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

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| **ANNE HARDING,** | § | |
| **RAY HUEBNER,** | § | |
| **GREGORY R. JACOBS,** | § | |
| **MORGAN MCCOMB, AND** | § | |
| **JOHANNES PETER SCHROER,** | § | |
| | § | |
| **PLAINTIFFS,** | § | |
| | § | |
| **v.** | § | **CASE NO. 3:15-cv-00131-D** |
| | § | |
| **COUNTY OF DALLAS, TEXAS,** | § | |
| **CLAY LEWIS JENKINS, in his official** | § | |
| **capacity as County Judge of Dallas** | § | |
| **County, Texas; *et al.*,** | § | |
| | § | |
| **DEFENDANTS.** | § | |

**PLAINTIFFS' RESPONSE TO DEFENDANTS'**
**FIRST AMENDED MOTION TO DISMISS**
**AND BRIEF IN SUPPORT THEREOF**

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**FEDERAL RULES OF CIVIL PROCEDURE**

In the Memorandum in Support of Defendants' First Amended Motion to Dismiss (the "Defendants' Brief"),[1] the Defendants argue that the Court must dismiss all claims asserted against them due to alleged pleading failures. They rely on both Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). But the Defendants are wrong: the Plaintiffs have met the federal pleading standards. A fair reading of the First Amended Complaint on file in this case (the "Live Complaint")[2] demonstrates that: (i) the Plaintiffs have standing; (ii) the Court has jurisdiction; and (iii) the facts alleged constitute an ongoing denial of the Plaintiffs' (and others in their community's) right to cast meaningful votes. Even if that weren't the case, though, the Defendants would not be entitled to dismissal: the Plaintiffs would be allowed to replead their claims to fix the alleged defects. Either way, this case would go on and the Defendants would be required, eventually, to justify their ongoing use of a discriminatory map.

Therefore, the Court should deny the Motion.

## I. LEGAL STANDARDS

When confronting a motion to dismiss under Rule 12(b)(1) on the basis of a purported lack of standing, a Court must determine whether plaintiffs have asserted an injury in fact that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[3] The Court should consider the factors required for standing appearing on the face of the pleadings, as supplemented by undisputed facts, or as supplemented by undisputed facts and the Court's resolution of disputed facts.[4] Dismissal is

[1] Dkt. 20. The Defendants' Brief was submitted in support of the Defendants' First Amended Motion to Dismiss. Dkt. 19 (the "Motion").

[2] Dkt. 17.

[3] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010).

[4] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

appropriate only if it appears certain that plaintiffs cannot prove any set of facts that would entitle them to relief.[5]

Generally, when confronting a motion to dismiss under Rule 12(b)(6), a Court must apply the general pleading standard from Rule 8(a) and determine whether plaintiffs have made sufficient factual allegations to nudge the asserted claims "across the line from conceivable to plausible."[6] When the pleaded facts would, if true, constitute actionable conduct, a Court should find the complaint sufficient and allow the case to proceed.[7] Where a complaint falls short of these requirements, "in view of the consequences of dismissal of the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of pleading, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case."[8]

## II. CLAIMS IN ORIGINAL COMPLAINT

### A. FACTS ALLEGED

All of the Plaintiffs are residents of Dallas County ("Dallas") and at least one of them lives in each of Dallas County's 4 commissioners court districts (each a "CCD").[9] Each of the Plaintiffs is a member of a local racial minority group

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5 *Id.*

6 *Bell Atlantic v. Twombly*, 550 U.S. 544, 564 (2007); *but see Tigrett v. Cooper*, 855 F. Supp.2d 733, 763 (W.D. Tenn. 2012) (holding that "the long-standing principal that courts should broadly construe complaints alleging violations of the Voting Rights Act" survived *Twombly* and denying dismissal despite pleading failures that required "the Court ... to stretch to find [sufficient] factual support" to preserve the action, because "such a stretch is merited by the broad remedial nature of the Voting Rights Act.").

7 *Bell Atlantic*, 550 U.S. at 555 and 564-70; *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

8 *In re Am. Airlines, Inc., Privacy Litig.*, 370 F.Supp.2d 552, 567-68 (N.D. Tex. 2005)(Fitzwater, J.)(internal quotation marks omitted).

9 Dkt. 17, Live Complaint, at ¶¶ 1-5.

that constitutes 48% of Dallas's population of citizens of voting age ("CVAP").[10,11]

Dallas exhibits ethnic-bloc voting.[12] Dallas has an established history of voting-related discrimination.[13] For a decade, the local, ethnically defined majority of Dallas has consistently voted sufficiently as a bloc to prevent the Plaintiffs' local, racial minority from electing its preferred candidates.[14] Over that period, Dallas has seen consistent, overt and subtle racial appeals in its local elections, including in elections to the Dallas Commissioners Court (the "Commissioners Court").[15] And the Commissioners Court elected by that majority has demonstrated unresponsiveness to the Plaintiffs' local, racial minority over the same period.[16]

When Dallas redistricted following the 2010 census, the Commissioners Court majority that approved a new map had been elected by an ethnically defined, bloc-voting coalition that did not include the Plaintiffs' local, racial minority.[17] This was, of course, the same Commissioners Court majority that had demonstrated unresponsiveness to the Plaintiffs' out-of-favor, local minority.

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[10] *Id*. at ¶ 13.

[11] In the Defendants' Brief, the Defendants intermittently seem to contest that the 48% of Dallas's electorate that is Anglo constitutes a minority for legal purposes. Dkt. 20, Defendants' Brief, at p. 2 (referring, in scare quotes, to "the Anglo 'minority' community.") and p. 8 (referring, again in scare quotes to "the 'Anglo Minority'"); *contra id*. at p. 9 ("like any minority group, Anglos are…"). To the extent that this is the Defendants' position, binding precedent affirmatively rejects it. *U.S. v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009) (holding that defendants "denied white [minority voters] the opportunity to elect representatives of their choice" in violation of Section 2 of the Voting Rights Act (the "VRA")).

[12] Dkt. 17, Live Complaint, at ¶¶ 11-12.

[13] *Id.* at ¶ 14.

[14] *Id*.

[15] *Id*. at ¶ 15.

[16] *Id*.

[17] *Id*. including at ¶ 16.

That Commissioners Court majority approved a map (the "Discriminating Map") that unnecessarily "packed" the local racial minority into CCD 2, where its members were super-concentrated as more than 72% of CVAP.[18] It simultaneously carved up the remainder of the local minority among the remaining CCDs (as a 45% minority of CVAP in CCD 1, a 32% minority of CVAP in CCD 3, and a 39% minority of CVAP in CCD 4), so assuring the political insignificance of the local minority in each.[19]

As far as the Commissioners Court majority that approved it was concerned, this treatment of the out-of-favor, local, racial minority was a feature of the Discriminating Map, not a flaw. Race was the predominant factor in the crafting of the Discriminating Map as a whole and in the design of each of its component CCDs.[20] The sponsor of the Discriminating Map bragged that it allowed racially defined communities within the ethnic-bloc-voting-majority-that-had-elected-him the chance to continue to elect those communities' candidates of choice in CCD 3 and CCD 4.[21] Another member of the Commissioners Court majority that approved the Discriminating Map explained that it had been designed to allow the ascendant, ethnic-bloc-voting majority the chance to elect a third candidate of its choice in CCD 1, a result he justified by reference to the increased population of the ethnic groups making up his majority coalition.[22]

In the Commissioners Court elections held since 2011, the Discriminating Map has performed as designed and prevented the local minority from electing more than one of its commissioners of choice.[23] Anticipated ethnic-bloc-voting

[18] *Id*. at ¶¶ 17 and 20.
[19] *Id*. at ¶¶ 17, 18, and 20.
[20] *Id.* at ¶¶ 16, 18, 23, and 26.
[21] *Id*. at ¶ 18.
[22] *Id*.
[23] *Id.* at ¶ 20.

saw the majority coalition in CCD 1 and 3 reject the Plaintiffs' minority-community's preferred candidates; CCD 4 presented its local minority so inhospitable a prospect for competition that no candidate challenged its incumbent (despite the fact that, under a previous map, the local minority had overwhelmingly preferred a different candidate than the incumbent).[24] As demonstrated by this history (and the intent of the Discriminating Map), the Discriminating Map denies the Plaintiffs' racial minority an equal opportunity to participate in the political process and to compete for the election of their preferred commissioners in three (3) of Dallas's four (4) CCDs.

Creating a map that allowed the 48% local minority the chance to elect only one commissioner was a decision.[25] The governing coalition was predominantly motivated to make that decision by race.[26] They chose to dilute the Plaintiffs' racial minority to give it the opportunity to elect a disproportionately small share of the Commissioners Court.[27] They could have acted differently, creating two CCDs with CVAPs in which the local minority constituted at least 50% of the electorate.[28] That local minority's population in Dallas is sufficiently compact and sufficiently large a portion of the county's total CVAP to support a second, performing opportunity district.[29] A map including such a district would have better respected traditional non-racial redistricting criteria (including Dallas's political subdivision lines and the equal apportionment of CVAP),[30] while better reflecting the racial balance of Dallas. But the Commissioners Court

[24] *Id*. at ¶ 27.
[25] *Id*. at ¶ 22.
[26] *Id*. at ¶¶ 16, 17, and 30.
[27] *Id.* at ¶ 21.
[28] *Id*. at ¶¶ 22 and 26.
[29] *Id*.
[30] *Id.* at ¶ 21.

chose, instead, to crack and pack the local, racial minority, providing it a less-than-equal opportunity to participate in the political process and to elect its preferred commissioners.[31]

### B. CLAIMS FOR RELIEF ARISING FROM THOSE CLAIMS

On the basis of these facts, the Plaintiffs asserted three (3) claims for relief in the Live Complaint:

1. That their rights as members of a local, racial minority in Dallas had been violated, in contravention of Section 2 of the VRA;[32]
2. That their rights under the Equal Protection Clause of the 14th Amendment had been violated; and
3. That, to the extent the Court should rule that the VRA does not protect them as it does other racial minorities, the VRA itself is unconstitutional in affording unequal protection to different races.

## III. ARGUMENT

### A. STANDING

#### 1. Defendants' Flawed Denial of Plaintiffs' Standing

The Motion asks the Court to dismiss the Live Complaint under FRCP 12(b)(1).[33] The Defendants never explain this request, however: while they include in the Defendants' Brief a cursory description of the standard of review that would govern a Rule 12(b)(1) motion,[34] at no point in the Argument section of the Defendants' Brief do they actually explain how or why the Court might

[31] *Id*. at ¶¶ 21, 23, and 27.

[32] The Defendants correctly note that the Plaintiffs have not asserted a claim under the VRA attacking the discriminating map as a *political* gerrymander. Dkt. 20, Motion, at pp. 11-12. Since no such claim was asserted, no such claim could be dismissed by the Court in this action.

[33] *Id*. at pp. 1 and 16.

[34] *Id*. at p. 3.

lack subject-matter jurisdiction or the Plaintiffs might lack standing.[35] The Defendants Brief only touches on this purported basis for dismissal in its introduction, stating (wrongly) that the Live Complaint fails to allege "that the individually named plaintiffs were in any way prohibited from exercising their individual right to vote or suffered any personalized injury in this respect."[36]

**2. Sufficiency of Pled Facts to Establish Standing**

To the extent that these assertions in the Defendants' Brief's introduction can be taken as an argument concerning the Plaintiffs' standing, that argument is simply wrong.

The Plaintiffs have alleged that Ms. McComb lives in CCD 2.[37] They have alleged that this district has been "packed" with a super-concentration of Anglo voters in excess of what is necessary to produce a performing Anglo-minority opportunity-district.[38] They have pled that the "packing" of this CCD was intentional.[39] They have alleged that this intentional "packing" resulted in the "waste[]" of Ms. McComb's vote.[40]

It is well established that a voter who is part of a racial minority so "packed" into a district has suffered a particularized harm sufficient to establish standing to complain about their inclusion in that district.[41] The Defendants have

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[35] *Id*. at pp. 5-16.
[36] *Id*. at p. 2.
[37] Dkt. 17, Live Complaint, at ¶ 5.
[38] *Id*. at ¶¶ 17, 20, and 27.
[39] *Id*. at ¶¶ 19, 21, 23, and 30.
[40] *Id*. at ¶ 27.
[41] *See, e.g., Thornburg v. Gingles*. 478 U.S. 30, 46 at n. 11 (1986) (actionable "dilution of racial minority group voting strength may be caused by … the concentration of [such voters] into districts where they constitute an excessive minority."); *Perez v. Texas*, Civil Action Nos. 11–CA–360–OLG–JES–XR, SA–11–CA–361–OLG–JES–XR, SA–11–CA–490–OLG–JES–XR, SA–11–CA–592–OLG–JES–XR, SA–11–CA–615–OLG–JES–XR, SA–11–CA–635–OLG–JES–XR, 2011 U.S. Dist. LEXIS 155222, *24, and *44-*46 (W.D. Tex. Sept. 2, 2011) (denying motion to dismiss dilution claims offered in challenge to districts that "packed" minority voters into districts that ensured a loss in voting strength); *see also Hays v. Louisiana*, 936 F.Supp.

not challenged (and could not credibly do so) that the Live Complaint asserts facts sufficient to establish that this particularized harm was caused by the Defendants' action and is redressable in this suit. Accordingly, Ms. McComb's standing (and the standing of the Plaintiffs to challenge CCD 2) is firmly established for the purposes of the Motion's section dedicated to Rule 12(b)(1).

Similarly, the Plaintiffs have alleged that the remaining Plaintiffs live in CCD 1, CCD 3, and CCD 4, respectively.[42] They have alleged that the Commissioners Court carved up between these districts the portion of Plaintiffs' racial minority not packed into CCD 2, so assuring the political insignificance of the remainder of the local minority stranded in each.[43] Necessarily, the Plaintiffs have alleged that the fracturing of Ms. Harding, Mr. Huebner, Mr. Jacobs, and Mr. Schroer from their community has resulted in the dilution of each's vote. They have pled that this "cracking" of the Plaintiffs' racial community was intentional.[44]

It is well established that voters who are part of a racial minority so fragmented between districts have suffered a particularized harm sufficient to establish standing to complain about their treatment in the offending map.[45] Again, the Defendants have not challenged (and could not credibly do so) that the Live Complaint asserts facts sufficient to establish that this particularized harm was caused by the Defendants' action and is redressable in this action.

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360, 366 (W.D. La. 1996) ("The Supreme Court has held that residents of a district allegedly the product of racial gerrymandering have standing to challenge the district").

[42] Dkt. 17, Live Complaint, at ¶¶ 1-4.

[43] *Id*. at ¶¶ 17, 18, 20, 23 and 27.

[44] *Id*. at ¶¶ 19, 21, 23, and 30.

[45] *See, e.g., Gingles*. 478 U.S. at 46 at n. 11 (actionable "dilution of racial minority group voting strength may be caused by the dispersal of [such voters] into districts in which they constitute an ineffective minority of voters…."); *Perez v. Texas*, 2011 U.S. Dist. LEXIS at *42-*43 (denying motion to dismiss dilution claim offered in challenge to districts fragmenting an individual plaintiff from his minority community).

Accordingly, the remaining Plaintiffs' standing (and the standing of the Plaintiffs to challenge CCD 1, 3, and 4) is firmly established for the purposes of the Motion's request for relief under Rule 12(b)(1).

**3. Conclusion Concerning Standing**

The Live Complaint demonstrates the Plaintiffs' standing. The portion of the Motion advanced under Rule 12(b)(1) should be denied.

**B. LIVE COMPLAINT ESTABLISHES AVAILABILITY OF RELIEF ON CLAIMS ASSERTED**

**1. Availability of Relief under VRA Section 2**

**a. Two-Staged Analysis**

A Court facing a claim under VRA Section 2, engages in a two-staged inquiry, first (as a threshold) determining whether plaintiffs have met their burdens in establishing the *Gingles* factors, before analyzing the totality of the circumstances to determine whether the members of the plaintiffs' minority group have been afforded an equal opportunity to participate in the electoral process and to elect their preferred candidates to office.[46] The second stage analysis must be "a flexible, fact-intensive inquiry predicated on 'an intensely local appraisal of the design and impact of the contested electoral mechanisms[.]'"[47] In conducting this balancing inquiry, courts consider a list of factors from the legislative history of the VRA that is "neither comprehensive nor exclusive[,]" along with "other factors [that] may also be relevant[.]"[48] Furthermore, "[i]t is well-established that

[46] *See, e.g., Benavidez v. Irving I.S.D.*, Civil Action No. 3:13–CV–0087–D, 2014 U.S. Dist. LEXIS 113239, *12 (N.D. Tex. Aug. 15, 2014) (Fitzwater, C.J.) (citing *Gingles*, 478 U.S. at 50-51; *League of United Latin Am. Citizens # 4434 (LULAC) v. Clements*, 986 F.2d 728, 741 (5th Cir. 1993)(other internal citations omitted).

[47] *Benavidez*, 2014 U.S. Dist. LEXIS at *12 (citing *NAACP v. Fordice*, 252 F.3d 361, 367 (5th Cir. 2001) (quoting *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1147 (5th Cir. 1993)).

[48] *Fabela v. City of Farmers Branch*, Civil Action No. 3:10–CV–1425–D, 2012 U.S. Dist. LEXIS 108086, *73 n.37 (N.D. Tex. Aug. 2, 2012)(Fitzwater, C.J.) (citing *Gingles*, 478 U.S. at 45).

the existence of racially polarized voting and the extent to which minority group members have" successfully elected their preferred candidates "to public office are the most important factors to be considered in a totality determination."[49]

**b. Defendants' Arguments Address Only the Second Stage**

The Defendants advance two arguments in favor of the dismissal under Rule 12(b)(6) of the Plaintiffs' VRA claim. Both contend that details of the Live Complaint doom the Plaintiffs' Section 2 claim at the Court's totality-of-the-circumstances analysis. Specifically, the Defendants assert that no relief can be granted to the Plaintiffs because the Live Complaint: (i) generally, pleads facts that are allegedly insufficient for the Court to find that the Plaintiffs and their community have not been afforded an equal opportunity to participate in the political process;[50] and (ii) specifically, establishes that the Discriminating Map provides the local racial minority the opportunity to influence elections in one (1) CCD, a figure allegedly substantially proportional to the minority's share of Dallas's population.[51]

Neither argument can survive scrutiny of the Live Complaint as a basis for dismissal.

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[49] *Fabela*, 2012 U.S. Dist. LEXIS 108086 at *10 (N.D. Tex.)(Fitzwater, C.J.)(citing *Gingles*, 478 U.S. at 48 n.15). In *Fabela*, referencing the particular evidence introduced at trial, the Court described the preferred candidates of a minority group through a short-hand reference to the numbers of candidates from the group elected to office. However a review of the cited footnote from *Gingles* makes clear that, like the VRA it itself, this factor is focused on the ability of minority voters to elect their preferred candidates, not the ability of minority candidates to prevail; as the Supreme Court put it, "unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged mechanism impairs their ability 'to elect….' By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that ¶ 2 plaintiffs prove their claim before they may be awarded relief." This reading is also consistent with later Supreme Court authority discussed in Section IV.B.1.e., below.

[50] Dkt. 20, Defendants' Brief, at pp. 9-11.

[51] *Id.* at pp. 7-9.

**c. Relevant Facts Pled in Live Complaint**

The Live Complaint alleges that:

1. The Plaintiffs' minority group and Dallas's controlling, ethnic coalition of African Americans and Hispanics exhibit divergent bloc-voting patterns;[52]
2. Dallas has an established history of voting-related discrimination;[53]
3. Dallas's majority coalition's bloc-voting has produced a near total inability for the Plaintiffs' racial minority to elect its preferred candidates to office countywide over an extended period;[54]
4. The Plaintiffs' racial minority has similarly failed to elect its preferred candidates in three (3) of the Discriminating Map's CCDs, due to the majority coalition's bloc-voting;[55]
5. Over that period, Dallas has seen consistent overt and subtle racial appeals in its elections, including in elections to the Commissioners Court;[56]
6. The Commissioners' Court has demonstrated unresponsiveness to the Plaintiffs' minority group over the same period;[57]
7. The Discriminating Map allows the Plaintiffs' minority group the chance to elect a disproportionately small portion of the Commissioners Court;[58]

[52] *See supra* n. 12.
[53] *See supra* n. 13.
[54] *See supra* n. 14.
[55] *See supra* n. 24.
[56] *See supra* n. 15.
[57] *See supra* n. 16.
[58] *See supra* n. 27.

8. The predominant factor considered by the Commissioners Court in approving the Discriminating Map was race.[59]

**d. Sufficiency of Alleged Facts to Support Section 2 Claim**

The Live Complaint alleges that six (6) of the nine (9) specific factors this Court has recognized should be considered in weighing the totality of the circumstances apply in this case, including the two factors this Court has consistently cited as "the most important."[60] Furthermore, it alleges a specific intent to punish the Plaintiffs' racial minority;[61] intent is not among the factors provided by legislative history, but since that list is "neither comprehensive nor exclusive[,]" such intent is surely "[an]other factor[ that] may … be relevant." Indeed, in discussing the current version of the VRA, the Court of Appeals for the 5th Circuit has recognized that "discriminatory intent of itself will normally render a plan illegal."[62]

The Defendants' Brief simply ignores all but one of these allegations, acknowledging only the Plaintiffs' reference to overt and subtle racial appeals.[63] Despite the Defendants' recognition that "this Court must accept all material allegations of the amended complaint as true and construe them in the light most favorable to the nonmoving party[,]" they assert "on information and belief" facts re-characterizing (if not outright denying) the Plaintiffs' allegations.[64] This effort is flatly inappropriate and should be ignored; the Court should read the Live Complaint "in the light most favorable" to the Plaintiffs and recognize that it puts

[59] *See supra* n. 20.
[60] *Fabela*, 2012 U.S. Dist. LEXIS at *13.
[61] Dkt. 17, Live Complaint, at ¶ 19.
[62] *U.S. v. Brown*, 561 F.3d 420, 433 (2009) (citing *Seastrunk v. Burns*, 772 F.2d 143, 149 n.15 (5th Cir. 1985); *c.f. McMillin v. Escambia County, Fla.*, 748 F.2d 1037, 1046-47 (5th Cir. 1984).
[63] Dkt. 17, Defendants' Brief, at p. 10.
[64] *Id*. at pp. 3 and 10.

the Defendants on fair notice of the Plaintiffs' allegation that the preferred candidates of Dallas's dominant, ethnic coalition (candidates disfavored by the Plaintiffs' racial minority) have made overt and subtle racial appeals in elections over the time-frame at issue in this litigation, including in elections to the Commissioners Court.

Still, the Defendants go further, arguing that because the Plaintiffs have *not* pled an additional factor specified by the legislative history, they "simply have not pleaded sufficient facts to [prevail in] the totality of the circumstance inquiry for a Section 2 claim."[65]

This argument is one for trial.[66] They ask the Court, at the Motion-to-Dismiss stage of this litigation, to balance the factor(s) unpled in the Live Complaint against those pled by the Plaintiffs. That sort of fact-intensive balancing has no place in a motion-to-dismiss practice. Perhaps for this reason, the Plaintiffs have been unable to find *a single decision from any court in America dismissing under Rule 12(b)(6) a claim brought under Section 2 of the VRA on the basis that a plaintiff may fail to demonstrate an unequal opportunity to participate in the political process under the totality of the circumstances.*

Since the Plaintiffs have pled more than enough facts to provide notice of the basis of their claim and to "nudge" their statutory claim under the VRA into plausibility, the Court should find the complaint sufficient and allow it to proceed.

**e. No Substantial Proportionality in Discriminating Map**

The Defendants also make a more specific argument for dismissal under the totality of the circumstances. They rightly note that, in such analysis, courts have looked to, among other factors, "the 'proportionality' or lack thereof,

[65] *Id*. at p. 11.

[66] *See e.g., Johnson v. DeGrandy*, 512 U.S. 997, 1002 (1994) ("[t]he District Court … held a 5-day trial….").

between the number of minority-majority districts and the minority's share of the … relevant population."[67] They continue to inaccurately assert that the Live Complaint "indicates that Anglos already have achieved or exceeded proportional representation[,]"[68] apparently both because of a "failure to allege or demonstrate how the currently elected County Commissioners are not the candidate of choice of Anglo voters" and because of the racial identity of the Commissioners Court's current members.[69] They close this argument by attacking the idea that a minority (apparently of any size) could be entitled under Section 2 of the VRA to an equal number of districted offices on any body.

The argument fails, first, for the same reason that the Defendants' general argument concerning the totality-of-the-circumstances stage of analysis must fail: the Court simply cannot balance factors at this stage of litigation. However, to the extent currently relevant, the Defendants are incorrect concerning the contents of the Live Complaint. The Live Complaint expressly alleges that the Plaintiffs' racial minority constitutes 48% of Dallas's electorate (its CVAP), but has been afforded only one over-weighted minority-majority district, leaving it with the chance to meaningfully participate in the election of only 20% of the Commissioners Court (25% of the districted commissioners).[70] This 23% under-representation in districted commissioners (28% under-representation in the Commissioners Court's total membership) is the math of disproportionality, especially as opposed to the alternative divergence of only 2% of districted membership (and 8% of total membership) that a second minority opportunity district would generate. Indeed, courts have both found illegal vote dilution in the

[67] Dkt. 17, Defendants' Brief, at p. 7.
[68] *Id.* at p. 8.
[69] *Id.* at p. 2.
[70] Dkt. 17, Live Complaint, at ¶ 21.

presence of far smaller discrepancies than those in the Discriminating Map[71] and found proportionality to sometimes require rounding up from a group's share of CVAP.[72]

As to the Defendants' more particular asserted faults with the Live Complaint's discussion of proportionality, they, too, fail. The Defendants suggest that the Live Complaint leaves open the possibility that the incumbents elected under the Discriminating Map are the preferred candidates of the Plaintiffs' racial minority community. It does not. The Live Complaint expressly states that the Plaintiffs' racial minority preferred alternative candidates rejected by the dominant, ethnic coalition in CCDs 1 and 3 at the elections for each held under the Discriminating Map.[73] The Live Complaint expressly alleges that CCD 4 has seen no contested election under the Discriminating Map, due to the unappealing prospect for competition it afforded any alternative candidate.[74] It also alleges that the preferred candidates of the Plaintiffs' racial minority have won only two (2) contested, countywide elections since 2008 (and won no additional elections to county office in 2006).[75] If this leaves any ambiguity as to whether County Judge Jenkins was the preferred candidate of the Plaintiffs' racial minority, the Plaintiffs are happy to clarify (as they will prove in due time) that he was not.

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[71] *E.g. League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 438 (2006) (holding jurisdiction-wide under-representation of language minority by 6% to render representation disproportionately small and to favor a conclusion that the totality of the circumstances indicate an unequal opportunity to participate in the political process and elect their preferred representatives); *Benavidez*, 2014 U.S. Dist. LEXIS, at *76-*78 (ordering the submission of a map increasing language-minority representation by one seat or 14%).

[72] *E.g. Rodriguez v. Pataki*, 308 F.Supp.2d 346, 353 (S.D.N.Y 2004) (finding "substantial proportionality" in map allocating 80% of offices to protected class constituting 76.1% of an area's CVAP).

[73] Dkt. 17, Live Complaint, at ¶ 20.

[74] *Id*.

[75] *Id*. at ¶ 14.

Indeed, the mere suggestion that the incumbent commissioners for CCD 1, 3, and 4 may also be the preferred candidates of the Plaintiffs' racial minority flies in the face of another argument pursued in the Defendants' Brief.[76] The Defendants maintain that Dallas was required by the VRA to create CCDs 3 and 4 in order to provide African-American and Hispanic voters, respectively, an effective opportunity to elect their preferred candidates.[77] Necessarily, this assertion includes the embedded assumption of divergently voting, cohesive, polarized, racial and ethnic voting-blocs within the Dallas electorate; without such bloc-voting, the VRA would simply have nothing to say about any districts in Dallas County.

The Defendants also assert that the Plaintiffs cannot prevail in the Court's assessment of the totality of the circumstances because of the current racial makeup of the Commissioners Court. To begin with, this argument is pre-mature in a motion-to-dismiss practice, because the Live Complaint says *nothing* about the race of the individual Defendants and there is no evidence of the individual Defendants' races in front of the Court at this time; to the extent that this argument *ever* has legal significance, it will have to wait until the Court has some evidence or even pleading in front of it establishing the argument's predicate. To the extent it has been brought before the Court, though, a district's compliance with Section 2 of the VRA cannot be determined by reference to the race of the official elected by that district.[78] Just as the Supreme Court could (and did) determine in *LULAC v. Perry* that, despite his heritage, Congressman Henry Bonilla was not the preferred candidate of a Hispanic community, the Court can (and the Plaintiffs trust that it eventually will) find that neither Judge Jenkins, nor

[76] For more on that theory and its failings, see Section IV.B.2.c, below.
[77] Dkt. 17, Defendants' Brief, at pp. 13-14.
[78] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. at 427-442.

Commissioner Theresa Daniel (to the extent that either is Anglo) are the preferred candidates of the Plaintiffs' local, racial minority.

When the Court fairly reads the Live Complaint, it should reject the more particularized arguments for dismissal on the basis of "proportionality" just as it should reject the more general arguments for dismissal on the basis of a balancing of factors in its determination of whether the totality of the circumstances reflect an unequal opportunity for the Plaintiffs' racial minority to participate in the political process.

**2. 14th Amendment Equal Protection Claim**.

**a. Analysis of a 14th Amendment, Vote-Dilution Claim**

"[I]n a racial gerrymandering case" where a plaintiff contends that a district is unconstitutional under the equal protection clause of the 14th Amendment, "the plaintiff's burden … is 'to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the … decision to place a significant number of voters within or without a particular district."[79] If a jurisdiction defends its racial gerrymander by claiming a political motive and if that jurisdiction is one "where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional redistricting principals[;]" furthermore, that party "must also show that those districting alternatives would have brought about significantly greater racial balance."[80] A defendant jurisdiction admitting that racial considerations

[79] *Ala. Leg. Black Caucus (ALBC) v. Ala.*, ___ U.S. ___, ___, 135 S.Ct. 1257, 1267 (2015) (internal citations omitted).

[80] *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

dominated its thinking, but pleading that this use satisfies strict scrutiny, must show both that: (i) it has a compelling interest in racially gerrymandering; (ii) and the districts drawn were narrowly tailored to achieve that compelling interest.[81]

**b. Facts Asserted in Live Complaint and Defendants' Approach to Those Facts**

The Plaintiffs have pled that CCD 1, 3, and 4 were intentionally designed to reject the Plaintiffs' preferred candidates (and those of the local racial minority of which the Plaintiffs are a part).[82] They have pled that CCD 2 was intentionally designed to incorporate a greater-than-necessary portion of the Plaintiffs' local racial minority.[83] They have pled that race was the predominant factor in the crafting of all four CCDs.[84] They have asserted demographics that suffice as strong circumstantial evidence of a preponderant racial motive behind the crafting of the CCDs.[85] The Live Complaint also asserts that the Commissioners Court had and rejected the option of approving a map that would have been more consistent with traditional redistricting principals and would have resulted in a significantly more representative balance of the ability of different racial communities to elect their preferred commissioners.[86]

The Defendants respond by categorizing the Live Complaint as admitting the applicability of an affirmative defense (that the Discriminating Map was "politically motivated" rather than racially motivated).[87] Specifically, they assert that the Live Complaint admits that CCDs 1 and 2 were predominantly motivated

[81] *Prejean v. Foster*, 227 F.3d 504, 515 (5th Cir. 2000).
[82] Dkt. 17, Live Complaint, at ¶ 20.
[83] *See supra* n. 39.
[84] *See supra* n. 20.
[85] *See supra* nn. 18-19.
[86] *See supra* n. 30.
[87] Dkt. 20, Defendants' Brief, at pp. 13-16.

by politics, rather than race, and that the Commissioners Court was required to create CCDs 3 and 4 by Section 2 of the VRA.[88]

Both contentions are wrong.

**c. "Admissions" not Made or Relevant**

First, the Plaintiffs have pled that race was the predominant factor in the crafting of all four (4) of the CCDs, including CCDs 1 and 2. The Defendants interpret their on-the-record statements included in the Live Complaint as demonstrating a competing, political motivation for the creation of CCDs 1 and 2.[89] This may be true, but it is not determinative at this stage of litigation. The Plaintiffs have asserted the kind of circumstantial evidence that the Supreme Court recognized in *ALBC* could suffice to prove racial intent even in the absence of any "more direct evidence" of racial motivation.[90] They have pled that the Commissioners Court had and rejected the option to create boundaries better respecting traditional non-racial redistricting criteria (including greater respect for political-subdivision lines and a fairer apportionment of Dallas's citizen population). And they have pled the math necessary to conclude that such a map would have divided Dallas's electorate into components empowering a significantly more accurate, racial balance of Dallas's electorate than does the Discriminating Map. This is enough to allow the Plaintiffs' equal protection claim to survive dismissal and to allow the Plaintiffs the chance to determine through discovery if there is "more direct evidence" of a predominant, unconstitutional, racial motive.

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[88] *Id*.

[89] *Id*.

[90] *ALBC*., ___ U.S. at ___, 135 S.Ct. at 1267 (citing *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995) (recognizing that, among such factors are a district's demographics, its compactness, its respect for political subdivisions, and its adherence to other traditional, race-neutral redistricting factors).

The Defendants' arguments concerning CCDs 3 and 4 fare no better. The Defendants interpret the Live Complaint's quoted language concerning CCDs 3 and 4 from the hearing at which the Commissioners Court approved the Discriminating Map as an admission by the Plaintiffs that the VRA required the drawing of such districts. It is no such thing. The Defendants argue that this language, coupled with the Supreme Court's *ALBC* decision and the Court of Appeals for the 5th Circuit's decision in *Prejean v. Foster*,[91] justifies the creation of these CCDs and shields them from attack on their intentional, racial gerrymander.

The Defendants seemingly misunderstand how these cases apply in the context of Dallas. *Prejean* recognized that jurisdictions have "a compelling interest in complying with the results test of Section 2 of the [VRA]." The *Prejean* court concluded that this interest "may lead [a jurisdiction] to create majority-minority district[s] only when it has a 'strong basis in evidence' for concluding, or a 'reasonable fear' that, otherwise, it would be vulnerable to a vote dilution claim." The *Prejean* court clarified that "compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."[92] The Supreme Court in *ALBC* agreed: "legislators 'may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance."[93]

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[91] 227 F.3d at 512.

[92] *Id.* at 518 (citing *Miller v. Johnson*, 515 U.S. at 920-21).

[93] *ALBC*, 135 S.Ct. at 1274 (citing *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (emphasis added in *ALBC*)).

But the Commissioners Court had no good reason to believe that CCDs 3 and 4 were so required. The VRA and its case law protect language and racial *minorities* from vote dilution; they do not provide an additional vehicle for the members of an ethnic-bloc-voting, governing majority to increase its own representation at such minorities' expense.[94] The Commissioners Court could not have created CCDs 3 and 4 out of a "reasonable fear" of a statutory VRA claim, because (as their able redistricting counsel presumably advised them in 2011) the groups for whom they drew these districts could not conceivably meet *Gingles*' third pre-condition in any such litigation: for years prior to the passage of the Discriminating Map, Dallas had had no bloc-voting majority capable of defeating either group's preferred candidates in the absence of special circumstances. On the contrary, as alleged in the Live Complaint, these groups' preferred candidates have won nearly every contested election held across Dallas County for a decade (and had done so in three (3) straight election cycles prior to the passage of the Discriminating Map).[95]

**d. Sufficiency of Facts Pled to Justify Relief**

The Plaintiffs have pled that the Commissioners Court was predominantly motivated by race in crafting CCDs 1, 2, 3, and 4. They have pled sufficient circumstantial evidence to support that allegation for all four (4) CCDs. For CCDs 3 and 4, they have produced the on-the-record, contemporaneous admissions of the Discriminating Map's sponsor that such districts were drawn for the purpose of creating "opportunities" for one racial and one "language" group within Dallas's dominant, bloc-voting, ethnic coalition to elect their

[94] *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (holding that members of bloc-voting racial majority had no standing to challenge their district as either an unconstitutional racial gerrymander or a violation of Section 2 of the VRA).

[95] *See supra* n. 14.

preferred candidates over any potential rival preferred by the Plaintiffs' local racial minority.

**3. Alternative Equal Protection Claim**

Finally, the Plaintiffs note that the Defendants have in no way addressed in the Motion or in the Defendants' Brief the alternative 14th Amendment claim included in the Live Complaint. Regardless of how the Court rules on the Motion, the Defendants having declined to ask the Court to dismiss this claim, it must survive this Rule 12(b) motion practice.

## C. EVEN IF THE DEFENDANTS WERE RIGHT, THE REMEDY WOULD BE LEAVE TO AMEND

Even if the Defendants were right about the Live Complaint, though, the proper remedy would not be dismissal. The Court would be well within its authority (and consistent with its general practice) in ordering the Plaintiffs to amend the Live Complaint to correct any pleading defects. There is no reason to believe that amending would be futile, and leave to amend is generally granted when the opposing party would suffer no prejudice.[96] That is the case here. If the Court agrees with the Defendants that the Live Complaint is flawed, the Court should grant the Plaintiffs leave to amend.

# IV. CONCLUSIONS AND PRAYER

Therefore, the Plaintiffs ask the Court to deny the Motion in its entirety. In the alternative, the Plaintiffs ask the Court for leave to amend the Live Complaint. In either case, the Plaintiffs also ask the Court for any other relief to which they may be entitled.

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[96] *See supra* n. 8.

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**CERTIFICATE OF SERVICE**

I certify that on May 7, 2015, I served a copy of this *Plaintiffs' Opposition to Defendants First Amended Motion to Dismiss* on all counsel of record by electronic filing through the Court's CM/ECF system.

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