztxlaw.com

COUNSEL TO THE PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on January 5, 2017, I served a copy of this Brief in Support of Plaintiffs' Response to Defendants' Motion for Summary Judgment on all other counsel of record by electronic filing through the Court's CM/ECF system.

Counsel for Defendants

Chad W. Dunn
chad@brazilanddunn.com
Brazil & Dunn LLP

Rolando Leo Rios
rrios@rolandorioslaw.com
Law Office of Rolando L. Rios

J. Gerald Hebert
hebert@voterlaw.com
J. Gerald Hebert, P.C.

Peter L. Harlan
pharlan@dallascounty.org
Dallas County District Attorney's Office

Co-Counsel for Plaintiffs

Elizabeth D. Alvarez
Elizabeth@alvareztxlaw.com
Law Office of Elizabeth Alvarez

/s/ Daniel I. Morenoff
Daniel I. Morenoff